When May a Court Set Aside a National Railroad Adjustment Board Decision on Due Process Grounds?

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**ISSUE**

Does the Railway Labor Act allow a court to set aside on due process grounds a National Railroad Adjustment Board decision dismissing five employees’ grievance claims contesting their discipline or discharge?

**FACTS**

In 2000 and 2001, petitioner Union Pacific Railroad Co. discharged or disciplined five locomotive engineers. The Brotherhood of Locomotive Engineers and Trainmen filed grievances in accordance with the Railway Labor Act (RLA) seeking reinstatement, back pay, and removal of the discipline for the five engineers. The Brotherhood then proceeded through the “on-property” process in the manner dictated by the collective bargaining agreement between the parties.

Each aggrieved party had an on-property hearing before an investigating officer or superintendent of Union Pacific. In each case, the hearings were recorded and transcribed with exhibits attached. Union Pacific declined each of the claims. The parties then met in conference in a last-chance effort to settle the case. When those efforts failed, and the Brotherhood did not prevail, it sent letters of intent to the National Railroad Adjustment Board (NRAB) to initiate arbitration proceedings.

In its original submission, the Brotherhood included the on-property record containing the notices of discipline, the hearing transcript, all the exhibits, and all the evidence used in the grievance procedure relating to the merits of the underlying discharge or discipline. The Brotherhood did not, however, include any written documentation that the parties had met in conference. Union Pacific raised no objection to the Brotherhood’s submission and, in due course, presented its own countersubmission on the merits of the dispute. It did

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**UNION PACIFIC RAILROAD CO. V. BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN**

**DOCKET NO. 08-604**

**ARGUMENT DATE:** October 7, 2009

**FROM: THE SEVENTH CIRCUIT**
not mention the Brotherhood's failure to include evidence that a conference had occurred.

After the parties filed their submissions, they met on March 15, 2005, for a hearing before an arbitration panel of the NRAB. Each arbitration panel of the NRAB consists of an equal number of members chosen by the carrier and by the labor organization. When the panels are deadlocked, a neutral person known as a referee sits with the panel to make an award. As a practical matter, the referee usually determines the outcome.

Just before the start of the oral argument, Union Pacific's panel representative requested an executive session of the panel, out of the presence of the Brotherhood's representative. During that session, Union Pacific's representative informed the referee that the Brotherhood's submission to the board did not contain any evidence of conferencing. Without such evidence, Union Pacific argued, the board must draw the inference that the conferences had not occurred. Union Pacific did not argue that conferencing had not occurred (as conferencing had in fact taken place), only that the Brotherhood had failed to offer any evidence of it in the on-property record submitted to the board.

The Brotherhood's advocate offered to submit documentation that the conferences had occurred. The referee gave the Brotherhood time to do that. The Brotherhood eventually proffered proof that a conference had occurred, which included phone logs, informal notes, and other documents. A majority of the panel voted not to allow this later submitted evidence. The majority voted to dismiss all five employee appeals for lack of jurisdiction.

In the five nearly identical decisions, the NRAB concluded that, without evidence in the on-property record that the conference had occurred, it had no jurisdiction to consider the Brotherhood's claims. The NRAB further concluded that it could not consider evidence not contained in the on-property record. The Brotherhood's representative filed a dissent in each of the five awards.

The Brotherhood then sought review in the district court of all five of these identically reasoned awards. Union Pacific argued that the NRAB's decisions were evidentiary rulings that could not be set aside absent misconduct or bad faith by the arbitrator. The railroad then sought to convince the district court that the conference is a mandatory precursor to arbitration and that without written evidence of the conference—evidence that could not be added to the record later—the NRAB had no jurisdiction to hear the claim.

The union countered that neither federal law nor the collective bargaining agreement required conferencing and that even if conferencing were required, no rule dictated that conferencing must be proved by evidence in the on-property record. The Brotherhood argued that the NRAB had failed to conform to its jurisdiction and had violated due process.

In the end, the district court concluded that conferencing is required before parties can refer their disputes to the NRAB. 432 F. Supp. 2d 768 (N.D. Ill. 2006). It found that the NRAB had not violated due process by refusing to consider evidence of conferencing outside of the on-property record. Consequently, the district court dismissed the Brotherhood's suit, concluding that the union had failed to state a claim upon which relief could be granted.

On appeal to the Seventh Circuit, the Brotherhood did not challenge the district court's holding that the RLA requires conferencing. Instead it focused on whether the NRAB denied due process and had failed to act within the scope of its jurisdiction by requiring proof of conferencing in the on-property record.

A three-judge panel of the Seventh Circuit held the NRAB had denied the Brotherhood due process by requiring evidence of conferencing to be presented in the on-property record, a requirement it said was not clearly enunciated in the statutes, regulations, or the collective bargaining agreement of the parties. 522 F.3d 746 (7th Cir. 2008). The court observed that decisions to admit or exclude evidence in an arbitration proceeding, absent bad faith or error, are left entirely to the discretion of the arbitrator. The Seventh Circuit said it would review claims of due process violations, absent clear and convincing evidence that Congress intended to foreclose judicial review.

The court explained that due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. According to the Seventh Circuit, this means that an arbitration tribunal may not alter, without warning, the rules for access to it. The Seventh Circuit concluded the NRAB had denied the Brotherhood due process and had failed to act within the scope of its jurisdiction by requiring as a prerequisite to arbitration proof of conferencing within the record of “on-property” proceedings. The court recognized that the RLA requires a conference be held as a prerequisite to arbitration. Because the proof requirement was not clearly enunciated in statutes, regulations, or the collective bargaining agreement, however, the court said the NRAB...
created a new rule that was previously unknown and unapplied.

The court declared that an arbitration award made by the NRAB may be overturned only if the reviewing court is convinced the arbitrator had not been trying to interpret the collective bargaining, but instead had resolved the parties’ disputes according to the arbitrator’s private notions of justice. When the NRAB creates a new requirement on its own, the court ruled, it is not interpreting the collective bargaining agreement or following dictates of RLA or its regulations, and such changes in rules violate due process rights of the parties.

Union Pacific’s petition for a rehearing was denied. No judge in regular service called for a vote on the suggestion for a rehearing en banc. 537 F.3d 789 (7th Cir. 2008) (Easterbrook, C. J.; Posner, J. concurring specially). Union Pacific’s subsequent request for review was granted by the U.S. Supreme Court. 129 S. Ct. 1315 (2009).

CASE ANALYSIS

The RLA is a federal law governing labor relations in the railway and airline industries. Passed in 1926 and amended in 1936 to apply to the airline industry, the RLA seeks to substitute bargaining, arbitration, and mediation for strikes as a means of resolving labor disputes. The National Railroad Adjustment Board is a 34-member board established by Congress in 1934. The NRAB is composed of persons appointed by private representatives of labor and management.

The NRAB consists of four separate divisions covering various classes of railroad employees. The relevant division in this case, the First Division, has jurisdiction over disputes involving engineers, firemen, conductors, and other yard-service employees of train carriers. It has its principal office in Chicago, Illinois. The NRAB panels hearing cases in the First Division consist of only five persons—two railroad representatives and two union representatives, and a referee or neutral member to break a deadlock. While the individual panels are different from the NRAB as a whole, they perform the day-to-day work of the NRAB—deciding disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. The RLA mandates that submission of a dispute to the NRAB is the exclusive remedy for these “minor disputes” regardless of the parties’ preferences.

Grievance procedures for resolving disputes between railroads and their employees are regulated by the RLA. Under the RLA, railroad employees with grievances against their employers must first attempt to resolve those grievances through an internal process before turning to the courts. The procedure for dispute resolution is set forth in the parties’ collective bargaining agreement and begins with investigations, hearings, and appeals that take place on the railroad property and are generally referred to as “on-property” proceedings. If one of the parties is dissatisfied with the result, the dispute is submitted to a conference. If the parties fail to resolve their differences in conference, an aggrieved party may initiate an arbitration proceeding before the NRAB.

In this case, Union Pacific argues that the RLA’s provision governing judicial review of NRAB decisions could not be clearer. It declares that under the RLA an order of the NRAB may be set aside only for any of three specified reasons. It says there is no basis for review of due process or any other issues not encompassed within the three statutory grounds for judicial review.

According to Union Pacific, the Supreme Court construed the statutory language in Union Pacific R.R. v. Sheehan, 439 U.S. 89 (1978), a case in which Union Pacific says the plaintiff was attempting to raise extrastatutory due process objections. Union Pacific asserts the Supreme Court squarely held that NRAB decisions “may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says.”

It is Union Pacific’s position that the statutory and legislative histories confirm this conclusion. It explains that, prior to 1966, an employee disappointed by an NRAB decision received no judicial review whatsoever, but carriers could obtain a new trial in court simply by refusing to comply with a resulting award. Union Pacific says Congress responded to the perceived inequity by providing that NRAB decisions would be final and binding on both sides, subject to a limited judicial review provision.

Contending that the requirements of due process are flexible and context specific, Union Pacific says that respecting Congress’s obvious wishes here does not raise any serious constitutional issues. It urges that Congress’s judgment that the RLA provides sufficient process on its own terms is reasonable and entitled to respect. The railroad says the RLA guarantees parties the fundamental requirements of due process—including notice and an opportunity to be heard before a neutral decision maker—and judicial review of whether those requirements have been satisfied. If, Union Pacific argues, the result is that parties are unable to pursue novel theories of due process beyond that guaranteed by the RLA, that is appropriate in these limited and unusual circumstances. It

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explains that Congress reasonably patterned the grounds for review of NRAB awards after the RLA's judicial review provision for voluntary arbitration. Union Pacific declares it does not violate due process for parties to NRAB proceedings to be given basically the same procedural protections, and the same grounds for judicial review, that are enjoyed by parties to employment arbitration in most other settings.

If the Supreme Court reaches the merits of the Brotherhood's due process objections, Union Pacific says, it still should reverse the Seventh Circuit. It reasons that the NRAB reasonably interpreted the statute and its own rules to require that the petitioner's initial submission establish a fact essential to the NRAB's jurisdiction.

Union Pacific argues there was nothing unprecedented or unpredictable about the NRAB's holding. It points out the RLA requires parties to supply the NRAB “with a full statement of the facts and all supporting data bearing upon the disputes.” 45 U.S.C. § 153, First (i). Claiming several prior decisions of the NRAB had interpreted the rules this way, Union Pacific asserts the Seventh Circuit reasoning that those decisions were not precedential would mean the NRAB engages in unfair surprise whenever it applies a general rule in a manner that is ambiguous or debatable by lawyers, even for the hundredth time.

Moreover, the railroad contends, even if this were the first time the NRAB had addressed the issue, it does not implicate due process for the NRAB to resolve a debatable issue and apply its resolution to the parties at hand. Union Pacific claims what the Brotherhood is complaining about is just the ordinary retroactivity inherent in all adjudication. According to Union Pacific, the law has been built, for centuries, around the premise (a fiction, perhaps, but a necessary one) that courts simply declare what the rules always were, and as a result litigants cannot claim unfair surprise when a legal dispute is resolved against them. It says the same is true in agency adjudication and in arbitration. Union Pacific concludes the Brotherhood's due process theory would transform all debatable questions into fodder for constitutional litigation, rendering the legal system utterly paralyzed and unable to function.

The Brotherhood argues the Seventh Circuit properly recognized and exercised jurisdiction to review the decision of the NRAB panel for denial of procedural due process. It says federal courts have exercised this jurisdiction for over 50 years, and before any provision for statutory review of NRAB actions under the RLA. In the 1966 amendments providing statutory review of NRAB actions, the Brotherhood asserts, Congress sought to expand and not limit the preexisting review by the federal courts under the Due Process Clause. It says that the jurisdiction for due process review had been recognized by this Court itself in *Union Pacific R.R. v. Price*, 360 U.S. 601 (1959).

According to the Brotherhood, there is neither express language in the 1966 amendments nor any statement from a member of Congress showing a “clear and convincing” intent, or any intent, to strip or preclude the Supreme Court's jurisdiction. The Brotherhood acknowledges that in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978), the Supreme Court restricted the use of procedural due process to override an NRAB panel's application of a specific collective bargaining agreement provision. However, the union argues that *Sheehan* never found due process was unavailable as a ground of review. It also points out that a majority of the circuits have found no such congressional intent.

According to the union, the Seventh Circuit properly exercised its jurisdiction and properly found that the NRAB panel denied the Brotherhood due process when it acted without legal or statutory authority to create a new rule requiring the Brotherhood to submit evidence of conferencing in its original submission—regardless of whether the fact of conferencing was in dispute. The Brotherhood says the Seventh Circuit correctly held that the federal regulation on which the NRAB panel purported to rely does not even apply to evidence of conferencing and that the NRAB panel had no authority to create such a rule.

The Brotherhood claims the NRAB panel unlawfully invoked its own “in-house” rule to dismiss the cases of the five engineers without any interpretation or decision of their claims under the collective bargaining agreement. The union declares that such denial of due process was especially egregious when the Brotherhood was provided with no notice that conferencing was in dispute or that such evidence was required when there had been no objection to the lack of conferencing. The Brotherhood says Union Pacific would not have been prejudiced by the consideration of the evidence at this stage when Union Pacific itself had previously failed to object to the lack of conferencing in a timely manner.

Finally, the Brotherhood says, it challenged the dismissals for the failure of the NRAB panel to “confine or conform” itself to its proper jurisdiction, as set out in 45 U.S.C. § 153, First (q). The Brotherhood argues that the NRAB panel unlawfully exceeded its jurisdiction in applying...
a new procedural requirement that had no basis in the RLA. According to the union, the Seventh Circuit’s finding that the NRAB panel acted without legal authority in dismissing these cases without resolution of the contract claims supports finding this statutory violation as well.

**SIGNIFICANCE**

In 1966, Section 3 of the RLA was amended to include subparagraph (q), permitting any party aggrieved by an NRAB award to have it reviewed on three grounds: (1) the NRAB has failed to comply with the requirements of the Act, (2) the NRAB has failed to conform or confine itself to matters within the scope of the board’s jurisdiction, and (3) the NRAB or one of its members has engaged in fraud or corruption.

In *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978), the Supreme Court held that judicial review of NRAB orders is limited to these three specific grounds. Since *Sheehan*, the circuits have disagreed whether the RLA allows a court to set aside NRAB decisions on due process grounds. Three circuits have held that review of due process arguments is forbidden. See *United Steelworkers v. Union R.R.*, 648 F.2d 905 (3d Cir. 1981); *Kinross v. Utah Ry.*, 362 F.3d 658 (10th Cir. 2004); *Henry v. Delta Air Lines*, 759 F.2d 870 (11th Cir. 1985). See also *Jones v. Seaboard System R.R.*, 783 F.2d 639 (6th Cir. 1986) (dictum).

Four other circuits have held that a review of due process arguments is not forbidden. See *Shaft v. PLC British Airzays*, 22 F.3d 59 (2d Cir. 1994); *Locomotive Engineers v. St. Louis Southwestern Ry.*, 757 F.2d 656 (5th Cir. 1985); *Goff v. Dakota, Minnesota & Eastern R.R.*, 276 F.3d 992 (8th Cir. 2002); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839 (9th Cir. 1989).

The question before the Supreme Court is a narrow one pertaining to only a relatively small number of employees—railroad workers whose claims are handled under Section 3 of the RLA. Unlike employees covered by the Labor Management Relations Act and airline employees who are exempt from Section 3 of the RLA, employees of rail carriers are subject to compulsory arbitration. This case gives the Supreme Court an opportunity, however, to resolve a conflict among the circuits that goes back more than 23 years.

**ATTORNEYS FOR THE PARTIES**

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In support of Respondent Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region

- American Federation of Labor and Congress of Industrial Organizations (James P. Coppess, 202.637.5337)
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