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

REPLY BRIEF OF PETITIONERS

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Respondent Brotherhood of Locomotive Engineers and Trainmen ("BLET") concedes that there is a clear 5-4 split among the circuits; that "thousands of arbitration cases are affected by the split"; and that the decision below rested solely on a due process exception rejected by other circuits. Opp. 1, 9. As Chief Judge Easterbrook emphasized, "[o]nly Congress or the Supreme Court can bring harmony" to this statutory scheme, and Respondent offers no persuasive reason to deny review.

1. Respondent contends that neither of the questions presented in the petition are properly before this Court. Its argument misunderstands the governing standard as well as the record below.

First, Respondent does not dispute that the Seventh Circuit expressly addressed and decided both questions. As the opinion plainly reflects, the Seventh Circuit "decline[d] to depart from [its] prior holdings" that "allow[] judicial review of Board orders where a party asserts a due process violation," Pet.App.8a-9a, and further held in no uncertain terms that "[w]hen a Board creates a new requirement on its own" it "violate[s] the due process rights of the parties," Pet.App.22a. As explained in the petition, this Court "'permit[s] review of an issue'" that has *either* been pressed *or* "'pass[ed] upon'" below. Pet. 11 n.4 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)); *see also Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented."). Having no answer to this authority, Respondent simply ignores it.

Second, the Seventh Circuit no doubt "passed upon" both questions because it recognized that Union Pacific had properly preserved those issues in its briefing below. Even though the Seventh Circuit had resolved the first question more than two decades ago, Union Pacific still called the court's attention to the split and made clear that it was only assuming *arguendo* that due process review could "ever" be appropriate. *See* Brief of Defendant-Appellee ("Def.-Appellee Br.") at 14 n.5, 22, 23-24 (7th Cir. filed Oct. 27, 2006). In light of the fact that the panel was plainly bound by the law of the circuit, nothing more was required at that stage of the proceedings. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (issue not waived where argument "would be futile" because prior circuit "precedent precluded jurisdiction over petitioner's ... claims, and the panel below had no authority to overrule" precedent). Indeed, the Seventh Circuit panel understood the statements in Union Pacific's brief to be an effort to "cast doubt on the law of this Circuit," and expressly rejected that effort by reaffirming adherence to its longstanding rule. Pet.App.8a-9a. And, as Respondent concedes, Union Pacific squarely presented the issue in its petition to the *en banc* court at the rehearing stage.

With respect to the second question, Union Pacific's brief argued 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; *see also id.* at 25 ("The Union improperly reads [prior circuit precedent] as standing for the proposition that the application of a

'new' procedural rule, without prior notice to the disadvantaged party, necessarily constitutes a denial of due process."). That is the precise issue raised in Question 2. There is no bar to this Court's review of either question.

2. BLET also asserts that resolution of the first question presented is unnecessary. It contends that the circuit conflict is "illusory" because the fourth, judicially-created exception is identical to the statutory grounds for review and that this case accordingly would have come out the same way under one of the statutory exceptions. Opp. 6-16. Not so.

First, the 5-4 split is far from "illusory." Respondent would have this Court find that five circuits decided to establish a controversial "fourth" ground for review for no reason at all. Certainly those courts did not regard the statutory grounds as merely duplicative. For example, the Second Circuit recognized an *independent* due process ground for review, based on its view that failure to do so "would leave unprotected a plaintiff's legitimate constitutional right to be treated in accord with due process before the Board." *Shafii v. PLC British Airways*, 22 F.3d 59, 64 (2d Cir. 1994); *see also, e.g., Smith v. Am. Eagle Airlines, Inc.*, No. 07 CV 3363(NG)(RER), 2008 WL 2600857, at *3 n.3 (E.D.N.Y. July 1, 2008) ("Second Circuit cases ... make clear that a due process challenge is an *independent* ground for judicial review ....") (emphasis added); *United Transp. Union v. Union Pac. R.R. Co.*, 116 F.3d 430, 432 (9th Cir. 1997) (describing due process as an "*independent* ground, *in addition* to the three enumerated in the statute") (emphasis added); *Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 846 (9th Cir. 1989) (holding that "due process

challenge does provide an *independent* basis for our jurisdiction") (emphasis added); *id.* at 847 (holding that "a constitutional challenge constitutes an *independent* ground, *in addition to* the three expressly stated in section 153 First (q)") (emphasis added).

Indeed, the extra-statutory due process exception is problematic precisely because it is untethered from the specific grounds set forth in the Railway Labor Act ("RLA"). By definition, this additional exception allows a court to substitute its own judgment about "fundamental fairness." Opp. 8-9. An amorphous and easy to manipulate "due process" exception invites backdoor challenges and encourages searching review of arbitrator decisions.

And while Respondent doubts that there has been or ever will be "*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," Opp. 8 (emphasis added), courts have held otherwise. In *International Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter Railroad* (cited at Pet. 18), the Second Circuit affirmed the vacatur of an NRAB award on due process grounds only after explicitly holding that "[n]one of [the statutory grounds] applies here." 24 F.3d 369, 371 (2d Cir. 1994).[1] And even in those cases where due process allegations are ultimately rejected, they are still considered as an additional, non-duplicative ground for relief. *Compare, e.g., Pokuta v. Trans World Airlines,*

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[1] Respondent also erroneously contends that Union Pacific conceded that "no court used procedural due process to invalidate an award for thirty years or more prior to this case." Opp. 16. Petitioner made no such assertion.

Inc., 191 F.3d 834, 839 (7th Cir. 1999) (holding that employee's objections fall within "none of [the statutory] categories," but then engaging in additional analysis after noting "[h]owever, we have recognized a fourth category of objections ... an allegation that a party was denied due process"), *with Sullivan v. Malin*, No. 3:07cv495, 2008 WL 1883283, at *3 (W.D.N.C. Apr. 24, 2008) (holding that because employee's objections fall outside the three grounds "enumerated by statute" and because the court has no jurisdiction over "due process allegations" analysis ends and case is dismissed). In short, the mere *availability* of this "fourth" ground for review prolongs disputes and contravenes Congress' call for finality.

Respondent also mistakenly relies on *Kinross v. Utah Railway Co.*, 362 F.3d 658 (10th Cir. 2004), for its view that a due process violation would also invariably exceed a Board panel's jurisdiction. Opp. 8, 12-13. The district court in that case initially vacated the arbitrators' award on due process grounds. On appeal, the Tenth Circuit reversed and remanded because Congress had not authorized due process review. On remand, the district court then rejected the *statutory* grounds advanced by the plaintiff and affirmed the arbitration award. *See Kinross v. Utah Ry. Co.*, No. 2:01-CV-0010BSJ, 2006 U.S. Dist. LEXIS 23162 (D. Utah Apr. 6, 2006); *Kinross v. Utah Ry. Co.*, No. 2:01-CV0010J, 2006 U.S. Dist. LEXIS 87749 (D. Utah Oct. 24, 2006). The availability of *independent* due process review was outcome-determinative and transformed what was designed as an efficient vehicle to keep minor disputes out of the courts into a more than five year court battle.

Second, Respondent's insistence that the outcome in this case "would" have been the same in circuits that do not recognize an independent due process exception is both irrelevant and wrong. Opp. 8, 9. There is no cause for this Court to deny review based on speculation about how courts would resolve a statutory argument that the Seventh Circuit did not decide and the district court necessarily rejected. And Respondent provides no reason to believe that any circuit would vacate this award under the statutory exceptions set forth in the text of the RLA in any event.

The only statutory exception Respondent relies on permits judicial review for "failure of the order to confirm, or confine itself, to matters within the scope of the division's jurisdiction." 45 U.S.C. § 153 First (q). Respondent points to four cases to argue that "the outcome in this matter would have been the same"—*i.e.*, the Board's award would not have been sustained—had the matter been brought in those circuits under this statutory ground for review. Opp. 10.

But of the four cases it cites, only *one* actually vacated an arbitration award on statutory grounds. As for the others, two courts affirmed awards without any analysis of the statutory exception cited by Respondent. *See United Steel Workers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905 (3d Cir. 1981); *Henry v. Delta Airlines*, 759 F.2d 870 (11th Cir. 1985). In the third, *Kinross*, 362 F.3d 658, the award was affirmed on remand after the district court expressly held that the jurisdictional exception did not apply. *See supra* at 5. And although the Sixth Circuit did reverse an arbitration award as "exceed[ing] [the panel's]

authority," it did so only where the arbitration panel violated *express* terms of the collective bargaining agreement ("CBA"). *See Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 266 (6th Cir. 1984) (holding Board panel exceeded its jurisdiction by rendering a decision 14 *months* after the hearing date when the CBA mandated an award within 15 *days*).

Here, it is undisputed that the Board did not ignore express terms of the CBA. To the contrary, Respondent's claim rests on the fact that the agreement was silent. Opp. 3 (The CBA is "silent as to how the fact that conferencing occurred can be shown."). All agree (and the rules make clear) that conferencing is required, and that all evidence must be submitted in the on-property record. Pet.App.12a-13a, 17a-18a. The Board's interpretation of these rules to mean that evidence of conferencing—like all other evidence—must be included in the on-property record does not amount to a failure of the Board to "conform" or "confine" itself to matters within the scope of its jurisdiction. *See The Railway Labor Act* 426-27 (Michael E. Abram et al. eds., 2d ed. 2005) ("A reviewing court will determine that an adjustment board acted within its jurisdiction ... unless it ignored 'clear and unambiguous provisions' in the parties' agreement.") (citations omitted).

Other courts have recognized that a Board panel does not act outside its jurisdiction merely by resolving procedural disputes where the parties' agreement is silent or ambiguous. For example, the Fourth Circuit rejected objections made under this statutory exception where "the Board did not ignore the plain meaning of the language in the arbitration agreement," but rather decided the evidentiary issue presented in

the common law tradition. *Norfolk & W. Ry. Co. v. Transp. Commc'ns Int'l Union*, 17 F.3d 696, 701-02 (4th Cir. 1994). The court explained that where the agreement is silent, the parties have "effectively ceded to the arbitrators the task of defining the scope of their power by providing in the contractual language little guidance to the arbitrators as to their powers." *Id.* at 701; *see also Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Ry. Co.*, 312 F.3d 943, 947 (8th Cir. 2002) (Board panel acted within its jurisdiction when it decided evidentiary issue absent "'specific controlling language in the collective bargaining agreement'") (citation omitted).

Thus, it is far from clear (and, indeed, quite unlikely) that the Seventh Circuit or "any other circuit" "would have reached the same outcome" absent an independent, judicially-created due process exception. Opp. 10, 9. The very real and significant circuit split is squarely presented.

3. Respondent offers no reason why this Court should deny review of the second question presented if it grants the first. Instead, Respondent merely tries to defend the merits of the Seventh Circuit's expansive holding that "new" rules (or really interpretations of already existing rules) cannot be applied to the parties before the tribunal without violating due process. It contends that the authorities cited in the petition are inapposite because arbitrators "cannot adopt 'rules' ... if those rules are not in the RLA, Circular One, or in the parties' own CBA's." Opp. 18. That argument is unfounded and hardly a basis to deny plenary review of a holding that threatens to constitutionalize a broad range of procedural rulings issued in the course of arbitrations Congress sought to expedite.

Arbitrators, like judges, are charged with adjudicating the case before them. Not every factual scenario has been anticipated and spelled out in the RLA, Circular One, or the parties' agreement. To discharge their duty to decide the case, Board panels *must* (and do) have the authority to interpret and apply general rules in specific contexts where the parties might reasonably disagree about what the general rule means. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) ("When the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator.") (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)); *Norfolk & W. Ry. Co.*, 17 F.3d at 701 (the power to decide evidentiary and procedural matters is "implicit in the powers expressly conferred upon [the panel] by the parties"). Indeed, Board panels have adopted a variety of common law "rules" through adjudication. *See, e.g.*, Pub. L. Bd. No. 1312, Award No. 156 at 3 (1976), *available at* http://kas.cuadra.com/star/images/nmb/020014BF.pdf (reading doctrine of laches into the RLA based on "[p]ublic [p]olicy, as enunciated by both statute and Court decision ... to handle disputes concerning the proper application of collective bargaining agreements expeditiously" and dismissing claim on laches ground without adjudicating merits).

The party on the losing end of such applications will *always* say that the panel created a "new rule." Equating this routine common law or agency adjudication with a due process violation, as the Seventh Circuit did, threatens to transform what was supposed to be "among the narrowest" standards of

review "known to the law" into a free pass to second-guess the merits of the arbitrators' interpretation.

It also contravenes this Court's and other circuits' precedents. *See* Pet. 24-28. Respondent suggests that those cases have no application here because the NRAB is not really an "administrative agency,"[2] and because its decisions do not constitute binding precedent.[3] This unnecessarily complicates the issue. The precedential force of a Board award is irrelevant for the question presented: whether a supposedly "new" interpretation of already existing rules can be applied "retroactively" *to the case at hand.* Likewise, whether the NRAB is more like a "traditional" administrative agency or a quasi-judicial tribunal is of no moment. The law is well-settled 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) (emphasis added).

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[2] Notably, Respondent is more than happy to cloak the NRAB with the "federal administrative agency" title when it suits them. *Compare* Opp. 17 ("The NRAB is less an administrative agency than a service provider like the American Arbitration Association or the Federal Mediation and Conciliation Service."), *with* Reply Br. at 9 (7th Cir. filed Nov. 13, 2006) ("The NRAB is not a private arbitrator ...; it is a federal administrative agency."), *and* Answer to Reh'g Pet. at 6 (7th Cir. filed May 14, 2008) (same).

[3] In fact, it is well-understood that (binding or not) NRAB panels can and do rely on "rules" announced in prior Board awards on a routine basis. *See Finley Lines*, 312 F.3d at 947 ("[I]t is well established that arbitrators may look to outside sources, including prior unrelated awards, without straying beyond their jurisdiction ....").

The Seventh Circuit's due process analysis exacerbates its error in recognizing an extra-statutory due process exception in the first place. It turns the NRAB from a tribunal charged with adjudicating disputes and issuing final and binding awards into a powerless entity left ineffectual when unanticipated issues arise. This Court's review is needed.

* * *

In the end, there is an undisputed and entrenched 5-4 split among the circuits—a split that has persisted for decades and that affects thousands of arbitration decisions in the railroad and airline industries. The questions presented are properly before this Court, are squarely at issue, and directly impact "the stability of labor relations in industries that Congress has deemed critical to the national economy." Mot. For Leave to File Brief of *Amicus Curiae* in Support of Petition for a Writ of Certiorari at 2. This Court's review is needed now and Respondent provides no sound reason to deny certiorari.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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