No.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. HEMMER
PATRICIA O. KISCOAN
UNION PACIFIC RAILROAD
1400 DOUGLAS STREET, STOP 1580
OMAHA, NEBRASKA 68154
(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
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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OPINIONS BELOW

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

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a pure question of law that has divided the Circuits for nearly three decades but has never been squarely presented: whether courts are authorized to set aside Board awards based upon alleged violations of due process that do not fall within the express statutory grounds for relief. The RLA specifically delineates three, and only three, "except[ions]" to

Congress' command that Board decisions "shall be conclusive." 45 U.S.C. §153 First (q). "Due process" is not one of them. Congress instead designated the standards it deemed sufficient to protect fundamental fairness while promoting finality, and this Court made clear in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), that the statutory exceptions provide the exclusive bases for setting aside a Board award. Nevertheless, the Seventh Circuit and four other Circuits have created, reviewed, and, in the case below, set aside Board awards under a fourth, judicially-created exception for alleged due process violations. Four other Circuits have held that the statute means what it says and have refused to review due process challenges to Board awards. This Court's intervention is needed to resolve this well-entrenched conflict, to ensure that Board decisions are given the same degree of finality regardless of where the reviewing court is located, to reaffirm the limited role of the judiciary in the context of binding arbitration, and to cabin a runaway "due process" exception that is easy to manipulate and that threatens to strip Board awards of the finality Congress intended.

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 Sheehan*, 439 U.S. at 94 ("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."). To accomplish this purpose, the RLA established a "mandatory, exclusive, and comprehensive system for resolving grievance disputes" between railroads and their employees. *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963).

1. The grievance procedure arising out of disciplinary charges begins with a series of investigations and hearings that take place on the railroad property as set forth in the parties' collective bargaining agreement ("CBA") and in accord with the Act. *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, hearing, and conferences are collectively referred to as "on-property" proceedings.

2. If the dispute cannot be resolved in conference, the parties may initiate arbitration proceedings before the National Railroad Adjustment Board ("NRAB" or "the Board").[1] 45 U.S.C. §153 First (i); 29 C.F.R. §301.2(a). The Board is a product of the 1934 amendments to the Act, Pub. L. No. 73-442, 48 Stat. 1185, 1186 (1934), and was created to handle so-called "minor" disputes 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) (citations omitted). In contrast, "[m]ajor" disputes "relate to 'the formation of collective [bargaining] agreements or efforts to secure them.'" *Id.* at 252.

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). This is because its membership—consisting of an equal number of labor and management representatives, 45 U.S.C. §153 First (a)—"is in daily contact with workers and employers,

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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 scope of judicial review for these alternative boards 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), *cert. denied*, 433 U.S. 914 (1977); *Employees Protective Ass'n v. Norfolk & W. Ry. Co.*, 511 F.2d 1040, 1045 (4th Cir. 1975).

and knows the industry's language, customs, and practices." *Gunther*, 382 U.S. at 261. The Board is split among four divisions, with each having jurisdiction over 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 litigants. 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); 29 C.F.R. §§301.7-.8. Litigants 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 all supporting data bearing upon the disputes." 45 U.S.C. §153 First (i); 29 C.F.R. §§301.2(a), 301.5(d)-(e); 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 of the controversy." *Id.* §153 First (m). In the event the Board is deadlocked, a neutral "referee" is appointed to break the tie. *Id.* §153 First (*l*).

3. If the aggrieved party is dissatisfied with the award, judicial review is available, but only under extremely 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 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). The RLA's "scope of judicial review of Adjustment Board decisions is 'among the narrowest known to the law'" in furtherance of Congress' intent to keep "so-called 'minor' disputes within the Adjustment Board and out of the courts." *Sheehan*, 439 U.S. at 91, 94 (citations omitted).

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. In 2002 and 2003, Union Pacific charged five employees with disciplinary violations after a formal investigation and hearing. Pet.App.28a-29a; SA4 ¶11. BLET filed claims with Union Pacific challenging each decision as violating one of the CBAs. Pet.App.3a. [2]

Dissatisfied with the result, BLET filed a Notice of Intent to arbitrate before the Board. Pet.App.29a. The Organization, however, failed to include evidence in the on-property record that any of the cases had been conferenced as required by the Act, 45 U.S.C. §152 Second. Pet.App.68a, 76a, 84a, 92a, 100a. In the arbitration proceedings, Union Pacific raised this as an issue precluding the Board's exercise of jurisdiction over the cases. Pet.App.66a, 74a, 82a, 90a, 98a. BLET

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[2] "SA" refers to the Supplemental Appendix of Defendant-Appellee filed with the Seventh Circuit.

offered to submit new evidence to demonstrate that the conferencing requirement had been satisfied, Pet.App.67a-68a, 75a-76a, 83a-84a, 91a-92a, 99a-100a, but the Board (or, more accurately, the neutral referee) ultimately refused to consider this evidence. Pet.App.69a, 77a, 85a, 93a, 101a. Citing extensive Board precedent on this issue, the referee found 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 in favor of Union Pacific: 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 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." The Board 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." Pet.App.69a, 77a, 85a, 93a, 101a.

2. BLET filed a Petition for Review to the United States District Court for the Northern District of Illinois. In its Petition, the Organization asked the

district court to set aside the NRAB awards 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 its untimely evidence of conferencing amounted to a violation of due process. Pet.App.30a-31a. The district court dismissed the Petition on a Rule 12(b)(6) motion after considering and rejecting each challenge. Pet.App.42a.

As relevant here, the district court explained that, in addition to the three specific statutory grounds for review, "[i]n this circuit, an award also may be vacated if the NRAB denied a party due process." Pet.App.30a. BLET had argued that the procedural rule adopted by the Board—requiring evidence of conferencing to be included in the on-property record—was "new" and could not be applied in this case without violating due process. Pet.App.38a. The district court disagreed. After reviewing the arbitral decisions relied on by the Board, the court found that "[u]nder its limited scope of review, [it could not] find that the NRAB proceedings were fundamentally unfair when the Organization had the ability to submit evidence of conferencing, Board precedent made it clear that it considered conferencing a jurisdictional requirement and Board precedent indicated that the record should contain evidence of such conferencing." Pet.App.40a-41a. Accordingly, the court affirmed the awards.

3. BLET appealed to the Seventh Circuit. The Organization 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.7a-8a.

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. In doing so, the court recognized that *Sheehan* "created confusion in some circuits as to the validity of due process review of NRAB decisions," but sided with the Courts of Appeals that had concluded *Sheehan* did not preclude such review. Pet.App.9a.

Turning to the merits of the due process challenge, the Seventh Circuit focused the inquiry on whether or not the Board's requirement of including evidence of conferencing in the on-property record was a "new rule, unknown to the Organization." Pet.App.10a. Rejecting Union Pacific's argument that no case law supported the notion "that an arbitrator violates due process if he or she applies a new or previously obscure evidentiary rule," Brief of Defendant-Appellee ("Def.-Appellee Br.") at 26, the Seventh Circuit concluded that "a tribunal may not alter, without warning, the rules for access to it." Pet.App.9a. Thus, according to the court, "if the Board created a new rule previously unknown and unapplied, this would constitute a violation of due process." Pet.App.11a. The court 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 on-property record.

Pet.App.12a-22a. Accordingly, the Seventh Circuit held that the Board denied BLET due process in refusing to review its late submission and reversed the district court.[3] Pet.App.22a-23a.

4. The Seventh Circuit denied Union Pacific's petition for rehearing or rehearing en banc on August 11, 2008. Pet.App.43a. Chief Judge Easterbrook and Circuit 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 exception permitting extra-statutory 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." Pet.App.44a. In the end, "[o]nly Congress or the Supreme Court can bring harmony." *Id.*

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

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[3] The Seventh Circuit also strangely found "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 in each case is very much in dispute. Rehearing Pet. at 7.

agencies as well, and applies regardless of whether the "new" rule is substantive or procedural in nature. *Id.*[4]

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve a well-recognized, entrenched conflict among the Courts of Appeals, reaffirm the limited role of the judiciary in the context of binding arbitration, and cabin a runaway "due process" exception that threatens to strip NRAB awards of the finality Congress intended. The Seventh Circuit, along with the Second, Fifth, Eighth, and Ninth Circuits, have repeatedly held that litigants are not limited to the grounds for judicial review set forth in the RLA and are permitted to secure relief based upon any alleged violation of due process. The Third, Sixth, Tenth, and Eleventh Circuits have held that the statutory grounds are exclusive and have dismissed complaints alleging due process violations no different than the one at issue here. This conflict is well-recognized by courts and

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[4] Judge Easterbrook went on to suggest that "all parties to this case assumed that a change of law during the course of administrative adjudication offends the Constitution." Pet.App.46a. He was mistaken. Union Pacific 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. Moreover, 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; *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'") (citations omitted).

commentators alike and is long overdue for this Court's review.[5]

The confusion among the circuits stems largely from this Court's 1978 decision in *Sheehan*. In that case, the Tenth Circuit had asserted jurisdiction to review "purely legal issues" that arose from Board decisions. 439 U.S. at 91-92 (emphasis omitted). This Court reversed the Tenth Circuit's holding that the Board's refusal to address the merits of plaintiff's equitable tolling claim violated due process. It held that if the Tenth Circuit believed that the Board had not considered the equitable tolling argument, it "was simply mistaken." *Id.* at 92. If, on the other hand, the court had intended to "reverse the Adjustment Board's rejection" of that argument, it had "exceeded the scope of its jurisdiction." *Id.* at 92-93.

This Court went on to explain that "[j]udicial review of Adjustment Board orders is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption." *Id.* at 93 (citing 45 U.S.C. §153 First (q)). The Court reasoned that "[o]nly upon one or more of *these bases* may a court set aside an order of the Adjustment Board" and

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[5] *See, e.g., Kinross v. Utah Ry. Co.*, 362 F.3d 658, 661-62 (10th Cir. 2004); *Shafii v. PLC British Airways*, 22 F.3d 59, 62-63 (2d Cir. 1994); *Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 846 (9th Cir. 1989); Buck S. Beltzer & Stephen A. Wichern, *Judicial Review Under the Railway Labor Act: Are Due Process Claims Permissible?*, 33 Transp. L.J. 197, 204-20 (2006); Christopher L. Sagers, Notes, *Due Process Review Under the Railway Labor Act*, 94 Mich. L. Rev. 466, 469 (1995).

"that this statutory language means just what it says" as it had "emphasized" "time and again." *Id.* at 93 (emphasis added). Some courts have found this language to be unequivocal; others have found ambiguity in the Court's holding. As Judge Easterbrook made plain: "[o]nly Congress or the Supreme Court can bring harmony . . . ." Pet.App.44a.

This case is an ideal vehicle with which to do so. Despite the long-standing nature of the split, this question has never been squarely presented to this Court.[6] There can be no doubt that Union Pacific would have prevailed if Respondent's challenge had been filed in the Third, Sixth, Tenth, or Eleventh Circuits. The Seventh Circuit held that the Board's decision violated due process—a question that would never have been considered in those courts. This is the Court's first genuine opportunity to resolve the confusion that has persisted since *Sheehan*.

The Seventh Circuit's erroneous due process holding provides an additional reason to grant review. The panel decision declared that all "new" rules adopted by the NRAB in the course of adjudication raise an issue of constitutional dimension requiring searching judicial review. This holding not only contravenes the law of this Court, *see, e.g., SEC v.*

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[6] In his denial of rehearing opinion, Judge Easterbrook suggests this Court may not be interested in bringing "harmony" given the long-standing nature of the conflict. Pet.App.44a. But, in fact, the only certiorari petitions raising this conflict were filed in the 1994 *Shafii* case (discussed *infra*) which, unlike the case at hand, did not find a constitutional violation, and the 2007 *Mitchell v. Continental Airlines, Inc.*, 481 F.3d 225 (5th Cir.), *cert. denied*, 128 S. Ct. 136 (2007), case (discussed *infra*) where the Fifth Circuit held that petitioners lacked standing.

Chenery Corp., 332 U.S. 194, 203 (1947), it also raises the specter of litigants reframing their disagreement with every arbitral outcome as a "due process" issue by simply pointing to something unique about the facts of *their case rendering the NRAB ruling "new."*

The outcome in this case cuts to the core of the RLA and raises an issue of national importance. Nearly half of the Circuits in the country routinely review the substance of Board awards for due process violations. In recent years—indeed, just last Term—this Court recognized the importance of congressional policies favoring arbitration and circumscribing the judiciary's limited role in resolving and reviewing such disputes.[7] This case is no different. Opening the door to judicially-created grounds for review, especially one as potentially expansive and easy to manipulate as due process (as evidenced by the Seventh Circuit's ruling),

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[7] *See, e.g., Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (Parties may not expand the scope of judicial review under the Federal Arbitration Act beyond the grounds specified in the statute.); *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (claim that party violated state statute to be decided by arbitrator, not agency); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (claim that contract containing an arbitration provision is void for illegality to be addressed by arbitrator, not court); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion of Breyer, J.) (whether agreements prohibited class arbitration was issue for arbitrator, not court); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (whether damages limitation rendered agreement unenforceable was to be addressed by arbitrator, not court); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (whether statute of limitations barred arbitration to be decided by arbitrator, not court); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001) (summarily reversing set aside of arbitration award where arbitrator was construing contract and acting within scope of authority).

fundamentally undermines the policies underlying the RLA and creates considerable problems for the industry.

I. THE SEVENTH CIRCUIT'S DECISION PERPETUATES A WELL-ENTRENCHED SPLIT IN THE CIRCUITS CONCERNING THE AVAILABILITY OF A FOURTH EXTRA-STATUTORY DUE PROCESS GROUND FOR REVIEW OF BOARD AWARDS

A. Five Circuits Have Squarely Held That Courts Must Adjudicate Due Process Challenges

1. In the decision below, the Seventh Circuit refused "to depart from [its] prior holdings" declaring that courts can review Board awards on due process grounds notwithstanding the omission of due process from the three exceptions provided by statute.[8]

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[8] Prior Circuit precedent recognizing this fourth ground for review began with *Steffens v. Brotherhood of Railway, Airline & Steamship Clerks*, 797 F.2d 442 (7th Cir. 1986). *Steffens* largely relied on pre-*Sheehan* Circuit cases for this exception but, in a footnote, concluded that *Sheehan* did nothing to "disapprove of due process as a basis for review." *Id.* at 448 n.5. Rather, *Steffens* believed the Sheehan Court held only that the Board had considered the equitable tolling issue and rejected it, and that reviewing the substance of that decision would fall outside the courts' limited bases for review. *Id.* The Seventh Circuit has consistently reviewed and rejected due process claims under this judicially-created exception. *See, e.g., Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 839 (7th Cir. 1999) (recognizing that plaintiff's allegations did not fall within any of the statutory grounds for setting aside an award but nevertheless reviewing and upholding the Board decision under "a fourth category of objections that supply jurisdiction over the award—an allegation that a party was denied due process"); *Bates v. Baltimore & Ohio R.R. Co.*, 9 F.3d 29, 31 (7th Cir. 1993) (considering and rejecting

Pet.App.9a. But the court did more than simply reaffirm prior decisions; it reassessed the contrary argument posed by Union Pacific (and adopted by other Circuit courts) and expanded on the rationale supporting its initial conclusion.

The court reasoned that judicial review of constitutional claims is presumed unless there is "clear and convincing evidence" showing Congress intended otherwise, and that "[n]othing in section 153 First (q) of the RLA manifests" such evidence. Pet.App.8a. Despite "confusion" created by *Sheehan* "in some circuits as to the validity of due process review of NRAB decisions," the court noted that several circuits, including the Seventh, had "concluded that the *Sheehan* decision does not prohibit due process review." Pet.App.9a. Accordingly, the court adhered to its prior holdings and reviewed Respondent's due process challenge on its merits.

2. Since *Sheehan* was decided three decades ago, the Second, Fifth, Eighth and Ninth Circuits have joined the Seventh in concluding that courts have implied authority to review Board awards on extra-statutory due process grounds. These courts reason that "[t]he Supreme Court has never clearly and explicitly ruled on whether there is federal jurisdiction over a constitutional challenge to a Board's proceedings," *Edelman*, 892 F.2d at 845, and thus set

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due process claim after recognizing prior Circuit case law allowing extra-statutory exception "for judicial review where the Board deprives a litigant of his or her constitutional right to due process"); *Morin v. Consol. Rail Corp.*, 810 F.2d 720, 722 (7th Cir. 1987) (considering and rejecting due process claim after holding that "review is available if the NRAB denies a person due process in contravention of the Fifth Amendment").

out to answer the question independent of *Sheehan*. In these Circuits, the availability of a judicially-created due process ground for review is well-established—and has been reaffirmed repeatedly, as recently as this year.

Second Circuit. In *Shafii v. PLC British Airways*, the Second Circuit confronted and rejected the argument that an alleged due process violation is not a basis for vacating an arbitration award. 22 F.3d 59 (2d Cir. 1994). Noting that pre-*Sheehan* courts "historically reviewed NRAB proceedings to ensure that a participant's rights to due process were not violated" and recognizing the post-*Sheehan* circuit split, the court ultimately held that *Sheehan* did not preclude due process review. *Id.* at 62. Instead, it concluded that the *Sheehan* Court reviewed the due process claim on its merits and simply "rebuff[ed] the Tenth Circuit for its expansive ruling on their ability to review 'purely legal questions.'" *Id.* at 63-64. Because of the "'serious constitutional question of the validity of'" a statute "foreclos[ing] constitutional review," the court looked for "clear and convincing evidence" of such intent and found none in the RLA. *Id.* at 64 (citation omitted). The Second Circuit refused to "presume that Congress intended" to "leave unprotected a plaintiff's legitimate constitutional right to be treated in accord with due process before the Board," and "reaffirm[ed]" the "rule . . . that an order of the [Board] or its counterparts is reviewable upon a claim that a participant was denied due process by the Board."[9] *Id.* Finding a deprivation of due process to

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[9] The court was presumably "reaffirm[ing]" the Second Circuit's decision in *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County Railroad/M.P.S.*

be a viable basis to set aside the award, the court ultimately remanded for consideration of the merits of plaintiff's claim.[10]

Since *Shafii*, the Second Circuit has reaffirmed this position. *See, e.g., Creasey v. Metro-North Commuter*, 269 Fed. Appx. 75, 77 (2d Cir. 2008) (citing *Shafii* as holding that due process provides an additional non-statutory ground for review). Indeed, in *International Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter Railroad*, 24 F.3d 369, 371 (2d Cir. 1994), the court adhered to the "view that due process affords a fourth ground for judicial review" and affirmed the district court's order setting aside an award as violative of due process. The sole basis was the judicially-created fourth exception—no statutory ground applied.

Fifth Circuit. In *Brotherhood of Locomotive Engineers v. St. Louis Southwestern Railway Co.*, the court held that, in addition to the three statutory bases to set aside a Board decision, "judicial review is required when a board denies a litigant due process and thus acts in an unconstitutional manner."[11] 757

Associates, Inc., 794 F.2d 816 (2d Cir.), *vacated in part on other grounds*, 806 F.2d 14 (2d Cir. 1986), which suggested it would permit due process challenges. 794 F.2d at 819 (noting, without discussing *Sheehan*, that had the Board reached a different outcome its "failure to comply with the basic requirements of due process" would "warrant judicial rejection of the result").

[10] On remand, the district court found no due process violation as a matter of law and granted summary judgment in favor of defendants. *Shafii v. British Airways*, 872 F. Supp. 1178, 1182-83 (E.D.N.Y.), *aff'd*, 71 F.3d 404 (2d Cir. 1995). On this record, the petition for certiorari was denied. 517 U.S. 1161 (1996).

[11] Before *St. Louis Southwestern Railway* and after *Sheehan*, the Fifth Circuit entertained and rejected a due process challenge

F.2d 656, 661 (5th Cir. 1985). For this proposition, the court relied on a pre-*Sheehan* decision. *Id.* at 661 n.25. The court ultimately concluded that the due process allegations lacked merit.

Since then, the Fifth Circuit still has not grappled with *Sheehan* but has nevertheless adhered to the view that violations of due process provide a fourth ground for review. *See Mitchell*, 481 F.3d at 231 (reiterating that Fifth Circuit recognizes "a fourth, implied ground for review: whether an award was rendered in violation of a party's due process rights"); *Atchison, Topeka & Santa Fe R.R. Co. v. United Transp. Union*, 175 F.3d 355, 357 (5th Cir. 1999) (noting that Fifth Circuit "has recognized a fourth basis for setting aside an award, in cases where the award failed to meet the requirements of due process").[12]

Eighth Circuit. In *Goff v. Dakota, Minnesota & Eastern Railroad Corp.*, the Eighth Circuit held that the district court correctly reviewed the merits of

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to a Board decision even after recognizing that the three statutory grounds for review were exclusive. *Del Casal v. E. Airlines, Inc.*, 634 F.2d 295, 298-99 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981). In *St. Louis Southwestern Railway* and subsequent cases, the court explicitly acknowledged due process as a fourth ground for review.

[12] The Fifth Circuit in *Hayes v. Western Weighing & Inspection Bureau*, likewise recognized due process as a fourth ground for judicial review, citing a pre-*Sheehan* case, and in fact reviewed and rejected plaintiff's due process challenge on the merits. 838 F.2d 1434, 1436 (5th Cir. 1988). It also strangely ignored *St. Louis Southwestern Railway Co.*, and cited *Del Casal*, 634 F.2d 295, and *Henry v. Delta Air Lines*, 759 F.2d 870 (11th Cir. 1985), as having "cabined the reach of the due process challenge." 838 F.2d at 1436. Despite this confusion, the Fifth Circuit has reiterated its *St. Louis Southwestern Railway Co.* holding on several occasions in more recent years, as noted above, *supra* at 16-17.

plaintiff's due process challenge but ultimately found that the allegations did not constitute a violation. 276 F.3d 992, 998 (8th Cir. 2002). For its conclusion that "railroad arbitration decisions are reviewable for possible due process violations," *id.* at 997, the court relied on a prior Eighth Circuit decision,[13] a pre-*Sheehan* Supreme Court case, and the Second Circuit's decision in *Shafii*.

Ninth Circuit. The Ninth Circuit in *Edelman v. Western Airlines, Inc.*, asserted that it was deciding a question of first impression in the Circuit as "[t]he Supreme Court has never clearly and explicitly ruled on whether there is federal jurisdiction over a constitutional challenge to a Board's proceedings." 892 F.2d at 845. As for the Supreme Court's decision in *Sheehan* more than a decade prior, the Ninth Circuit found it unclear whether the Court "refused to review the railroad adjustment board's decision ... because the board was interpreting the collective bargaining agreement, or whether the Court refused because due process is not one of the three explicitly enumerated grounds for judicial review." *Id.* at 846. The court decided it was the former and aligned itself with the Fifth and Seventh Circuits. Finding this result consistent with the "'well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed,'" and seeing no "clear and convincing evidence" that Congress intended otherwise, the court held that due process claims were cognizable despite the limitations of the

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[13] The case relied on was *Armstrong Lodge No. 762 v. Union Pacific Railroad Co.*, where the court cited the three statutory grounds as exclusive but nevertheless entertained a due process challenge. 783 F.2d 131, 134-35 (8th Cir. 1986).

RLA. *Id.* at 846-47 (citations omitted). In the end, the court found no violation of due process and affirmed.

Since *Edelman*, the Ninth Circuit has reiterated that due process provides a fourth ground for reviewing a Board decision. *See English v. Burlington N. R.R. Co.*, 18 F.3d 741, 744 (9th Cir. 1994) (citing *Edelman* for its authority to review a due process challenge but ultimately finding no violation); *Kuball v. Trans World Airlines, Inc.*, No. 91-56230, 1994 U.S. App. LEXIS 18678, at *2 (9th Cir. July 13, 1994) (citing *Edelman* for authority to review and reject due process challenge); *see also United Transp. Union v. Union Pac. R.R. Co.*, 116 F.3d 430, 432-33 (9th Cir. 1997) (reiterating *Edelman* holding).[14]

B. Four Circuits Have Squarely Held That The RLA Forecloses Review Of Alleged Due Process Violations

The Third, Sixth, Tenth, and Eleventh Circuits have unequivocally held that the three statutory exceptions are exclusive and that courts cannot review Board awards on independent due process grounds. These courts steadfastly follow *Sheehan* and refuse to consider the substance of extra-statutory due process challenges—regardless of their merit. The well-entrenched split continues to deepen, with the Tenth

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[14] The Fourth Circuit has yet to issue a clear holding taking a side in this conflict. Dicta in *Radin v. United States*, appears to suggest that deprivation of due process could be reviewable—although it relies on the Tenth Circuit's discredited decision in *Sheehan* and notes that the allegations also fall within one of the statutory bases for review. 699 F.2d 681, 684 (4th Cir. 1983).

Circuit joining this side of the conflict as recently as 2004.[15]

Third Circuit. In *United Steelworkers of America Local 913 v. Union Railroad Co.*, the Third Circuit held that the three statutory grounds for review are exclusive and rejected the argument that a court can also review alleged due process violations that do not otherwise fit within those categories. 648 F.2d 905, 911-12 (3d Cir. 1981). In that case, the plaintiff had conceded that *Sheehan* precluded review of procedural due process claims but argued that substantive due process review was still available. Finding "no language in *Sheehan* to justify such a procedural/substantive distinction," the Third Circuit reversed the district court's decision to set aside the Board's findings because of "the statutory command that Board findings be set aside in only three narrow

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[15] The split here is strikingly similar to that presented in *Hall Street Associates*, decided by this Court last Term. There, "[t]he Courts of Appeals had split over the exclusiveness of the[] statutory grounds" provided in the Federal Arbitration Act as bases "to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions." 128 S. Ct. at 1403. Although the actual holding in that case centered on whether parties could expand upon the limited statutory bases for review by private contract (they could not), the underlying question of exclusivity bears a close resemblance to the RLA split squarely presented here. This Court recognized that the statutory limitations "substantiat[ed] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 1405. This Court also stated that "[a]ny other reading" would just "open[] the door" "'to a more cumbersome and time-consuming judicial review process.'" *Id.* (citation omitted). The same is true here, and the problem is equally in need of resolution by this Court.

sets of circumstances." *Id.* at 911, 914. It did so even though in some cases "circumstances may seem compelling." *Id.* at 914.

Sixth Circuit. The Sixth Circuit in *Jones v. St. Louis-San Francisco Railway Co.*, held that judicial review of an arbitration award "is limited to only those grounds specified" by statute and that, accordingly, a due process claim "cannot serve as a basis for judicial review" under the RLA. 728 F.2d 257, 261 (6th Cir. 1984). The court relied on *Sheehan* and the Third Circuit's decision in *United Steelworkers of America.* Two years later, the Sixth Circuit reiterated this holding in *dicta. See Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 n.2 (6th Cir. 1986) (noting that district court had "correctly relied on *Sheehan* in holding that [plaintiff's] allegations of due process violations did not provide a legitimate ground for review").

Tenth Circuit. As recently as 2004, the Tenth Circuit joined the split and held that *Sheehan* "preclude[s] judicial review of due process claims beyond those specifically articulated in the Railway Labor Act." *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 662 (10th Cir. 2004). Recognizing the conflict among the Circuits, the court sided with the Third, Sixth, and Eleventh. *Id.* at 661-62. It reasoned that a contrary conclusion would not only "require an evasive reading of *Sheehan*, it would also frustrate Congress' intent to keep such disputes out of the courts." *Id.* at 662. Further, it concluded that the three statutory grounds themselves provided sufficient protections to satisfy constitutional due process requirements. As the Tenth Circuit explained:

> First, Congress allowed for review of the Board's failure to comply with the

> requirements of the Railway Labor Act, including procedural requirements ensuring claimants an opportunity to present evidence and argue their case. Second, it allowed for review of the Board's failure to confine itself to matters within its jurisdiction. Finally, it allowed for review for fraud or corruption on the part of the Board, which ensures an impartial tribunal.

Id. at 662 n.3. Ultimately, the court reversed the district court's due process finding as outside its jurisdiction and remanded for consideration of whether plaintiff's claims fell within one of the three statutory grounds for review.

Eleventh Circuit. In *Henry v. Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985), the Eleventh Circuit held that, per *Sheehan*, "judicially created due process challenges to System Board awards" "must fail." In later cases, the court has consistently referred to the three statutory exceptions as exclusive. *See Steward v. Mann*, 351 F.3d 1338, 1344 (11th Cir. 2003) (citing *Henry* and stating that court may set aside award for "one of only three" statutory reasons); *Parsons v. Cont'l Airlines, Inc.*, 215 Fed. Appx. 799, 800-01 (11th Cir. 2007) (same).

II. THE SEVENTH CIRCUIT'S DUE PROCESS HOLDING CONTRAVENES THIS COURT'S PRECEDENT AND EXCEEDS THE SCOPE OF ANY EXTRA-STATUTORY DUE PROCESS EXCEPTION

The mischief threatened by the Seventh Circuit's extra-statutory due process exception is magnified by the substance of its due process analysis. The NRAB's

decision in this case was perfectly foreseeable in light of its prior precedent and did not constitute a "new rule" at all—certainly not in any constitutionally significant sense. By confusing the ordinary retroactivity inherent in common law or agency adjudication with a due process violation, the Seventh Circuit's decision transforms what was supposed to be "among the narrowest" standards of review "known to the law" into a free pass for litigants to second-guess the agency's routine application of broad principles to particular factual circumstances, and the Board's basic authority to articulate its interpretation of the governing statutes via adjudication rather than rulemaking.

This runs counter to this Court's and other Circuits' precedents. It is well-settled that "new" rules adopted in the course of an adjudication are rarely applied *prospectively*. *See, e.g., Chenery*, 332 U.S. at 203 ("Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency."); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (plurality opinion of Fortas, J.) ("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein."); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (agency interpretation announced in adjudication "is entitled to deference even if it represents a departure from ... prior policy"). Rather, the presumption is that such rules or interpretations apply to the parties before the court or agency, as well as to cases pending at the time of decision. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293-94 (1974) ("The views

expressed in [*Chenery*] and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding . . . ."); *see also* Pet.App.45a ("Administrative agencies no less than courts may adopt new rules by adjudication.") (Easterbrook, J., concurring).[16]

This presumption of retroactivity is especially strong when the "new" rule does not upset settled precedent but rather simply fills in interstices in the law. *United Food & Commercial Workers Int'l Union, AFL-CIO, Local No. 150-A v. NLRB*, 1 F.3d 24, 35 (D.C. Cir. 1993) ("[W]here an agency ruling seeks only to clarify the contours of established doctrine, we will almost *per force* allow its retroactive application."); *see also* 2 Richard J. Pierce, Jr., *Administrative Law Treatise* §13.2 (4th ed. 2002) ("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."). Even in those rare instances where prospective adjudication is *permitted*, this Court has never couched the inquiry in terms of due process nor has it declared retroactive decision-making to be an error of constitutional magnitude.

In the case at hand, no one has suggested that the Board's ruling upsets settled precedent. (To the

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[16] Indeed, in recent years, this Court has moved very close to adopting a rule of absolute retroactivity in the context of judicial adjudication. *See, e.g., Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (plurality opinion of Souter, J.).

contrary, the Board concluded and Union Pacific argued that prior precedent compelled this result, *see, e.g.*, Pet.App.3a-5a; Def.-Appellee Br. at 26-32, and the district court found it "indicated" by "Board precedent," Pet.App.40a-41a.) Even the Seventh Circuit held only that prior Board awards were "unclear" and "not conclusive," and that the statute and regulations failed to reveal such a "rule." Pet.App.16a, 18a. BLET ultimately conceded that (1) parties cannot proceed to arbitration without first meeting in conference, and (2) that "parties to arbitration must present all of their evidence to the Board in the on-property record." Pet.App.12a. That the NRAB—functioning as an appellate tribunal—would (and had) read these two rules together does not reverse any settled expectations. *Cf. Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 875-76 (D.C. Cir. 1996) (dismissing for lack of jurisdiction where litigant failed to demonstrate compliance with statutory exhaustion prerequisites); *Gleason v. Sec'y of Health & Human Servs.*, 777 F.2d 1324, 1324 (8th Cir. 1985) (dismissing appeal where there was no "clear and unambiguous statement in the record of both parties' consent to the magistrate's jurisdiction").

Yet, instead of applying the presumption of retroactivity to what it (erroneously) believed to be a new interpretation of Board rules, the Seventh Circuit turned the presumption on its head and gave it constitutional status. *See* Pet.App.11a ("[I]f the Board create[s] a new rule previously unknown and unapplied, this ... constitute[s] a violation of due process."); Pet.App.9a ("[A] tribunal may not alter, without warning, the rules for access to it."). This separates the adjudicative process of the NRAB from

that of every other agency and court in this country—and does so where judicial review is supposed to be "'among the narrowest known to the law.'" *Sheehan*, 439 U.S. at 91 (citation omitted).

In the end, the Seventh Circuit's holding in this case stands alone. If Union Pacific had litigated in the Third, Sixth, Tenth, or Eleventh Circuits, it would have prevailed without any due process inquiry at all. But it would have won even if the reviewing court was one of the other four Circuits recognizing due process as a permissible ground for review. Every one of those courts engages in a balancing test to determine whether a "new" rule or interpretation should be applied retroactively and none couches the inquiry in due process terms. *See, e.g., NLRB v. Niagara Mach. & Tool Works*, 746 F.2d 143, 151 (2d Cir. 1984); *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050-51 (5th Cir. 1988); *Minn. Licensed Practical Nurses Ass'n v. NLRB*, 406 F.3d 1020, 1026-27 (8th Cir. 2005); *Golden Rainbow Freedom Fund v. Ashcroft*, 24 Fed. Appx. 698, 700 (9th Cir. 2001).[17] Accordingly, whether or not the Board's decision was "new," it would not have been reviewed under the implied due process exception in those Circuits and, absent any statutory basis for review, would have been dismissed.

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[17] *See also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1075 (1997) (noting that "[t]he Court has not identified [a] ... due process limitation on adjudicative retroactivity" 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 developed").

III. THE SEVENTH CIRCUIT'S DECISION RAISES ISSUES OF NATIONAL IMPORTANCE

The recognition of an additional, extra-statutory ground for review by the Seventh Circuit and nearly half of the Circuits in this country fundamentally undermines the policy underlying the RLA. And the Seventh Circuit's expansive (and unfounded) due process holding renders the Act's promise of final and binding arbitration illusory.

"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); *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 613-14 (1959) (same). 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).

This is why Congress enacted a judicial review provision exceedingly limited in scope—one that this Court has recognized as "'among the narrowest known to the law.'" *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987) (citation omitted). Indeed, in 1966, Congress amended the RLA to narrow the scope of judicial review even further. In so doing,

it rejected a railroad industry proposal that would have expanded judicial review to permit, *inter alia*, setting aside Board awards that were "contrary to constitutional right, power, privilege, or immunity." *See 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. 123-44, 303-16 (1966).

Now nearly half of the country has adopted this rejected proposal by judicial fiat, expanded the "narrow" scope of review beyond permissible statutory bounds, and opened the door to dozens and dozens of arbitration award challenges asserting "due process" violations. This is to be expected. Any litigant can easily reframe its disagreement with an arbitral outcome as a question of due process. The sheer number of "due process" claims filed in courts in the Second, Fifth, Seventh, Eighth and Ninth Circuits in the last three decades—approximately sixty *reported* decisions—proves as much. And this was before the Seventh Circuit declared all "new" rules—*i.e.*, interpretations that a court decides are not obvious from the RLA or Circular One—constitute a due process violation if applied to the case at hand. Each case is distinct on its facts and any competent claimant can surely find some way to claim surprise. The Seventh Circuit has set a dangerous precedent by granting litigants leeway to dress up merits challenges in constitutional garb and run to the courts willing to entertain (if not grant) such review.

The resulting uncertainty and potential for protracted litigation has a dramatic impact on the efficiency and finality of NRAB awards. More than 150,000 Class 1 railroad employees are covered by the

RLA. In 2008 alone, thousands of claims under CBAs have been filed against the Petitioner, and nearly 1,500 have been submitted to arbitration. The costs and delay that would ensue from subsequent, expansive judicial review are tremendous. This case provides a telling example. Far from being an efficient vehicle to keep minor disputes out of the courts, the claims under review were first filed in 2002 and 2003, SA4 ¶11, and have been working their way through the court system for the past three-and-a-half years, SA1-13. The finality envisioned by the RLA cannot withstand this onslaught.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

MICHAEL J. HEMMER
PATRICIA O. KISCOAN
UNION PACIFIC RAILROAD
1400 DOUGLAS STREET, STOP 1580
OMAHA, NEBRASKA 68154
(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
LATHAM & WATKINS LLP
555 11TH STREET, NW
SUITE 1000
WASHINGTON, DC 20004
(202) 637-2200

Counsel for Petitioner