Note:

An Incompletely Conceptualized Statute: The Railway Labor Act's Quasi-Federal Agency and its Quasi-Constitutional Problems

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I. Introduction

One of the most significant and longest lasting pieces of labor legislation has at its core a highly uncertain body. The Railway Labor Act of 1926 (RLA),[1] which covers railroads and airlines, is in part effectuated by The National Railroad Adjustment Board (NRAB),[2] an agency whose

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1. Railway Labor Act of 1926, 45 U.S.C. §§ 151-188 (2006).
2. *Id.* §§ 151, 153.

core identity has largely been unexamined. The RLA was passed 9 years prior to the National Labor Relations Act (NLRA)[3] and has served as a model for subsequent labor legislation. The RLA provides a mechanism through which labor disputes between railroads, and currently airlines as well, could be handled in a peaceful, non-disruptive manner.[4]

The Act conceives a separation between "minor" and "major" disputes, and allows different courses of resolution for each.[5] Major disputes are those relating to the formation of, or changes to, an agreement between the carriers and unions.[6] When a major dispute is at issue, employees remain free to take job actions and bring other economic weapons to bear upon the carrier. Minor disputes are employee grievances,[7] and the RLA sought to find a better way to deal with the debilitating effects of unaddressed and poorly addressed minor disputes. Before the RLA, "[d]eadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute."[8] Therefore, the RLA requires the NRAB, a body whose identity is uncertain, to conduct compulsory arbitration for minor disputes that cannot be resolved by the parties.[9]

The NRAB was formed in 1934, a year before the passage of the NLRA, and was one of the earliest federal agencies to be established and yet has remained one of the least considered federal agencies.[10] The NRAB functions similarly to private arbitration, but is identified as a federal agency. It was designed to keep the peace in the world of railroads, aptly described by Lloyd Garrison as "a state within a state," with "its

3. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

4. Railway Labor Act of 1926, § 151(a) (The five purposes of the Act are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.").

5. The terms "major" and "minor" were first used in the seminal case of *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723-24 (1945).

6. *Id.* at 723.

7. *Id.* at 724.

8. *Id.* at 726.

9. Itasca Lodge 2029 of the Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emp. v. Ry. Express Agency Inc., 391 F.2d 657, 668 (8th Cir. 1968).

10. Edwards v. St. Louis-S.F. R.R., 361 F.2d 946, 955 n.21 (7th Cir. 1966).

own economy, language, and culture."[11] The NRAB has a simple but arcane set of procedures, promulgated during its one-time rulemaking of 1934, and is constituted by the very parties for which it is intended to serve as referee. The uncertain identity of the NRAB, whether public or private, has nowhere caused more confusion than in the question of constitutional protections.

This paper addresses the various dimensions, issues, and problems associated with the NRAB and its identity. It attempts to examine the NRAB's identity through the lens of due process and state action, and tries to take up a question that the Supreme Court left open this term in *Union Pacific Railroad v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, Central Region*, (*UP v. BLET*).[12] This inquiry is important because it attempts to better identify a unique federal agency at the heart of American transportation and provides another lens through which to examine the complicated state action doctrine.

1. 1979: Sheehan v. Union Pacific

After 30 years of confusion and a near balanced circuit split, the Supreme Court had the opportunity to provide resolution on a vexing problem in labor law, a problem that the Court had a hand in creating. The *UP v. BLET* case presented the question of whether a party is entitled to due process judicial review of arbitration compelled by the RLA and conducted by the NRAB.[13] Due process review is important not only for the review it provides, but for the fairness that it injects into the system through the specter of review. The question of due process review of NRAB awards had never been a controversial issue until the Supreme Court ostensibly tried to address the question in 1979 in *Union Pacific R.R. v. Sheehan*.[14] The *Sheehan* decision was short, per curium, and passed without the benefit of briefs or oral arguments. The issue in *Sheehan* was whether the Tenth Circuit had erred in vacating an NRAB award on due process grounds because the NRAB refused to toll the arbitration.[15] The Supreme Court reversed, holding:

> If the Court of Appeals' remand was based on its view that the Adjustment Board had failed to consider respondent's equitable tolling argument, the

11. Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567, 568-69 (1937).

12. Union Pac. R.R. v. Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S.Ct. 584 (2009). Full Disclosure - author contributed to the Respondent's brief in this case.

13. *Id.* at 588.

14. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 91 (1979).

15. *Id.* at 92-93.

> court was simply mistaken. The record shows that respondent tendered the tolling claim to the Adjustment Board, which considered it and explicitly rejected it. If, on the other hand, the Court of Appeals intended to reverse the Adjustment Board's rejection of respondent's equitable tolling argument, the court exceeded the scope of its jurisdiction to review decisions of the Adjustment Board.[16]

Sheehan did not hold that there was no due process review under the NRAB; it simply held that the Tenth Circuit erred in applying due process review in the case at issue.[17] The decision seemed to simply reiterate the fact that there are few grounds for review of an arbitration decision by the NRAB, and that the particular facts in the *Sheehan* case did not fit neatly into one of those circumscribed exceptions. *Sheehan* affirmed the proposition that "the scope of judicial review of Adjustment Board decisions is 'among the narrowest known to the law.'"[18] The *Sheehan* decision also unhelpfully proclaimed the seemingly simple proposition that "[the RLA] statutory language means just what it says."[19] The problem with such statements, when not followed by a description of how to interpret the statute, is that it gives fodder for both sides in a situation where the statute is arguably ambiguous.

Following *Sheehan*, the circuits split five to four on whether there is due process judicial review under the (RLA), with the five circuits that allow it focusing on the text and history of the RLA, and the four circuits that preclude it focusing on their reading of *Sheehan*.[20] The 2009 case of *UP v. BLET*[21] presented a unique set of facts that seemed ripe for the Supreme Court to finally resolve the matter. Furthermore, in the Seventh Circuit's refusal to hear the case *en banc*, Judges Easterbrook and Posner wrote a concurrence where they threw up their hands over the matter, saying that though they disagreed with the circuit's rule on due process, the Seventh Circuit would not rehear the case *en banc* because "[t]here is little to be gained from making the conflict 5-4 one way rather than 5-4 the other way. Only Congress or the Supreme Court can bring harmony, and neither institution seems much interested in doing so. (This conflict is 23 years old.)."[22]

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16. *Id.*

17. *Id.* at 93-95

18. *Id.* at 91.

19. *Id.* at 93.

20. The Seventh, Second, Fifth, Eighth, and Ninth Circuits allow for due process review; the Third, Sixth, Tenth, and Eleventh Circuits do not allow for due process review. Jonathan A. Cohen, *Grievance Resolution and the System Board of Adjustment*, A.L.I.-A.B.A., Apr. 15-17, 2010, at 521.

21. Union Pac. R.R. v. Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S.Ct. 584 (2009).

22. Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjustment, Cent. Region v. Union Pac. R.R. Co., 537 F.3d 789, 790 (7th Cir. 2008) (Easterbrook & Posner JJ., concurring).

2. 2009: Union Pacific v. Brotherhood of Locomotive Engineers

UP v. BLET involved five engineers who had their claims dismissed by the NRAB for failure to include evidence of conferencing with the carrier in their "on-property" submission.[23] Conferencing, which is required by the RLA, is merely an informal process through which the parties try to resolve the grievance before submitting it for arbitration.[24] The union offered to submit evidence that conferencing occurred, but the neutral arbitrator on the panel refused to consider the evidence because it had not been included in the "on-property record."[25] The carrier did not deny that conferencing took place and later in the litigation admitted that two of the grievances were conferenced, but held the position that evidence could not be submitted at this stage of the arbitration.[26] Conferencing between the parties, which is intended to be a final effort to try to resolve the matter internally before resorting to arbitration, is a requirement of the RLA.[27] But nowhere in the RLA, or the procedures prescribed by the NRAB, is there an evidentiary rule of when and how submissions concerning evidence of conferencing should occur. Indeed, conferencing is often an informal affair, consisting of a brief telephone exchange between the parties, and it is usually assumed to have occurred.[28] In the NRAB Instruction Sheet, the Board states that parties should "omit documents that are unimportant and/or irrelevant to the disposition of the dispute;"[29] and in this case the issue of conferencing was not originally in dispute. The engineers argued that they were prejudiced by a new evidentiary rule and sought to set aside the arbitration on three grounds, two of which are explicitly articulated in the

23. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region v. Union Pac. R.R. Co., 522 F.3d 746, 748 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 1315 (2009), *aff'd*, 130 S. Ct. 584 (2009).

"The parties' CBA here provides for an 'on-property' process that includes a series of investigations, hearings and appeals up to the designated Labor Relations officer (citation omitted). Disputes that cannot be resolved on the property may be referred to the NRAB." Bhd. of Locomotive Eng'rs & Trainment Gen. Comm. of Adjustment, Cent. Region v. Union Pac. R.R. Co., 432 F. Supp. 2d 768, 770 (N.D. Ill. 2006), *rev'd*, 522 F.3d 746 (7th Cir. 2008).

24. Itasca Lodge 2029 of the Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emp. v. Ry. Express Agency Inc., 391 F.2d 657, 668 (8th Cir. 1968).

25. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 522 F.3d at 749.

26. *Union Pac. R.R.*, 130 S. Ct. at 593.

27. Railway Labor Act of 1926, 45 U.S.C. § 152 (2006) ("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.").

28. *Union Pac. R.R.*, 130 S. Ct. at 587.

29. *NRAB Instruction Sheet*, NATIONAL MEDIATION BOARD (July 1, 2003), *available at* http://www.nmb.gov/arbitration/nrab-instruc.pdf.

RLA.[30]

The RLA articulates three grounds upon which an arbitration may be set aside: "for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."[31] Prior to the 1966 Amendments to the RLA, which added these three grounds for setting aside an arbitration award, the Supreme Court read the additional implied ground of due process into the Act.[32] Between 1966 and 1979, when the *Sheehan* case was decided, the courts continued to assume that due process was available to carriers and employees, reading no change on this front in the 1966 Amendments.[33] *Sheehan's* glib and sloppy simplicity created a problem, with employees and carriers each staking out a position: the carriers maintained that *Sheehan* illustrated how the 1966 Amendments to the RLA wrote out of the Act any sort of due process review, while the employees maintained that *Sheehan* and the 1966 Amendments did nothing to change the longstanding presumption that parties who suffer a violation of due process are entitled to judicial review.[34]

In *UP v. BLET*, the BLET engineers argued that the arbitrator created a new rule in the middle of their case and that rule substantially prejudiced them.[35] Therefore, they argued that there were three grounds for vacating the arbitration: failure to comply with the RLA, failure to conform to NRAB jurisdiction, and violation of due process.[36] On the carrier's motion for summary judgment, the district court held that due process review is available under the RLA,[37] but there was no such violation in this instance because the NRAB precedent put BLET on notice of the requirement to submit evidence of conferencing in the on-property submission.[38]

30. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 522 F.3d at 756-57.

31. Railway Labor Act of 1926, §153(q).

32. *See* Union Pac. R.R. v. Price, 360 U.S. 601, 616-17 (1959).

33. *See, e.g.*, Rosen v. E. Air Lines, 400 F.2d 462, 464 (5d Cir.), *cert. denied*, 394 U.S. 959 (1968) (citing S. Pac. Co. v. Wilson, 378 F.2d 533 (5d Cir. 1967)). *See also* Edwards v. St. Louis-S.F. R.R., 361 F.2d 946, 953-54 (7th Cir. 1966); Kotakis v. Elgin, J. & E. Ry., Co., 520 F.2d 570, 574 (7d. Cir.), *cert. denied*, 423 U.S. 1016 (1975) (citing Union Pac. R.R. Co. v. Price, 360 U.S. 601, 616 (1959)).

34. Union Pac. R.R. v. Sheehan, 439 U.S. 89, 89-90 (1979).

35. *Bhd. of Locomotive Eng'rs & Trainment Gen. Comm. of Adjustment, Cent. Region*, 522 F.3d at 751-52.

36. *Id.* at 749-50.

37. Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjustment, Cent. Region v. Union Pac. R.R., 432 F. Supp. 2d 768, 775 (N.D. Ill. 2006), *rev'd*, 522 F.3d 746 (7th Cir. 2008).

38. *Id.* at 775-76.

The Seventh Circuit reversed the district court's decision, holding that the NRAB panel made up a new jurisdictional rule that violated the employees' due process rights.[39] The appeal was brought on both constitutional and statutory grounds, and though the Seventh Circuit acknowledged the "fundamental rule of judicial restraint" of addressing statutory issues before constitutional ones, it said that in this instance "once we answer the key question at issue in this case, adjudication of the due process claim is unavoidable."[40] The Seventh Circuit answered the key question of whether proof of conferencing is a pre-requisite to NRAB jurisdiction in the negative and therefore found that there was a violation of due process.[41] The carrier objected to due process review, arguing that the only grounds for judicial review were articulated in the RLA.[42] The Seventh Circuit, however, rejected this argument.[43]

The Supreme Court accepted certiorari in the *UP v. BLET* case ostensibly to resolve the circuit split over the open question of whether the RLA permits due process review of NRAB awards.[44] The question raises serious issues that have not been sufficiently addressed by the circuits, including an answer to what exactly is the NRAB and whether the state action requirement for constitutional claims is satisfied. The answer to this inquiry is at the center of the constitutional issues surrounding the NRAB, because only state action is subject to due process constraints. The circuits that permit due process review under the RLA[45] typically look to the development and presumptions of the Act and the general rule that there is presumed constitutional review, absent "clear and convincing evidence" that Congress intended to foreclose judicial review.[46] The circuits that deny due process review perform no analysis of the Act or its history, but simply defer to their interpretations of *Sheehan*.[47]

39. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 522 F.3d at 757-58.

40. *Id.* at 750.

41. *Id.*

42. *Id.* at 751.

43. *Id.*

44. *See* Union Pac. R.R. v. Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S. Ct. 584 (2009).

45. *See* Edelman v. Western Airlines, 892 F.2d 839 (9th Cir. 1989); Shafii v. PLC British Airways, 22 F.3d 59 (2nd Cir. 1994); Armstrong Lodge No. 762 v. Union Pacific R.R., 783 F.2d 131 (8th Cir. 1986).

46. Califano v. Sanders, 430 U.S. 99, 109 (1977).

47. *See* United Steelworkers of Am. Local 1913 v. Union R.R., 648 F.2d 905, 911 (3d Cir. 1981) ("However, even if Godich's characterization of his claim is correct, we note that there is no language in Sheehan to justify such a procedural/substantive distinction. To the contrary, the Court in Sheehan was quite specific in rejecting nonstatutory grounds for review."). *See also* Jones v. St. Louis-S.F. Ry. Co., 728 F.2d 257, 261-62 (6th Cir. 1984) ("While the appellant characterizes this error as constituting a due process violation, we recognize that such a claim cannot serve as a basis for judicial review in this context (citations omitted). The gravaman of this

The Supreme Court affirmed the Seventh Circuit, but held that the ruling should have been under a statutory rather than a constitutional rubric.[48] In a unanimous decision written by Justice Ginsburg, the Court held that the NRAB panel failed "to conform, or confine itself," to matters within the scope of the division's jurisdiction when it dismissed the engineers' charges for lack of jurisdiction.[49] Congress did not grant the NRAB panel authority to define its own jurisdiction, and therefore the NRAB arbitration could be vacated and remanded on a statutory exception provided in the RLA rather than through a violation of due process.[50] The Supreme Court left the circuit split that followed *Sheehan* intact and left the constitutional question for another day.[51]

The issue that the Court decided to leave unanswered involves a series of difficult questions that hit at the core of the NRAB's identity and constitution, and at the very purposes of the RLA and the 1966 Amendments to the Act. It is what Judge Posner has referred to as "a bundle of delicious uncertainties."[52] In order to begin to determine whether one can bring a constitutional claim concerning an NRAB proceeding, it must first be determined what exactly the NRAB is.[53] This examination of the NRAB should be performed with the background of the state action inquiry in order to better understand if its actions can be fairly attributable to the government.

3. The State Action Omission in the Courts

In discussing the question of whether due process review is permitted under the RLA, both Congress and the judiciary consistently fail to address the important preliminary question of whether the NRAB fulfills the state action requirement. The NRAB is a quasi-administrative agency and is not controlled by the Administrative Procedure Act of 1946 (APA), which governs the procedures of federal agencies.[54] If the NRAB were under the APA, there would be no question of whether constitutional review would be available, as it is one of the six forms of review

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portion of the appellant's complaint, however, is that he attacks the award as being improper because the Board failed to comply with the requirements of the Railway Labor Act, namely 45 U.S.C. First(j) and (n)."); Kinross v. Utah Ry. Co., 362 F.3d 658, 662 (10th Cir. 2004); Henry v. Delta Air Lines, 759 F.2d 870, 873 (11th Cir. 1985) (per curiam).

48. *Union Pac. R.R.*, 130 S. Ct. at 595-96.

49. *Id.* at 599.

50. *Id.* at 595-96.

51. *Id.* at 596.

52. Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986).

53. For a contemporaneous history of the NRAB, *see* Garrison, *supra* note 11.

54. CSX Transp., Inc. v. Transp.-Commc'ns Intern. Union, 413 F. Supp. 2d 553 (D. Md. 2006).

that the APA prescribes.[55] But the NRAB is not covered because it is "composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them."[56] As a basic matter, it is not clear that the state action requirement for constitutional review has been satisfied when the NRAB decides a case. There have been 69 cases where a party has attempted to get an arbitration award under the RLA vacated on due process grounds.[57] Of these, six have

55. *See* 5 U.S.C. § 706(2)(A)-(F) (2006).

56. *Id.* § 551(1)(E).

57. These cases are: Whitehouse v. Ill. Cent. R.R. Co, 349 U.S. 366 (1954); Mo.-Kan.-Tex. R.R. Co. v. N.R.A.B., 128 F. Supp. 331 (N.D. Ill. 1954); Pigott v. Detroit, T & I.R. Co., 221 F.2d 736 (6th Cir. 1955); Finlin v. Pa. R.R. Co., 288 F.2d 826 (3rd Cir. 1961); D'Elia v. N.Y., N.H. & H.R.R., 338 F.2d 701 (2nd Cir. 1964); Edwards v. St. Louis-S.F. R.R. Co., 361 F.2d 946 (7th Cir. 1966); Gordon v. E. Air Lines, Inc., 268 F. Supp. 210 (W.D. VA 1967); S. Pac. Co. v. Wilson, 378 F.2d 533 (5th Cir. 1967); Sys. Fed'n, No. 30, Ry. Employees' Dep't, AFL-CIO v. Braidwood, 284 F. Supp. 611 (N.D. Ill. 1968); Rosen v. E. Air Lines, Inc., 400 F.2d 462 (5th Cir. 1968); Gibson v. Mo. Pac. R.R. Co., 441 F.2d 784 (5th Cir. 1971); Barrett v. Mfr's Ry. Co., 326 F. Supp. 639 (E.D. Mo. 1971); Rinker v. Penn Cent. Transp. Co., 350 F. Supp. 217 (E.D. Pa. 1972); Dorsey v. Chesapeake & O. Ry. Co., 476 F.2d 243 (4th Cir. 1973); Chi., Rock Island & Pac. R.R. Co. v. Wells, 498 F.2d 913 (7th Cir. 1974); Hall v. E. Air Lines, Inc., 511 F.2d 663 (5th Cir. 1975); Kotakis v. Elgin & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975); McConnell v. Ala. Great S. R.R. Co., 424 F. Supp. 1364 (S.D. Miss. 1976); Merchants Despatch Transp. Corp. v. Sys. Fed'n, 413 F. Supp. 577 (N.D. Ill. 1976); Fong v. Am. Airlines, 431 F. Supp. 1340 (N.D. Cal. 1977); O'Neill v. Pub. Law Bd. No. 550, 581 F.2d 692 (7th Cir. 1978); Hunt v. Nw. Airlines, Inc., 600 F.2d 176 (8th Cir. 1979); Sheehan v. Union Pac. R.R. Co., 439 U.S. 89 (1979); Essary v. Chi. and Nw. Transp. Co., 618 F.2d 13 (7th Cir. 1980); Air Line Pilots Ass'n v. Nw. Airlines, 498 F. Supp. 613 (D. Minn. 1980); United Steelworkers of Am. Local 1913 v. Union R.R. Co., 648 F.2d 905; Radin v. U.S., 699 F.2d 681 (3rd Cir. 1981); Ramey v. Chesapeake & Ohio Ry. Co., 621 F. Supp. 1 (S.D. W. Va. 1983); Epple v. Union Pac. R.R. Co., 558 F. Supp. 63 (D. Colo. 1983); Jones v. St. Louis-S.F. Ry. Co., 728 F.2d 257 (6th Cir. 1984); James v. Am. Airlines, Inc., No. C-851179-WWS, 1985 WL 17878 (N.D. Cal. 1985); Henry v. Delta Air Lines, 759 F.2d 870 (11th Cir. 1985); Bhd. of Locomotive Eng'rs v. St. Louis Sw Ry. Co., 757 F.2d 656 (5th Cir. 1985); Steffens v. Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, 797 F.2d 442 (7th Cir. 1986); Bhd. of Maint. of Way Employees v. St. Johnsbury & Lamoille County R.R., 794 F.2d 816 (2nd Cir. 1986); Armstrong Lodge No. 762 v. Union Pac. R.R. Co., 783 F.2d 131 (8th Cir. 1986); Elmore v. Chi. & Ill. Ry. Co., 782 F.2d 94 (7th Cir. 1986); Morin v. Consol. Rail Corp., 810 F.2d 720 (7th Cir. 1987); Hankin v. Nat'l R.R. Passenger Corp., No. 86C7233, 1988 WL 67642 (N.D. Ill. 1988); Norris v. Ne. Ill. R.R. Bd. Corp., No. 85C10195, 1987 WL 13991 (N.D. Ill. 1987); Ferguson v. Norfolk S. Corp., 704 F. Supp. 666 (W.D. Va. 1987); Chapman v. Nat'l R.R. Passenger Corp., No. 87-0266, 1987 WL 4840 (D. D.C. 1987); Bhd. of Locomotive Eng'rs v. Portland Terminal R.R. Co., 860 F.2d 1088 (9th Cir. 1988); Hayes v. W. Weighing and Inspection Bureau, 838 F.2d 1434 (5th Cir. 1988); Edelman v. W. Airlines, Inc., 892 F.2d 839 (9th Cir. 1989); Slesinski v. Consol. Rail Corp., No. 89-CV-71099-DT, 1990 WL 302717 (E.D. Mich. 1990); Springfield Terminal Ry. Co. v. United Transp. Union, 767 F. Supp. 333 (D. Me. 1991); Holmes v. Elgin, Joliet & E. Ry. Co., 815 F. Supp. 279 (N.D. Ind. 1992); Bates v. Baltimore and Ohio R.R. Co., No. IP 89-1228-C, 1992 WL 547990 (S.D. Ind. 1992); Chandler v. Am. Airlines, 961 F.2d 219 (10th Cir. 1992); Shafii v. PLC British Airways, 22 F.3d 59 (2nd Cir. 1994); Int'l Ass'n of Machinists and Aerospace Workers v. Metro-N. Commuter R.R., 24 F.3d 369 (2nd Cir. 1994); English v. Burlington N. R.R. Co., 18 F.3d 741 (9th Cir. 1994); Cumberbatch v. Metro N. Commuter R.R. Co., No. CV-92-4220, 1994 WL 62197 (E.D. N.Y. 1994); Bhd. of R.R. Signalmen v. Union Pac. R.R., No. 95C2652, 1997 WL 80956 (N.D. Ill. 1997); Transp. Workers Union, Local 2001 v.

been brought by the carrier, and two have been successful.[58] Sixty-four of the cases were brought by the employee or union, and three were successful.[59] These figures are relevant in part because, though due process review usually benefits the weaker party in a dispute, in this instance both parties have brought due process arguments with similar levels of success. This is in line with the purpose of the 1966 Amendments, where Congress attempted to create a balance of power between the unions and the carriers.[60] It is further relevant because none of these decisions have ever reasoned through the state action question.[61] The only place that the argument has ever been made one way or the other is in the AFL-CIO's amicus brief in support of BLET; and curiously they made the argument that the state action requirement was not satisfied and therefore due process review should not be available.[62]

The AFL-CIO correctly stated that Judge Posner's brief dicta on state action in *Elmore v. Chicago & Illinois Midland Railway Co.*, represents the entirety of the judiciary's wrestling with the state action issue in regards to the NRAB.[63] In *Elmore*, the Seventh Circuit stated:

> The tribunal, although grandly styled the National Railroad Adjustment Board, in fact consists of private individuals chosen by the railroad industry and the railroad unions. The standard of judicial review of these arbitrators' decision is similar-perhaps, as we recently suggested in *Brotherhood of Lo-*

Metro-N. Commuter R.R., No. 93CIV.0240, 1998 WL 352097 (S.D. N.Y. 1998); Ricciardi v. Consol. Rail Corp., No. CIV. A. 98-3420, 1999 WL 77253 (E.D. Pa. 1999); Pokuta v. TWA, 191 F.3d 834 (7th Cir. 1999); Soileau v. Sw. Airlines, 232 F.3d 210 (5th Cir. 2000); Edwards v. UPS, 16 Fed. Appx. 333 (6th Cir. 2001); Goff v. Dakota, Minn. & E. R.R. Corp., 276 F.3d 992 (8th Cir. 2002); Kinross v. Utah Ry. Co., 362 F.3d 658 (10th Cir. 2004); Mitchell v. Continental Airlines, Inc., 416 F. Supp. 2d 535 (S.D. Tex. 2005); Mitchell v. Union Pac. R.R. Co., 381 F. Supp. 2d 733 (N.D. Ill. 2005); Int'l Bhd. of Elec. Workers v. CSX Transportation, 369 F. Supp. 2d 982 (N.D. Ill. 2005); Int'l Bhd. of Elec. Workers v. CSX, 446 F.3d 714 (7th Cir. 2006); Ollman v. Special Bd. of Adjustment No. 1063, 527 F.3d 239 (2nd Cir. 2008); McQuestion v. N.J. Transit Rail Operations, No. Civ A 06-2329, 2008 WL 5191040 (D. N.J. 2008); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S.Ct. 584 (2009).

58. The six brought by the carrier are: Whitehouse, 349 U.S. 366; N.R.A.B., 128 F. Supp. 331; Wells, 498 F.2d 913; Merchants Despatch Transp. Corp., 413 F. Supp. 577; Springfield Terminal Ry. Co., 767 F. Supp. 333; Bhd. of R.R. Signalmen, 1997 WL 80956. The two successful cases were: N.R.A.B., 128 F. Supp. 331; Wells, 498 F.2d 913.

59. Not including the 2009 Supreme Court case, the three successful cases were: Braidwood, 284 F. Supp. 611; Hall, 511 F.2d 663; Int'l Ass'n of Machinists & Aerospace Workers, 24 F.3d 369.

60. See *infra* note 122.

61. A full review of the cases listed *supra* note 57, indicates no analysis by any court concerning the state action question.

62. Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Respondent at 17-23, Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 130 S. Ct. 584 (2009) (No. 08-604), 2009 WL 2247125, at *17-23 (hereinafter AFL-CIO Brief).

63. *Id.* at *18.

> *comotive Engineers v. Atchison, Topeka & Santa Fe Railway,* identical-to the standard for judicial review of commercial and labor arbitration in general. Errors, even clear ones, are not grounds for setting aside the decision. If the decision is a bona fide effort to interpret and apply the parties' contract (the collective bargaining agreement), it is conclusive.
>
> Private arbitration, however, really is private; and since constitutional rights are in general rights against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term "due process of law" cannot give rise to a constitutional complaint. *The National Railroad Adjustment Board, however, while private in fact, is public in name and function; it is the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life, liberty, or property without due process of law.*[64]

Aside from this description of the public nature of the NRAB, there seem to be no other direct statements about an arbitrator's award constituting state action.[65] Several plaintiffs have attempted to bring due process cases stemming from the employer's conduct rather than the NRAB's conduct, but the courts have consistently rejected this argument.[66] *Edwards v. St. Louis-San Francisco Railroad* [67] was an interesting hybrid case decided in the same term that the 1966 Amendments were passed, where the employee made two distinct due process arguments.[68] The first was that the employee's constitutional rights had been violated by the railroad's failure to allow him to confront the main wit-

64. Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 95-96 (7th Cir. 1986) (emphasis added) (citations omitted).

65. Several years prior to the 1966 Amendments to the RLA, courts wrestled briefly with the state action question in regards to the emergency arbitration board that Congress created in order to avoid imminent threatened nationwide railroad strike. Pub. L. No. 88-108, 77 Stat. 132 (1963). The history of this bill was detailed in *Bhd. of Locomotive Firemen and Enginemen v. Chi., Burlington & Quincy R.R.*, 225 F. Supp. 11 (D.D.C. 1964).

The courts that considered the question of whether one could bring a constitutional challenge to emergency board procedures held that state action existed and due process review was available. *See e.g.*, Bhd. of R.R. Trainmen v. Chi., Milwaukee, St. Paul & Pac. R.R. (Lines East), 237 F. Supp. 404, 418 (D.D.C. 1964). ("In concretizing, through binding adjudications in compulsory proceedings, a function initiated by the Joint Resolution, they act under the aegis of Congress. The organization asserts here a claim of deprivation of the due process right to a full and fair hearing. The actions of the Special Board thus placed under attack bear vividly the imprimatur of government, and must withstand the test of the Fifth Amendment.").

66. *See e.g.*, Hunt v. Nw. Airlines, Inc., 600 F.2d 176, 179 (8th Cir. 1979); D'Elia v. N.Y., New Haven & Hartford R.R., 230 F. Supp. 912, 915 (D. Conn. 1964), *aff'd per curiam*, 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 380 U.S. 978 (1965).

67. Edwards v. St. Louis-S.F. R.R., 361 F.2d 946 (7th Cir. 1966).

68. *Id.* at 951-56. The AFL-CIO significantly misread in its *UP v. BLET* amicus brief that argued that the NRAB's conduct did not constitute state action. *See* AFL-CIO Brief, *supra* note 62, at *18-19.

ness against him.[69] The Seventh Circuit made the distinction between the employee's right to due process before the company investigator and before the NRAB, stating that in the former instance due process does not attach.[70] The Seventh Circuit held that even if the collective bargaining agreement resulted in unfair results and contained unfair procedures, it is still a private contract.[71]

The plaintiff in *Edwards* made a second due process argument based on *Shelley v. Kraemer*, that "[T]he Adjustment Board - 'an administrative arm of the federal government'- cannot enforce a decision or action taken prior to its own finding where that decision or action would itself be unconstitutional in the first instance."[72] The Seventh Circuit rejected this argument because the NRAB is a unique arm of the federal government that does not simply give its imprimatur to the controversies it handles.[73] The Court laid out the unique nature of the NRAB and why it was not amenable to a *Shelley* analysis:

> Furthermore, appellant's characterization of the Adjustment Board as an 'arm of the federal government' is an imprecise over-simplification of the issue as he presents it. While there is no doubt that the National Railroad Adjustment Board has responsibilities which ultimately flow to the public, it is equally evident that the Board is not of the conventional species of governmental agency as they are generally envisaged. Rather, this Board is part of 'a framework for peaceful settlement of labor disputes between carriers and their employees', consisting of bipartisan representatives selected and paid by the respective parties, the purpose of which is to provide 'a mandatory, exclusive, and comprehensive system for resolving grievance disputes,' in the nature of 'compulsory arbitration in this limited field.' Looking to the nature of the Board itself, therefore, it is clear that the action it took in this case, the procedural aspects of which were those contemplated by the statute, cannot be said to be of that category of 'governmental action' prohibited by the constitutional demands of *Shelley v. Kraemer*.[74]

The *Edwards* court concludes that it does not know what the NRAB is, but it knows what it is not; that is, it is not analogous to the judiciary.

4. The NRAB and the State Action Inquiry

The state action inquiry should focus on the several tests that the Supreme Court has articulated, with particular attention to the unique facts surrounding the NRAB. These tests are the "traditional state function" test, the "nexus" test, the "symbiotic" test, the "compulsion" test,

69. *Edwards*, 361 F.2d at 951-52.
70. *See id.* at 953-54.
71. *Id.*
72. *Id.* at 954 (citing Shelley v. Kraemer, 34 U.S. 1, 18-23 (1948)).
73. *Id.* at 954.
74. *Id.* at 954-55 (citations omitted).

and the "agency of the state" test. The "traditional state function" test finds state action in private conduct when the private party is performing a traditional state function, such as the operation of a company town.[75] The "government involvement" or "nexus" test looks at "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[76] The "interdependence" or "symbiotic" test looks at whether the "State has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the [Constitution]."[77] The "compulsion" test finds state action where the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[78] The "agency of the state" test finds state action where the private party is controlled by an agency of the State.[79] Ultimately, all the tests try to answer the same difficult question: in what instances should the government take responsibility for conduct of private actors? The examination of the NRAB must look at the language of the RLA, Congressional intent as found in the legislative history, and the functioning of the Board.

The compelled nature of NRAB arbitration, the procedures prescribed by the government, and the compensation of neutrals applied to the tests above indicates that NRAB arbitration constitutes state action. Carriers and employees covered by the RLA have no choice but to proceed with NRAB arbitration (or NRAB type arbitration through a PLB or SBA)[80] if they cannot resolve problems on their own. NRAB arbitrations must be distinguished from private arbitrations, which are contractual arrangements between the parties.[81] The mandatory nature of NRAB arbitration is analogous to the mandatory administrative adjudication that parties under the jurisdiction of other federal agencies must follow.[82] The exclusive judicial nature of the NRAB may not be what the Supreme Court anticipated in its "traditional state function" test, but on its face it seems to satisfy the test.

The National Mediation Board (NMB) staffs and pays for the opera-

75. *See* Marsh v. Alabama, 326 U.S. 501, 506-09 (1946).

76. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

77. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (alteration in original).

78. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

79. Brentwood Academy v. Tenn. Secondary Athletic Ass'n, 531 U.S. 288, 296 (2001).

80. Edwards v. St. Louis-S.F. R.R., 361 F.2d 946, 952 (7th Cir. 1966).

81. Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 323 (1972).

82. *See, e.g.*, 29 U.S.C. § 151 (2006) (requirements under the National Labor Relations Board).

tions of the NRAB.[83] The NMB also determines which persons may serve as possible referees.[84] It sets their rate of pay and determines the propriety of the Referee's expenses, which are also paid by government funds.[85] The NRAB is administered by federal employees operating out of government offices in Chicago and Washington D.C.[86] The United States Attorneys represents NRAB panels in any federal or state courts in which they may be sued.[87] Furthermore, the procedures of the NRAB, contained at Circular One have the status of federal regulations and are codified in the Code of Federal Regulations.[88] This involvement with the private arbitrators meets the court's "symbiotic" test requirements.

When the RLA was passed in 1926, it did not have a provision calling for mandatory arbitration through a federal adjustment board.[89] The RLA merely allowed for temporary local voluntary boards of adjustments to be created by contract between the carriers and the employees, and set the procedures of these boards and the parameters for what these boards would handle.[90] The Act made it clear that there was no obligation to submit matters to arbitration, but in an unremarkable move, simply articulated the possibility of doing so.[91] The Act creates a purely voluntary mechanism that the parties may contract to follow if they choose. The 1926 bill itself reads as a contract, perhaps unsurprisingly as it was a compromise between the carriers and the unions, ratified by Congress with an expectation that the courts would interpret it functionally.[92]

By 1934, the carriers, the unions and Congress recognized that the

83. Railway Labor Act of 1926, 45 U.S.C. § 154 (2006).

84. 29 C.F.R. § 1202.10 (2010).

85. Railway Labor Act of 1926, § 153(u).

86. *Id.* § 153(s).

87. *See* Sheehan v. Union Pacific R.R., 574 F.2d 854 (10d Cir. 1978), *rev'd on other grounds*, 439 U.S. 89 (1978).

88. 29 C.F.R. § 301.5 (2010).

89. Railway Labor Act of 1926, Pub. L. No. 69-257, § 3(d), 44 Stat. 577, 578 ("In case of a dispute between a carrier and its employees, arising out of grievances . . . it shall be the duty of the designated representative or representatives of such carrier and of such employees . . . to confer in respect to such dispute.").

90. *Id.* § 3, 44 Stat. at 578.

91. *Id.* § 7, 44 Stat. at 582 ("Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board . . . such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three . . . persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.").

92. CSX Transp. Inc. v. Marquar, 980 F.2d 359, 379-80 (6th Cir. 1992) (The Sixth Circuit noted "[t]he legislative history of the RLA demonstrates that Congress intended for the courts to develop private remedies on a case-by-case basis. That is, Congress expected the courts to develop a body of law, analogous to the common law, for the enforcement of the RLA."); *see* 1 THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY 283 (Michael H. Campbell &

RLA needed to be amended "[t]o relieve the existing emergency in relation to interstate railroad transportation [and] to provide for the prompt disposition of disputes between carriers and their employees."[93] The Report of Congressman Dill, from the Committee on Interstate Commerce, discussed the experience of the unions and carriers under the 1926 version of the RLA:

> They have tried this act for nearly 8 years. It has served a most useful purpose and brought about many good results, but both representatives of the railroads and employees agree that it needs improvement. The most important change in the bill is the creation of what is termed the "National Adjustment Board."[94]

The 1934 Amendments to the RLA established a National Railroad Adjustment Board (NRAB), composed of 36 members (18 selected by the carriers and 18 selected by unions) that is divided into four divisions, each with a different area of jurisdiction.[95] These individual divisions were empowered to create arbitration panels composed of one carrier and one union representative, with a neutral referee chosen and compensated by the NMB.[96] Congress authorized the full NRAB panel to engage in a one-time rulemaking "as it deems necessary to control proceedings before the respective divisions,"[97] which resulted in the promulgation of Circular One. This has remained the primary instructions for proceeding with NRAB arbitration.[98]

All "minor disputes" between employees and the carrier, disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," must be submitted to compulsory arbitration conducted by the NRAB,[99] or by a Public Law Board or Special Board of Adjustment.[100] NRAB awards

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Edward C. Brewer III eds., 1988) ("The law for enforcement would be developed in the courts.").

93. H.R. REP. NO. 73-7650, at 1 (1934), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 767.

94. S. REP. NO. 73-1065, at 1 (1934), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 820.

95. Labor Act of 1926, Pub. L. No. 442, § 3, 48 Stat. 1185 (1926) (amended 1934) (current version at 45 U.S.C. §153(a) (2006) (The current structure consists of thirty-four members, with seventeen representatives from the carrier and seventeen representatives from the union.).

96. §3, 48 Stat. at 1190.

97. Railway Labor Act of 1926, 45 U.S.C. § 153(v) (2006).

98. 29 C.F.R. § 301.1 (2010).

99. Railway Labor Act of 1926, § 153(i).

100. *Id.* § 153 (The RLA permits the parties to form a Public Law Board (PLB) or Special Board of Adjustment (SBA), where the neutral is chosen by the NMB, in lieu of proceeding through the NRAB. The SBA is created by mutual agreement of the parties to decide specifically designated grievances between a single union and carrier. The PLB is similar, but may be established upon the written request of either party. If either party becomes dissatisfied with the

are intended to interpret contract language drafted by the parties, and they are often not well-reasoned.[101]

The NRAB as a whole, the individual divisions, and the panels empowered to hear cases are each unique bodies whose actions must be considered individually. The panels that actually hear the cases are composed of two representatives from the carrier and two representatives from the union, each of which is paid by the body they represent, and one neutral member.[102] The neutral member is compensated through the NMB, which is the federal agency that funds and staffs the NRAB as a whole.[103] The NMB's relationship to the NRAB is not entirely clear, as evidenced by the comments received when the NMB attempted to promulgate a rule for the NRAB in 2005.[104] During that process, many of the comments, including a letter written by 125 members of Congress, argued that the NMB did not have statutory authority to promulgate rules.[105] The Fourth Circuit tried to describe the tenuous relationship between the NMB and the NRAB:

> The Board's relationship to the NRAB is very limited and does not trench upon the substantive responsibilities of the NRAB. The most important link between the two bodies is that the Board holds the pursestrings for expenditures by the NRAB and its regional boards .... In their substantive areas of operation, however, the two bodies are totally separate and distinct. The NRAB has exclusive and mandatory jurisdiction to adjudicate minor disputes, including discharge grievances, and the Board has no power to review the work of the NRAB. Rather, review of NRAB awards is in the appropriate district court.[106]

Between 1934 and 1966 an imbalance had developed with regards to enforcement of NRAB awards, with carriers in a far stronger position than unions. Prior to the 1966 amendments, a carrier who had an adverse NRAB money award could simply choose not to comply.[107] The employee or union had two courses of action in such a scenario: either petition a federal district court and have the matter reviewed de novo, or

PLB or SBA, that party may elect that the matter come under the NRAB's jurisdiction, so long as it provides 90 days notice to the other party).

101. Garrison, *supra* note 11, at 584 (explaining the NRAB's early awards "The evidence indicates that the movements made did not constitute switching under Article I-R.").

102. Railway Labor Act of 1926, §153(f)-(g).

103. *Id.* § 153(g).

104. *See* letter from Rep. James L. Oberstar, Comm. on Transp. and Infrastructure, to Chairman Hoglander, Nat'l Mediation Bd. (February 24, 2005), *available at* http://www.nmb.gov/arbitration/arb-rulemaking.html.

105. *Id.*

106. Radin v. United States, 699 F.2d 681, 685-86 (4th Cir. 1983).

107. Garrison, *supra* note 11, at 591 (noting that "[t]he board has no power of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance").

bring economic pressures to bear upon the railroad.[108] Either because of the strength of the unions or because of the perceived unfairness of the federal judiciary, the latter course was far more often taken by employees and unions.[109] The employee, on the other hand, had no statutory recourse if the NRAB ruled against him.[110] Due process was used on occasion, with the courts generally assuming that such review was available under the RLA.[111]

In 1959, the Supreme Court explicitly stated in two cases that even if the RLA did not provide statutory grounds for judicial review, due process review was available to aggrieved parties.[112] *Union Pacific v. Price* held that when an employee lost a NRAB arbitration, he could not file the same claim in state court.[113] The court also clearly held that the RLA, as conceived, allowed for review of awards on due process grounds.[114]

In *Pennsylvania Railroad v. Day*, the majority did not discuss the issue of due process, but Justice Black, joined by Chief Justice Warren and Justice Douglas, brought up the issue in dissent.[115] Justice Black's comments on due process review constitute the part of the dissent that the majority would likely agree. He states:

> I would affirm the judgment of the Court of Appeals for two reasons: I do not agree that the Railway Labor Act requires retired railroad employees to submit their back-wage claims to the National Railroad Adjustment Board; I believe that Act, as here construed to grant railroads court trials of wage claims against them while compelling the employees to submit their claims to the Board for final determination, denies employees equal protection of the law in violation of the Due Process Clause of the Fifth Amendment.[116]

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108. *Id.*

109. *Id* at 591-92 (Noting that between 1934 and 1936, there were 1,616 awards, approximately half of which were in favor of the union. Only one of these awards was petitioned for enforcement in federal court, either because the carriers voluntarily complied or because the unions effectively threatened job actions. The author presumes that the latter was the true reason for the dearth of judicial involvement. The one case that was petitioned to the district court involved a violation of due process, where the court held that an employee had been deprived of due process by being deprived of seniority rights and having an NRAB hearing without notice. *See* Griffin v. Chi. Union Station Co., 13 F. Supp. 722 (N.D. Ill. 1936)).

110. Garrison, *supra* note 11, at 591 (stating that "[t]he statute gives no right of appeal to either carriers or unions from an adverse decision of the Hoard [sic]").

111. *See Griffin*, 13 F. Supp. at 724.

112. *See* Union Pac. R.R. v. Price, 360 U.S. 601, 616-17 (1959); Penn. RR Co. v. Day, 360 U.S. 548, 554 (1959) (Black, J, dissenting).

113. *Price*, 360 U.S. at 617.

114. *Id* at 616 ("Congress did not purpose to foreclose litigation in the courts over . . . the review sought of an award claimed to result from a denial of due process of law.").

115. *Day*, 360 U.S. at 554.

116. *Id.*

Justice Black later mentions in a footnote that "[c]ourts have intimated, however, that review of Board rulings adverse to the employee is permissible to the extent of insuring that the employee was not deprived of procedural rights protected by due process."[117] He cites to both *Ellerd v. Southern Pacific Railroad* [118] and *Barnett v. Pennsylvania-Reading Seashore Lines*,[119] which the *Price* decision also cited to for this proposition.[120]

The 1966 Amendments to the NRAB set out to abate the inequity that had developed under the RLA in favor of the carriers. Congressman Staggers' Report to the Committee of the Whole House stated that the employee "has no means by which judicial review may be obtained."[121] One of the explicit purposes of the amendments was to provide the employee statutory means of judicial review.[122] "The constitutionality of permitting judicial review to be obtained by carriers while such review is prohibited to employees was upheld in 1959 in two decisions of the Supreme Court, *Union Pacific v. Price*, and *Pennsylvania Railroad v. Day*."[123] Quoting these two decisions with general approval is relevant in understanding Congressional intent with regards to due process because both *Price* and *Day*, decided in the same term, state that there is judicial review for due process violations by the NRAB.[124]

The legislators' approval of *Price* and *Day*, juxtaposed beside their statements that previous to the 1966 amendments an employee had no judicial review, shows that the legislators accepted the constitutional review articulated by the Supreme Court in several 1959 cases as a given. When legislators stated that under the pre-1966 scheme, an employee who "loses his case before the National Railroad Adjustment Board . . . has no judicial remedy at all-he cannot sue the railroad on his claim, and he cannot obtain judicial review of the decision of the Board," they did so

117. *Id.* at 558 n.7.

118. Ellerd v. S. Pac. R.R. Co., 241 F.2d 541 (7th Cir. 1957) (holding that due process review is available if employee had been denied due process by having unauthorized union represent him before the NRAB).

119. Barnett v. Pa. Reading Seashore Lines, 245 F.2d 579, 581 (3rd Cir. 1957) (stating that if there was an allegation of a violation of due process then the employee may have received review).

120. *Day*, 360 U.S. at 558 n.7.

121. H.R. REP. NO. 89-1114, at 15 (1965), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1321.

122. S. REP. NO. 89-1201, at 1, (1966), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1337 (noting that "[t]he principal purpose of the bill is to . . . provide equal opportunity for limited judicial review of awards to employees and employers").

123. H.R. REP. NO. 89-1114, at 15 (1965), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1321.

124. *See* Union Pac. R.R. v. Price, 360 U.S. 601, 616-17 (1959); *Day*, 360 U.S. at 548.

in the shadow of *Price*.[125] The "no judicial review" meant "no statutory judicial review." The legislators accepted the Supreme Court's interpretation of the RLA to allow for due process judicial review, and based much of their constitutional arguments on the Court's 1959 interpretation of the RLA.[126]

The 1966 amendments to the RLA only expanded judicial review; they did not limit them. The purpose of the amendments was to make the RLA fair by expanding employees' access to judicial review following an NRAB decision.[127] Congressman Staggers remarked that "the one-sidedness of existing law is extremely unfair to employees."[128] In the Senate, Senator Morse remarked of the pre-1966 law, where an employer could get statutory judicial review while an employee could not, that "the committee believes that this result is unfair to employees and that an equal opportunity for judicial review should be provided under the act."[129] It would be inconsistent with this purpose to insert an implied preclusion of review for a constitutional principle that is synonymous with fairness. Nowhere in the legislative history do any legislators decry the Supreme Court's decision in *Price*. Quite the opposite: legislators use *Price* to state that the additional statutory grounds for judicial review are constitutional.[130] It would be a strange reading of the legislative history to find implicit preclusion of due process review in a statute that was intended to bring fairness to the RLA and expand employees' access to the courts when they can show fundamental unfairness in an NRAB proceeding.

Though these factors speak to the public nature of the NRAB, there are significant private qualities of the NRAB that speak against NRAB arbitration being treated as state action. Though the NMB pays the salary of the neutral member of the NRAB panel, the other representatives are chosen and compensated by their respective organizations.[131] Therefore a full 80% of the NRAB panel is essentially constituted by private arbitrators who are chosen and paid for by purely private parties.[132] The

125. 112 CONG. REC. 2751 (1966), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1354.

126. *See* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92.

127. S. REP. NO. 89-1201, at 1, (1966), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1337.

128. H.R. REP. NO. 89-1114, at 15 (1965), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1321.

129. S. REP. NO. 89-1201, at 3, (1966), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1339.

130. *See* H.R. Rep. No. 89-1114, at 15, 17 (1965), *reprinted in* THE RAILWAY LABOR ACT OF 1926: A LEGISLATIVE HISTORY, *supra* note 92, at 1321, 1323.

131. Railway Labor Act of 1926, §153(b), (c), (g) (2006).

132. Union Pac. R.R. v. Bhd. of Locomotive Eng'rs. & Trainmen Gen. Comm. of Adjust-

arbitrators have no power to set law or policy, but rather only interpret private contracts.[133] Judicial review of NRAB arbitration is extraordinarily narrow, much like the review available, or perhaps, unavailable, under private labor arbitration.[134] And though there are commentators who argue that private arbitration should be considered state action, arbitration currently receives no such classification.[135]

The problem with these arguments against finding state action for NRAB arbitration is that they rest almost entirely on the fact that there are private aspects to the NRAB. The Supreme Court's tests comprehend instances where wholly private parties are treated as state actors because of their associations with or direction by the government.[136] Therefore, finding private aspects of the NRAB does not preclude the finding of state action. Pointing out the ways in which the NRAB is not fully governmental merely means that one must find significant governmental involvement such that it meets one of the Supreme Court's tests.

II. Conclusion

The state action and due process issues under the RLA have remained unanswered for 75 years. Now is an ideal time to finally tackle these issues. Resolving these issues is important not only for the purpose of better understanding the RLA, but also because the issues may soon become relevant to the NLRA. Congress is currently considering amending the NLRA through the Employee Free Choice Act (EFCA).[137] Under the EFCA, parties may have to submit to mandatory arbitration in certain circumstances.[138] It is uncertain what this arbitration will ultimately look like, but it is almost certain that courts will eventually be presented with the state action and due process issues under NLRA arbitration. Under the NLRA, this question will certainly be far more complicated and difficult to address because it will involve a much larger

ment, Cent. Region, 130 S. Ct. 584, 591 (2009) (noting that arbitration panels consist of five individuals, one of whom serves as a neutral referee).

133. Radin v. United States, 699 F.2d 681, 686 (4th Cir. 1983).

134. *See* United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigating Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) (the "Steelworks' Trilogy", in which the Supreme Court held that a court must give broad deference to a labor arbitration and could only overturn an arbitration if it does not draw its essence from the collective bargaining agreement).

135. *See* Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. Rev. 1, 49 (2005).

136. *See* Evans v. Newton, 382 U.S. 296, 299 (1966) (noting that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action").

137. H.R. Rep. No. 111-1409 (2009), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1409:.

138. *Id.* § 3.

sector of the American economy, and the arbitration will probably not be performed under the aegis of a federal agency. A well-reasoned inquiry into the particularities of the RLA will once again serve as an important model for other labor legislation faced with similar questions.