No. 08-604

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,
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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE, ASSOCIATION OF AMERICAN RAILROADS, AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the National Railway Labor Conference ("NRLC"), the Association of American Railroads ("AAR"), and the Airline Industrial Relations Conference ("AIRCON") move for leave to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari.

The *amici* are filing this motion because the respondent, Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region, has refused to consent to the filing of this brief. The petitioner, Union Pacific Railroad Co., has consented to the filing of this brief, and its letter of consent has been lodged with the Clerk of the Court.

The *amici* seek to file the attached brief to emphasize the importance of the question presented in this case to the railroad and airline industries in the United States – the two industries whose labor relations are regulated by the Railway Labor Act. The question presented affects the efficacy of the Act's compulsory framework for the resolution of labor disputes, and hence the stability of labor relations in industries that Congress has deemed critical to the national economy. The *amici* represent the collective views of the Nation's major rail and air carriers.

The NRLC is an unincorporated association whose membership includes all of the Class I freight railroads in the United States and many smaller lines. The NRLC, through its National Carriers' Conference Committee, represents most of its members in multi-employer collective bargaining under the RLA. It also represents the industry on labor-related issues (including grievance arbitration) before congressional committees, other governmental bodies, and the courts. The NRLC has filed briefs as *amicus curiae* in numerous cases before this Court, including *Brown v. Pro Football*, 518 U.S. 231 (1996), and *Conrail v. RLEA*, 491 U.S. 299 (1989).

AAR is a trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 92 percent of the workers, and account for 94 percent of the freight revenue of all railroads in the United States. Members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR represents its members in connection with numerous administrative, legislative, and judicial matters. AAR has submitted *amicus* briefs in this

Court in numerous cases, including *Norfolk Southern Ry. Co. v. Kirby*, 125 S. Ct. 385 (2004), *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), and *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000).

AIRCON was formed in 1971 as a voluntary association of various passenger and air cargo carriers. AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues and to represent member carriers, who collectively operate in 49 states, concerning legislative, judicial, and administrative matters. AIRCON has submitted *amicus* briefs in this Court in numerous cases, including *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000), *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989), and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 486 U.S. 1014 (1988).

Because the *amici* represent virtually all of the major rail and air carriers covered by the Railway Labor Act, the views of the *amici* expressed in the attached brief will assist the Court in understanding the scope and impact of the issues presented by the lower court's decision. The Seventh Circuit's decision continues a conflict among the courts of appeals with respect to the legal standards for federal court review of grievance-arbitration awards under the Railway Labor Act ("minor disputes"). In addition, the court has inappropriately expanded the bases for judicial review of such awards, and has thereby prolonged the resolution of potentially disruptive grievance disputes. This is a great concern to *amici*. Thus, the

amici seek leave to file the attached brief urging the Court to grant the petition.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST [1]

The interests of the *amici* are set forth in the preceding motion and therefore are not repeated here.

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The questions presented in the petition are important to the stability of labor relations on the Nation's railroads and airlines, as well as to the administration of the Railway Labor Act ("RLA" or "Act"). The Act calls for the "prompt and orderly settlement of all disputes growing out of grievances." 45 U.S.C. § 151(a) (2006). The achievement of this statutory goal depends in large part on the finality that attends the Act's grievance-arbitration procedures. The decision below is inconsistent with the language, structure, and purpose of the Railway Labor Act because it undermines the practical finality of adjustment board awards by expanding the bases for judicial review and prolonging the resolution of disruptive minor disputes.

The current division among the various courts of appeals over the legal standards for reviewing adjustment board awards encourages forum shopping for a circuit and court in which to file a petition for review. The pending petition should be granted not only to promote uniformity in the law, but also because Congress intended that disputes over grievances in these vital industries should be finally decided by the grievance-arbitration procedures specified in the RLA, subject only to the Act's narrowly delineated standards for federal court review. The court of appeals decision is an invitation for the losing party to take a second bite at the same apple. In addition, the Act's carefully defined standards, in contrast to elusive concepts of arbitral "due process," reduce the risk that inconsistent judicial adjudications will lead to disparate treatment of similarly situated employees and to the very labor discord that the Act was designed to prevent. The various boards of adjustment

provided for in the Railway Labor Act are established and conducted by labor and management as an adjunct to the bargaining process in order to resolve disputes about grievances and collective agreements. Awards are made by representatives of the parties. Only if they deadlock does a neutral arbitrator become involved. The "due process" provided by adjustment boards is set out in Section 3 of the Act, and also by the procedures and practices of the boards and the collective agreements that implement the statute.

The questions presented in the petition for a writ of certiorari are important to the rail ar d air industries because they will affect how decisively adjustment board awards will bring closure to labor-management disputes over grievances and the interpretation or application of labor agreements. The pendency of minor disputes is an obstacle to a properly functioning work-place.

ARGUMENT

When Congress enacted the Railway Labor Act, it intended to promote stability in railroad labor-management relations by establishing a comprehensive framework for resolving labor disputes. Two classes of disputes directly addressed by the RLA involve (i) the formation of collective bargaining agreements ("major disputes"), and (ii) grievances or the interpretation of agreements covering rates of pay, rules, or working conditions ("minor disputes"). *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994); *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n et al.*, 491 U.S. 299, 302 (1989) ("Major disputes seek to create contractual rights, minor disputes to enforce them.") (citing *Elgin, Joliet & Eastern Ry. Co.*

v. Burley et al., 325 U.S. 711, 723 (1945)).[2] The two procedures are complementary because the principal purpose of the grievance-arbitration procedure is to apply the collective bargaining agreement to day-to-day events and disputes at the workplace.

Grievance resolution in the railroad and airline industries begins with grievance and/or disciplinary proceedings conducted by management and labor representatives at the employing railroad or airline carrier. They are characterized as "on the property" proceedings. Details of these procedures are largely spelled out in the applicable collective bargaining agreements on each carrier. The Railway Labor Act requires that such disputes be "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." 45 U.S.C. §§ 153(i), 184 (2006). The "on the property procedures" include satisfying the statutory requirement that representatives of the carrier and employees "confer in respect to such dispute." § 152 Sixth. This duty to meet in conferences to resolve disputes appears throughout the RLA, for example in Sec. 2 Second, Sec. 2 Sixth, and Sec. 6, reflecting a general intent that disputes are best resolved by the parties themselves.[3]

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[2] The Railway Labor Act also establishes the procedures for resolving disputes over the identity of collective bargaining representatives or "representation disputes." 45 U.S.C. § 152 (2006).

[3] Judicial construction describes the conference process as short of formal negotiations, but a process that facilitates reasonable communication and a good faith desire to settle the dispute. *The Railway Labor Act* 323, 402-05 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

If a dispute is not resolved on the property, it may be referred by either party to an adjustment board. The Act authorizes a variety of adjustment boards with different geographic and subject-matter jurisdictions. Sec. 3 First (National Railway Adjustment Board); Sec. 3 Second (system, group, regional, and special adjustment boards) (railroads); Sec. 184 (system, group, and regional boards) (airlines); 45 U.S.C. §§ 153, 184 (2006). Some boards deal with disputes on one carrier. The National Railroad Adjustment Board ("NRAB"), whose awards are at issue, is a standing board with general jurisdiction throughout the railroad industry.[4]

The various adjustment boards existing under the Act have similar characteristics: They are expert bodies typically composed of an equal number of representatives from management and labor, who are "peculiarly familiar with the thorny problems and the whole range of grievances." *Gunther v. San Diego & AE R.R. Co.*, 382 U.S. 257, 261 (1965). The boards include, when necessary, experienced neutral arbitrators to join the parties' representatives to break deadlocks. The Act specifies that adjustment board awards are conclusive, final, and binding on the parties. 45 U.S.C. § 153(m), (q) (2006); § 153 Second; *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S 682, 686 (1963). A restricted judicial review of adjustment board awards is also set out in the statute. The statute provides only three bases for

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[4] The National Mediation Board has not exercised its discretion to establish a National Air Transport Adjustment Board as a counterpart to the NRAB. 45 U.S.C. § 185 (2006). Consequently, system and regional boards of adjustments operate by agreement of labor and management pursuant to Sec. 184 of the Act. John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* 191 (1981).

review: (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 by a Board member. 45 U.S.C. 153 First (q) (2006). "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts. The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations." *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) (citation omitted).

The questions presented in the petition for a writ of certiorari are important to the rail and air industries because they will affect how decisively adjustment board awards will bring closure to labor-management disputes over grievances and the interpretation or application of labor agreements. The pendency of minor disputes is an obstacle to a properly functioning work-place.

Congress has shared this concern. It has twice modified the Act's minor dispute procedures to expedite final resolutions and to enhance their effectiveness. In 1934, Congress established the National Railroad Adjustment Board with the intention of having its awards be final and binding on the parties. The amendment made the Adjustment Board procedures mandatory and provided for the appointment of neutrals in the event of deadlocks. The board's findings and orders, with expressly defined exceptions, "shall be conclusive on the parties." Pub. L. No. 73-442, 48 Stat. 1185 (1934).[5] In 1966, Congress

[5] In 1936, Congress authorized a similar grievance-arbitration procedure for the airline industry. Pub. L. No. 74-487, 49 Stat. 1189 (1936).

again modified Section 3 to expedite the resolution of rail grievances, by authorizing alternative special adjustment boards (so-called "public law boards")[6] to speed up the award process and to eliminate the backlog of pending grievances. Pub. L. No. 89-456; Benjamin Aaron et al., *The Railway Labor Act at Fifty* 229 (1977).

Grievances are an inevitable part of the workplace in the highly organized rail and airline industries. The awards at issue here involve five disciplinary grievances arising out of the violation of railroad operating rules. The National Mediation Board, the federal agency that administers aspects of the Railway Labor Act, formally logged almost 5,000 new cases in the railroad industry during FY 2007,[7] and a multiple of that number undoubtedly were initiated but not progressed to the adjustment boards. Similarly, in the airline industry, while the number of grievance arbitrations is more difficult to track, it was reported that during 1988 more than 15,000 grievances were filed and about 17% were expected to progress to arbitration. It was also estimated that 8,000 cases were decided by airline system boards of adjustment in 1988.[8] Grievance procedures that

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[6] These special boards are called "public law boards" because they were authorized by the Public Law that is now codified in §3 Second (2 para). *See The Railway Labor Act* 72, 410-12 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

[7] National Mediation Board, *2007 Annual Report*, *available at* http://www.nmb.gov/publicinfo/foia-fy2007rpt.pdf.

[8] Dana Eischen & Mark Kahn, *Grievance Handling and Arbitration in the Airlines Industry: Can they be Improved?*, in *Labor and Employment Dispute Resolution Under the Railway Labor Act: Airlines and Railroads,* Society of Professionals in Dispute

provide expeditious solutions to disagreements reduce potentially disruptive labor-management controversies.

From a labor relations perspective, the prompt finality of awards by the NRAB, system boards or public law boards is central to the grievance-arbitration procedures in the RLA. *Landers v. Nat'l R.R. Passengers Corp., et al.*, 485 U.S. 652, 656 (1988). Congress and the *Sheehan* Court understood that the expansion of judicial review undermines finality, prolongs disputes, and moves the application and interpretation of collective agreements away from expert decision-makers and into a generalist judiciary. "[P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's award is final, for in reality it would almost never be final." *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960). Expert labor arbitrators are best equipped to understand the custom and practices of a particular factory or a particular industry. *Id.* at 596. As stated earlier, Congress established three narrow bases for review in deference to the parties and expert arbitrators. *Sheehan*, 439 U.S. at 91. The *Sheehan* Court emphasized that "[o]nly upon one or more of *these bases* may a court set aside an order of the Adjustment Board." *Id.* at 93 (emphasis added). RLA standards for review are purposefully designed to be "among the narrowest known to the law." *Id.* at 91.[9]

Resolution 49 (1990). *See generally Cleared for Takeoff* (McKelvey ed. 1988) (citing Part 6, Handling of Minor Disputes).

[9] Procedural and evidentiary questions are particularly within the purview of the Board or arbitrator. *See United Paperworkers, Int'l Union v. Misco, Inc.*, 484 U.S.29, 40 (1987) (reviewing procedural or evidentiary rulings which grow out of the dispute

The precedent in some courts of appeals permitting review of arbitrator awards on "due process" grounds undermines the practical finality of adjustment board awards and prolongs the underlying labor relations dispute by encouraging the unsuccessful party to seek court review. *Sheehan*, 439 U.S. at 94. The Railway Labor Act does not provide for court review of adjustment board awards on "due process" grounds. Instead, Section 3 of the Act provides due process through its operative provisions and the procedures and the practices of the boards and the collective agreements that implement the statute.[10] This reflects the special character of adjustment boards. They are established and conducted by labor and management. These boards normally consist of lay representatives on both sides and neutrals who are not required to have legal training.[11]

The arbitral task of adjustment boards is to apply agreements to day-to-day workplace disputes and to follow specific procedures set out in the Act and the applicable labor agreements, along with the rules and practices of the adjustment board. The parties to these proceedings are not strangers to one another.

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and bear on its final disposition is limited to bad faith or misconduct). The lower court's detailed parsing of the Board precedent relied on by the NRAB in making its award illustrates this confusion of roles.

[10] *See* Buck Belcher & Stephen Wichern, *Judicial Review under the Railway Labor Act: Are Due Process Claims Permissible?*, 33 Transp. L.J. 197 (2006).

[11] Because it is composed of representatives of the parties to the disputes that come before it, the NRAB has been held to be exempt from the Administrative Procedure Act, except for its disclosure provisions, 5 U.S.C. §§ 551 et seq.. *See Jones v. Seaboard Sys. R.R.*, 783 F.2d 639 (6th Cir. 1986); *Kotakis v. Elgin, Joliet & E. Ry.*, 520 F.2d 570 (7th Cir. 1975).

They have had almost a century's experience establishing a form of self-governance that has worked effectively. In the NRAB arbitration proceeding at issue, it was well known that the NRAB functions as an appellate body that relies on the "on the property record" and that the occurrence of a "conference" between the parties must be established in the submission to the Adjustment Board. The introduction of elusive concepts of arbitral "due process" to the grievance-arbitration procedures and adjustment board awards is simply an invitation for a losing party to take another bite at the same apple.

The proliferation of litigation over grievance-arbitration disputes is a major concern to the employers in both the railroad and airline industries. Added litigation will diminish the authority of adjustment boards and prolong the disruptive effects of unresolved grievances. It is timely and important to grant the petition for a writ of certiorari and address the ongoing conflict among the courts of appeals.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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