

Judicial Review Under the Railway Labor Act: Are Due Process Claims Permissible?

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I. INTRODUCTION

In March 2004, the Tenth Circuit Court of Appeals decided *Kinross v. Utah Railway Co.*,¹ escalating the divergence among the circuits over whether a federal court may review an arbitration decision under the Railway Labor Act (“RLA”) on due process grounds. This conflict originated from Congress’ attempt to regulate disputes between organized labor and management in the airline and railroad industries through the RLA’s statutory arbitration scheme.² Specifically, Congress mandated that such disputes be referred to the National Railroad Adjustment Board (“NRAB” or “Board”), an arbitral tribunal created by the RLA.³ While administrative bodies are ordinarily subjected to due process review by federal courts, Congress restricted the scope of judicial review of Board decisions made under the RLA.⁴ The RLA explicitly prohibits reviewing courts from reversing NRAB findings unless for non-compliance

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1. *Kinross v. Utah Ry. Co.*, 362 F.3d 658 (10th Cir. 2004).

2. Christopher Sagers, *Due Process Review Under the Railway Labor Act*, 94 MICH. L. REV. 466, 470 (1995).

3. See 45 U.S.C. § 153 First (h) (2000).

4. Sagers, *supra* note 2, at 470.

with the RLA's requirements, for a decision made without jurisdiction, or for fraud or corruption.⁵

However, the Fifth Amendment of the United States Constitution provides that all individuals are protected from governmental taking of "life, liberty, or property without due process of law."⁶ The rights to representation, a fair hearing, and the opportunity to present evidence are essential elements of justice. Holding close to this principle, several courts have determined that the fundamental right to due process is supplemental to the RLA's three express grounds for review. Federal courts thus disagree over whether courts may review RLA rulings under the auspices of procedural due process.⁷

This survey will explain the Railway Labor Act's arbitration process, discuss the Supreme Court cases that have led to the Tenth Circuit's *Kinross* decision, and explore the split of authority among the circuits regarding judicial review of due process claims in the RLA context. This analysis will demonstrate that the Tenth Circuit in *Kinross* was consistent with both the holding of the Supreme Court and congressional intent when it held that due process review is impermissible. Finally, this note will analyze the RLA's arbitration process and conclude that the system's procedural safeguards are sufficient to protect individual due process rights, rendering judicial review of independent due process challenges unnecessary.

II. THE RAILWAY LABOR ACT

In the early 1900's, disruptions caused by the litigation of minor disputes between employers and employees in the transportation industry created federal concerns over the stability of this vital sector of the national economy. There was a clear need for a system by which the two parties could resolve minor disputes outside of the courtroom.⁸ In response, Congress enacted the RLA in 1926.⁹

The purpose of the RLA was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to "insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of manag-

5. 45 U.S.C. § 153 First (p)-(q).

6. U.S. CONST. amend. V.

7. Sagers, *supra* note 2, at 470.

8. Richard Schoolman, *Developments In The Preemption Or Preclusion Of Otherwise Justiciable Employment-Related Claims By The Railway Labor Act's Adjustment Board Procedures (Or Their Resulting Decisions) In Defending Against Certain Civil Rights Claims*, SH094 A.L.I.-A.B.A. 989, 992 (April 2003).

9. 45 U.S.C. §§ 151-163.

ers and employees to settle peaceably their controversies.”¹⁰

The RLA provides an arbitration scheme for the resolution of disputes between organized labor and management in the airline and railroad industries.¹¹

Congress amended the RLA in 1934 to create the National Railroad Adjustment Board, an arbitral tribunal that hears disputes covered by the RLA.¹² The Board is comprised of three members: one each from the appropriate Labor Union and Carrier, and one neutral member.¹³ The Board has jurisdiction to hear “minor” disputes, defined as those disagreements arising out of grievances or interpretation or application of agreements regarding the rates of pay, rules or working conditions.¹⁴ The NRAB’s decisions are final and binding.¹⁵ While federal district court review of NRAB decisions is available, it is severely limited.

The federal courts do not sit as super arbitration tribunals in suits brought to enforce awards of the [National Railroad] Adjustment Board. Prompt execution of Board orders is a necessity. The range of judicial review in enforcement cases is among the narrowest known to the law and the findings and order of the Board are conclusive.¹⁶

Section 153 First (q) of the RLA sets forth the grounds for reversal of an Adjustment Board decision, providing, in pertinent part:

If any employee or group of employees, or any carrier is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division’s order The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for 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 jurisdic-

10. *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 609 (1959) (quoting H.R. REP. No. 69-328, at 1).

11. *Sagers*, *supra* note 2, at 470.

12. 45 U.S.C. §§ 151-163.

13. 45 U.S.C. § 153 First (c).

14. *Sheehan v. Union Pac. R.R. Co. (Sheehan I)*, 576 F.2d 854, 856 (10th Cir. 1978), *rev’d on other grounds*, 439 U.S. 89 (1979) (quoting S. REP. No. 89-1201, at 2287 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2285, 2287).

15. 45 U.S.C. § 153 First (c).

16. *Sheehan I*, 576 F.2d at 856.

tion, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.¹⁷

III. SUPREME COURT ANALYSIS OF THE RLA

A. *UNION PACIFIC RAILROAD CO. v. PRICE*

In the 1959 *Union Pacific Railroad Co. v. Price* decision, the United States Supreme Court articulated its understanding of the RLA, carefully describing the Act's legislative history and primary purpose.¹⁸ The case originated when Union Pacific terminated Price, a brakeman, for violating rules of the collective bargaining agreement. When the union took up his cause with railroad management, the dispute was submitted to the NRAB, which determined that Price's termination was valid.¹⁹ Some three years later, Price brought an action against the railroad in district court under the grounds of wrongful dismissal, asserting that he was dismissed without cause and that the railroad had failed to perform a proper investigation prior to his termination.²⁰ The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of the railroad.²¹ On certiorari, the Supreme Court reversed.²²

Finding that the NRAB had properly decided against Price on both claims, the Court carefully addressed what it considered to be the primary issue, namely whether Price could pursue a common-law remedy for damages in district court despite the adverse determination of the NRAB.²³ After reviewing the legislative record, the Court found that Congress intended for the findings of the NRAB to be final and binding.²⁴ The Court explained that the plain language of the RLA "imports that Congress intended that the Board's disposition of a grievance should preclude a subsequent court action by the losing party."²⁵ In holding that Price's action was precluded, the Court reasoned that

our duty to give effect to the congressional purpose compels us to hold that the instant common-law action is precluded unless the overall scheme established by the Railway Labor Act and the legislative history clearly indicate a congressional intention contrary to that which the plain meaning of the words imports. Our understanding of the statutory scheme and the legislative history, however, reinforces what the statutory language already makes

17. 45 U.S.C. § 153 First (q).

18. *Price*, 360 U.S. at 606.

19. *Id.* at 604.

20. *Id.* at 604-05.

21. *Price v. Union Pac. R.R.*, 255 F.2d 663, 668 (9th Cir. 1958).

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

23. *Id.* at 607.

24. *Id.* at 608 (citing 45 U.S.C. § 153 First (m)).

25. *Id.* at 608.

clear, namely, that Congress barred the employee's subsequent resort to the common-law remedy after an adverse determination of his grievance by the Adjustment Board.²⁶

Noting that Price's relitigation of the NRAB's determination might have been permissible under a legislative scheme other than the RLA, the Court added that "the disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought be removed."²⁷

B. *ANDREWS V. LOUISVILLE & NASHVILLE RAILROAD CO.*

Later, in the 1972 case *Andrews v. Louisville & Nashville Railroad Co.*, a discharged railroad worker sought review of the dismissal of his state court claim due to the fact that he had not exhausted all avenues for dispute resolution provided for in the RLA.²⁸ The Court affirmed the dismissal, overturning its prior holding in *Moore v. Illinois Central Railroad Co.*²⁹ The *Moore* decision stood for the principle that a common-law remedy for damages might be pursued by a discharged employee who did not resort to the statutory remedy before the NRAB to challenge the validity of the dismissal.³⁰ The *Andrews* Court rejected this principle, ruling that "the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law."³¹

The Court's strong language in *Andrews*, reaffirming the principle that the dispute resolution process established by the RLA is mandatory and binding, marked the culmination of a series of RLA cases that had slowly chipped away at the *Moore* rationale.³² In the 1957 *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.* decision, the Court recognized that the RLA's legislative history demonstrated that "the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."³³ Additionally, the Court observed in its 1966 *Walker v. Southern Railway Co.* opinion that "the Act *compels* the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act."³⁴

26. *Id.* at 608-09.

27. *Id.* at 615-16.

28. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 321 (1972).

29. *Moore v. Ill. Cent. R.R. Co.*, 312 U.S. 630 (1941).

30. *Id.* at 630; *see also Price*, 360 U.S. at 609 n.8.

31. *Andrews*, 406 U.S. at 322.

32. *Id.*

33. *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 39 (1957).

34. *Walker v. S. Ry. Co.*, 385 U.S. 196, 198 (1966) (emphasis added).

C. *UNION PACIFIC RAILROAD CO. v. SHEEHAN*

The Supreme Court's 1979 holding in *Union Pacific Railroad Co. v. Sheehan* ("*Sheehan I*") is the dispositive opinion regarding the scope of judicial review of NRAB rulings.³⁵ The Court's holding was made largely in response to the Tenth Circuit Court of Appeals' reasoning in the case below.³⁶ In that opinion, the Tenth Circuit had re-examined the scope of review of NRAB rulings, stating that "implications arising from, and the developments since" the Supreme Court's *Andrew* decision necessitated a new approach.³⁷ The Supreme Court embraced *Sheehan II* as an opportunity to correct the judicial uncertainty that had evolved since *Andrews* and to re-affirm the limitations of judicial review imposed by the RLA.

The *Sheehan II* decision originated from the Union Pacific Railroad's termination of Kermit Sheehan for violating an unspecified company rule.³⁸ Sheehan sought review in state court, but during the litigation the Supreme Court, in *Andrews*, held that a party must exhaust all available measures under the RLA before seeking judicial review.³⁹ Accordingly, Sheehan dropped his state court case and sought NRAB review.⁴⁰ Unfortunately for Sheehan, the NRAB dismissed the appeal due to Sheehan's failure to file his claim within the prescribed time limits.⁴¹ Sheehan then filed a complaint in the federal district court, seeking an order directing the NRAB to hear his case, or, in the alternative, for reinstatement and a money judgment.⁴²

Sheehan argued that the RLA's time limits should have been tolled during his state-court suit and that the NRAB should be required to hear his case.⁴³ While the district court admitted that Sheehan's tolling argument was persuasive, it nonetheless granted Union Pacific's motion for summary judgment.⁴⁴ The court found that Sheehan's claim did not fall under any of the statutory grounds for review of NRAB decisions and that it could not grant Sheehan relief without violating the RLA.⁴⁵ Sheehan appealed to the Tenth Circuit, which reversed and remanded on due process grounds, holding that the Board did not afford Sheehan an opportunity to be heard.⁴⁶

35. *Union Pac. R.R. Co. v. Sheehan (Sheehan II)*, 439 U.S. 89 (1979).

36. *Id.* at 91.

37. *Sheehan I*, 576 F.2d at 856.

38. *Sheehan II*, 439 U.S. at 89.

39. *Andrews*, 406 U.S. at 326.

40. *Sheehan II*, 439 U.S. at 89.

41. *Id.* at 91; *see also* 45 U.S.C. § 153 First (r).

42. *Sheehan II*, 439 U.S. at 90.

43. *Id.*

44. *Id.*

45. *Id.*; *see also* 45 U.S.C. § 153 First (p)-(q).

46. *Sheehan II*, 439 U.S. at 91.

In overturning the court's holding, the Supreme Court offered two alternatives as to why the Tenth Circuit granted Sheehan relief on due process grounds despite the court's recognition of the limited scope of judicial review of Board decisions.⁴⁷ The Court first surmised that the Tenth Circuit might have found that the NRAB had failed to consider Sheehan's "tolling" argument.⁴⁸ As the record demonstrated that the Board had in fact considered this argument, the Court held that the Tenth Circuit was "simply mistaken" if it had relied upon this rationale to grant relief.⁴⁹

The Court next reasoned that the Tenth Circuit might have granted relief simply because it wanted to overrule the Board's decision of the "tolling" argument.⁵⁰ If that were indeed the case, the Court found that the Tenth Circuit had exceeded the scope of its jurisdiction to review decisions of the NRAB.⁵¹ A reviewing court may only set aside an order of the Board under one or more of the three statutory bases provided by the RLA: failure of the Board to comply with the requirements of the RLA, failure of the Board to conform, or confine itself, to matters within the scope of its jurisdiction, or for fraud or corruption by a member of the Board.⁵² Sheehan's claim against the Board did not fall under any of these options. First, the Board acted within the requirements of the RLA in hearing Sheehan's minor dispute.⁵³ Second, the Board had jurisdiction to hear the "tolling" argument.⁵⁴ Third, Sheehan did not suggest that the NRAB's refusal was a result of fraud or corruption.⁵⁵

The Court emphasized that the primary question in federal court claims stemming from NRAB decisions is whether the claim falls within one of the three available statutory grounds for review. The Court added that the RLA

unequivocally states that the "findings and order of the adjustment Board shall be conclusive on the parties" and 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. And nothing in our opinion in *Andrews* suggests otherwise.⁵⁶

The Court's strong language is further bolstered by the principle of

47. *Id.*

48. *Id.* at 92.

49. *Id.*

50. *Id.* at 93.

51. *Id.*

52. 45 U.S.C. § 153 First (p)-(q).

53. *Sheehan II*, 439 U.S. at 93.

54. 45 U.S.C. § 153 First (i).

55. *Sheehan II*, 439 U.S. at 93.

56. *Id.*

inclusio unius est exclusio alterius.⁵⁷ Only by considering the RLA's list of permissible grounds for review as exclusive may Congress' intent be realized. If the statute is to mean just what it says, there can be no legal option for review of NRAB decisions beyond the three named grounds.

Moreover, the Court noted that its decision was consistent with the RLA's legislative history. Congress limited the grounds for review of NRAB rulings precisely so that the Board could settle most minor disputes, sparing union members the expense and delay of a lengthy trial.⁵⁸ In this manner, Congress "endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes."⁵⁹

Although the Court's opinion has since been deemed ambiguous by at least one court,⁶⁰ the Tenth Circuit's decision in *Kinross* demonstrates that the Supreme Court's *Sheehan II* opinion successfully communicated the principle that due process is not grounds for judicial review of an arbitration decision under the RLA.⁶¹

IV. THE TENTH CIRCUIT FOLLOWS THE SUPREME COURT'S DIRECTION: NRAB DECISIONS MAY NOT BE REVIEWED UNDER DUE PROCESS

The Tenth Circuit's 2004 *Kinross* decision is a strong affirmation of the principles laid down by the Supreme Court in *Sheehan II*.⁶² The case originated in early 1998 when William Kinross, a railroad employee for over twenty-one years, bought five or six railroad ties from his Utah Railway Company supervisor, a section foreman, for the stated price of a six-pack of Pepsi.⁶³ In April of that year, a large number of ties were reported missing from the company railyard.⁶⁴ The company inspected the homes of various employees, leading to the discovery of company ties in Kinross' yard.⁶⁵ The company conducted an investigation and held a hearing relating to Kinross' conduct, determining that he had improperly obtained the ties.⁶⁶ Utah Railway terminated Kinross after the hearing.⁶⁷

57. Sagers, *supra* note 2, at 470. In a "finite list of permissible grounds of review, the doctrine of inclusion unius thus mandates that the list be considered exclusive." *Id.*

58. *Sheehan II*, 439 U.S. at 94.

59. *Id.*

60. *Shafii v. PLC British Airways*, 22 F.3d 59, 64 (2d Cir. 1994).

61. *Kinross*, 362 F.3d at 662.

62. *Id.* at 658.

63. *Id.* at 659.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

After unsuccessfully appealing his termination to a Utah Railway Executive Vice President, Kinross sought a Special Board of Adjustment (“SBA”) review pursuant to section 153 of the RLA.⁶⁸ The SBA determined that just cause supported his termination; section foremen did not have authority to sell company ties to employees, and Kinross had failed to follow company policy for purchasing used railroad ties.⁶⁹ While Utah Railway had submitted to the Board that it suspected that Kinross had been involved in the April theft of a large number of railroad ties, there was no indication that this suggestion factored into the Board’s decision.⁷⁰

Kinross sought review in the United States District Court for the District of Utah, claiming that the Board: (1) failed to confine itself to matters within its jurisdiction, (2) acted in a fraudulent and corrupt manner, and (3) failed to afford him due process.⁷¹ The district court found in his favor, granting his motion for summary judgment and vacating the Board’s award.⁷² The court determined that the Board had inappropriately considered both testimony on the large number of missing ties in April and the company’s accusation that Kinross was involved in a scheme to steal a large number of ties.⁷³ The court found that the information unfairly influenced the neutral member of the Board, violating Kinross’ right to due process.⁷⁴ The district court remanded for a new hearing with new Board members and a stipulated set of facts excluding any info about the April event.⁷⁵

The company appealed the district court decision on three grounds. First, that the district court exceeded its subject matter jurisdiction because it considered the case under due process grounds.⁷⁶ Second, the company argued that, regardless of the propriety of the due process claim, the court exceeded its jurisdiction in making independent factual findings and evidentiary rulings.⁷⁷ Third, the district court exceeded its jurisdiction by ordering a new hearing and directing the manner in which the SBA was to conduct the hearing.⁷⁸

68. The Special Board of Adjustment was created within the parameters of the Railway Labor Act, 45 U.S.C. § 153 Second (2000). The SBA, like the NRAB, consists of one union representative, one carrier representative, and one neutral arbitrator.

69. *Kinross*, 362 F.3d at 659.

70. *Id.*

71. *Id.*

72. *Id.* at 660.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

The Tenth Circuit Court of Appeals reversed, holding that the RLA does not provide for judicial review of a Board hearing on due process grounds.⁷⁹ Citing extensively from the Supreme Court's direction in *Sheehan II*, the Tenth Circuit determined that judicial review of due process claims beyond those specifically articulated in the RLA is impermissible.⁸⁰ The court emphasized that the RLA provides only three grounds for judicial review, and noted that the *Sheehan II* Court repeatedly stated that only upon one of these three concerns would a claim be recognized in federal court.⁸¹

The Tenth Circuit recognized that a split existed among the circuits over this primary issue.⁸² While the Second, Fifth, Seventh, Eighth, and Ninth Circuits allowed review for due process violation, the Third, Sixth, and Eleventh Circuits held the opposite.⁸³ After analyzing the key decisions of both sides, the Tenth Circuit joined the three circuits that held against due process review, consistent with *Sheehan II*'s plain language and the RLA's legislative history.⁸⁴ The *Sheehan II* Court had clearly stated that the motivation behind the enactment of the RLA was that "[C]ongress considered it essential to keep . . . so called 'minor' disputes within the Adjustment Board and out of the courts."⁸⁵ Consistent with this purpose, the Tenth Circuit elected to limit due process review of Board decisions to the three specific claims articulated in the statute.⁸⁶

Moreover, the court noted that Congress armed the RLA with sufficient procedural protections so as to obviate the need for due process litigation.⁸⁷ First, Congress allowed for review of the Board's failure to comply with the requirements of the Act, procedural or otherwise, ensuring claimants an opportunity to present evidence and argue their case.⁸⁸ Second, the Act allows for review in the case of the Board surpassing its jurisdiction.⁸⁹ Third, the Act allows for review in the case of corruption or fraud on the Board, ensuring an impartial tribunal.⁹⁰

In addressing the position held by the other circuits, the Tenth Circuit stated that review on due process grounds requires an "evasive" reading of *Sheehan II* and would "frustrate Congress' intent to keep such

79. *Id.* at 662.

80. *Id.*

81. *Id.*

82. *Id.* at 661.

83. *Id.* at 661-62.

84. *Id.* at 662.

85. *Id.* (quoting *Union Pac. R.R. Co. v. Sheehan (Sheehan II)*, 439 U.S. 89, 94 (1979)).

86. *Kinross*, 362 F.3d at 662.

87. *Id.* at 661.

88. *Id.*

89. *Id.*

90. *Id.*

disputes out of the courts.”⁹¹

V. CIRCUITS HOLDING THAT DUE PROCESS IS NOT GROUNDS FOR JUDICIAL REVIEW

The Tenth Circuit’s reasoning in prohibiting independent due process review is consistent with the conclusion reached by several other circuits regarding this issue. These courts have correctly interpreted *Sheehan II*, the controlling decision issued by the Supreme Court, as affirming the RLA’s limitations for the review of NRAB decisions. Specifically, the Third, Sixth and Eleventh Circuits have all cited to *Sheehan II*’s strong language holding that judicial review of arbitration decisions under the RLA is only proper under the three grounds expressly stated in the Act.⁹²

A. THIRD CIRCUIT

In *United Steelworkers of America Local 1913 v. Union Railroad Co.*, the Third Circuit followed the Supreme Court’s direction in *Sheehan II* by holding that review of NRAB decisions is limited to the three grounds listed in the RLA.⁹³ The case arose when the defendant Union Railroad terminated Sam Godich, a railroad employee and member of the plaintiff union, due to insubordination and for the violation of other work rules.⁹⁴ Godich appealed to the NRAB, which affirmed Godich’s termination despite several challenges⁹⁵ and procedural errors.⁹⁶ Godich then sought review in the district court, which remanded the matter to review before a new Board on the grounds that the Board had violated Godich’s contractual right to legal representation.⁹⁷

In reversing the district court, the Third Circuit interpreted the Supreme Court’s *Sheehan II* decision as limiting the permissible grounds of review for NRAB decisions.⁹⁸ The court found that there is a “very narrow standard of review of board findings” and that “the Court in *Sheehan [II]* was quite specific in rejecting nonstatutory grounds for review.”⁹⁹ The court summarized the Act as limiting review of NRAB decisions to

91. *Id.*

92. *Sheehan II*, 439 U.S. at 93. (“We have time and again emphasized that this statutory language means just what it says.”).

93. *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 912 (3d Cir. 1981).

94. *Id.*

95. Godich first claimed that he was denied counsel, then claimed that his counsel was inadequate. *Id.* at 908.

96. *Id.*

97. Rule 26 of the contract between the Railroad and the Union affords a party the right to counsel. *Id.*

98. *Id.* at 910.

99. *Id.* at 911-12.

situations where the Board “fails to comply with the Act, [issues a] new order outside the Board’s jurisdiction, or [where] a Board member acts fraudulently or corruptly.”¹⁰⁰

Godich argued that he was deprived of substantive due process and not limited by the narrow standards of the statute because *Sheehan II* applied only to denials of procedural due process.¹⁰¹ However, the court noted that “there is no language in *Sheehan [II]* to justify such a procedural/substantive distinction” and that the only issue was “whether the party’s objections to the Board’s decision fall within any of the three limited categories for review” listed in the RLA.¹⁰² As Godich’s claims did not fall within one of the three categories, the Third Circuit concluded that the district court erred when it set aside the Board’s findings.¹⁰³

B. SIXTH CIRCUIT

In *Jones v. Seaboard System Railroad*, the Sixth Circuit affirmed the district court’s reliance on *Sheehan II* in holding that the plaintiff’s allegations of due process violations did not provide a legitimate ground for review.¹⁰⁴

The case originated when railroad employee, Thomas Jones, was arrested for selling twenty-one pounds of marijuana to an undercover police officer.¹⁰⁵ The railroad employer dismissed Jones subsequent to his arrest for conduct unbecoming an employee.¹⁰⁶ Jones unsuccessfully challenged the Board’s decision directly with his employer.¹⁰⁷ He then unsuccessfully petitioned the NRAB to review his dismissal. Finally, Jones appealed to the district court, asking the court to order the NRAB to reconsider his case.¹⁰⁸ He argued that the NRAB had violated his right to due process.¹⁰⁹ When the district court granted the railroad’s motion for summary judgment, Jones appealed to the Sixth Circuit.¹¹⁰

The Sixth Circuit strongly refuted the notion that due process was a permissible basis for review of NRAB decision. The court stated that *Sheehan II* precluded the judicial review of NRAB decisions on any grounds outside of the RLA’s three specific requirements.¹¹¹ It added

100. *Id.* at 910.

101. *Id.* at 911.

102. *Id.* (quoting *Union Pac. R.R. Co. v. Sheehan (Sheehan II)*, 439 U.S. 89, 93 (1979)).

103. *Id.* at 914.

104. *Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 644 (6th Cir. 1986).

105. *Id.* at 641.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 641-42.

111. *Id.* at 642 (citing *Union Pac. R.R. Co. v. Sheehan (Sheehan II)*, 439 U.S. 89, 94 (1979)).

that “if an appellant cannot satisfy one of these three grounds, review cannot be granted.”¹¹² Noting that Jones had “wisely abandoned his due process argument,” the court held that his appeal was proper only because he had “assert[ed] other grounds to support judicial review” in the district court.¹¹³ The Sixth Circuit determined that Jones’ demand to the NRAB to reconsider his case was time barred and affirmed the district court’s decision to dismiss his complaint.¹¹⁴

C. ELEVENTH CIRCUIT

In *Henry v. Delta Air Lines*, the defendant, Delta Airlines, fired Jack Henry for numerous occasions of misconduct.¹¹⁵ Henry appealed with three arguments, one of which was judicial review of the Board’s decision for denying him due process.¹¹⁶

The Eleventh Circuit simply refused to hear Henry’s due process argument.¹¹⁷ The court’s brief opinion summarily dismissed Henry’s claim by holding that it was “without merit because the Supreme Court has held that judicially created challenges to System Board’s awards must fail.”¹¹⁸ The Eleventh Circuit added that “*Sheehan [II]* precludes judicially created due process challenges” to NRAB findings.¹¹⁹

VI. CIRCUITS PERMITTING JUDICIAL REVIEW UNDER DUE PROCESS GROUNDS

Despite the Supreme Court’s firm direction to the contrary, five Circuits, the Second, Fifth, Seventh, Eighth, and Ninth, have affirmed the review of NRAB decisions under due process. The following section offers an examination of the dispositive decision in each circuit, demonstrating that this conclusion is based on a flawed interpretation of *Sheehan II*, is not supported by case law, and is contrary to congressional intent as embodied in the RLA.

A. SECOND CIRCUIT

The Second Circuit’s holding in *Shafii v. PLC British Airways* is a strong articulation of the arguments supporting judicial review of NRAB decisions for due process.¹²⁰ *Shafii* is particularly instructive because the

112. *Id.* (citing *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972)).

113. *Id.* at 642 n.2.

114. *Id.* at 643.

115. *Henry v. Delta Air Lines*, 759 F.2d 870, 871 (11th Cir. 1985).

116. *Id.* at 873.

117. *Id.*

118. *Id.* (quoting *Union Pac. R.R. Co. v. Sheehan (Sheehan II)*, 439 U.S. 89, 99 (1979)).

119. *Id.*

120. *See Shafii*, 22 F.3d 59.

Second Circuit discussed many, if not all, of the issues involved in the circuit split.

British Airways fired employee Seyed Shafii from his Reservation Sales Agent job for insubordination.¹²¹ Upon his termination, Shafii filed a grievance against British Air and the parties presented the matter to the NRAB for arbitration, as required by the RLA.¹²² Shafii contended that he was denied due process when the arbitrator rejected his request to present one witness and two documents during the hearing.¹²³ Shafii presented an affidavit establishing that the arbitrator had decided not to admit his witness and documents simply because the arbitrator wanted to catch a flight, leaving no time to consider further evidence.¹²⁴ The district court granted British Air's motion for summary judgment on the grounds that the affidavit constituted inadmissible hearsay.¹²⁵ The court did not entertain British Air's argument that judicial review of the arbitrator's decision on due process grounds was not allowed under RLA.¹²⁶

On appeal, the Second Circuit Court of Appeals recognized the three aforementioned grounds upon which a court has jurisdiction to review a NRAB decision.¹²⁷ The court further noted that courts have historically reviewed NRAB decisions to ensure that a participant's due process rights were not violated.¹²⁸ The court reviewed *Sheehan II* and cited the numerous cases inside and outside of the Second Circuit that have reviewed NRAB decisions on due process grounds.¹²⁹ The court then stated that the *Sheehan II* Court never directly interpreted the RLA to bar a challenge on due process grounds.¹³⁰ The *Shafii* court determined that the ambiguous *Sheehan II* Supreme Court opinion was a direct response to the "equally ambiguous" Tenth Circuit Court of Appeals opinion which indicated that judicial review of NRAB decisions was available for "purely legal questions."¹³¹

Further, the court found significant Congress' silence regarding its intention for the RLA to serve as the last stop in the protection of a

121. *Id.* at 63.

122. 45 U.S.C. § 153 et seq.

123. *Shafii*, 22 F.3d at 60-61.

124. *Id.*

125. *Id.* at 61.

126. The court refused to challenge a previous Judge's ruling that denial of due process was reviewable. *Id.*

127. *Id.* at 63 (citing 45 U.S.C. § 153 First (p)-(q)).

128. *Id.* (citing *Bhd. of Maint. of Way Employees v. St. Johnsbury & Lamoille County R.R./M.P.S. Ass'n*, 794 F.2d 816, 189 (2d Cir. 1986), *Kicking Woman v. Hodel*, 878 F.2d 1203 (9th Cir. 1989), and *Edelman v. W. Airlines*, 892 F.2d 839 (9th Cir. 1989)).

129. *Id.*

130. *Id.* at 62-64.

131. *Id.* at 64.

participant's constitutional due process rights.¹³² As neither the Supreme Court nor Congress had articulated an express intention to bar review of NRAB decisions on due process grounds, the Second Circuit determined that judicial review was a valid means of protecting the constitutional rights of participants.¹³³ Having found that due process afforded it jurisdiction to hear the case, the court went on to address Shafii's substantive evidentiary claims, which are irrelevant here.

The Second Circuit's reasoning was based on its interpretation of *Sheehan II* as permitting due process review, its reliance on cases from other circuits, and its understanding of the statute's congressional intent. Each of the court's arguments for due process reviewability will be discussed in turn.

First, the *Shafii* court found that the Supreme Court in *Sheehan II* supported due process review, an interpretation exactly opposite to that reached by the Tenth Circuit in *Kinross*. The Second Circuit began its argument by contending that the *Sheehan II* opinion was "somewhat ambiguous," due largely to the "equally ambiguous" nature of the Tenth Circuit opinion upon which it was based.¹³⁴ Believing that the Supreme Court's *Sheehan II* decision was unclear, the Second Circuit proffered a different interpretation to that which most naturally flows from *Sheehan II*'s plain language, as articulated by the Tenth Circuit in *Kinross*. The Second Circuit noted that "[n]owhere in [*Sheehan II*] does the Court state that it interprets the statute to bar due process challenges."¹³⁵

The court further argued that the Supreme Court itself considered *Sheehan*'s due process claim on the merits when it held that the Tenth Circuit was "simply mistaken" if it ruled that remand was necessary due to the NRAB's failure to consider the plaintiff's equitable tolling argument.¹³⁶ The Second Circuit held that this language was sufficient to demonstrate that the Supreme Court had itself engaged in a due process review of the plaintiff's case and, having found no violation, disposed of that issue summarily.¹³⁷

As for *Sheehan II*'s strong language upholding the narrow scope of review for NRAB decisions and reaffirming the limitations stipulated in the RLA, the *Shafii* court contended that the Supreme Court was merely

132. 45 U.S.C. §153 First (q); see also *Elmore v. Chicago & Ill. Midland R.R.*, 782 F.2d 94, 96 (7th Cir. 1986) ("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.").

133. *Shafii*, 22 F.3d at 64.

134. *Id.* at 62.

135. *Id.* at 63.

136. *Id.*

137. *Id.* at 64.

chastising the Tenth Circuit for its review of “purely legal questions,” separate from the issue of due process.¹³⁸ The Second Circuit argued that the examination of NRAB decisions for due process violations is an entirely reasonable practice, much different from the category of “purely legal questions” that the Supreme Court specifically emphasized as impermissible.¹³⁹

The Second Circuit’s interpretation of *Sheehan II* must fail for several reasons. First, there is no language in the *Sheehan II* opinion to support the Second Circuit’s contention that the Supreme Court was engaging in due process review. The *Sheehan II* excerpt relied upon by the *Shafii* court, quoted above, does not even use the words “due process.”¹⁴⁰ Further, nowhere in *Sheehan II* did the Court provide any standards by which to evaluate whether sufficient process has been afforded.¹⁴¹ Nowhere in the opinion did the Court make reference to the *Mathews v. Eldridge* balancing test, the complex, fact-specific scheme that is predominantly utilized to determine when a litigant has received due process.¹⁴² Completely absent from the opinion is any discussion of the elements of the *Mathews* test, such as an analysis of the gravity of the private interests involved, the likelihood of erroneous deprivations of life, liberty, or property, or the social costs of added procedural safeguards.¹⁴³

Finally, the Second Circuit’s interpretation of *Sheehan II* is questionable because it relies on a small, ambiguous section of the decision’s text to reach a conclusion that is clearly contrary to the opinion’s prevailing message. The unequivocal nature of the *Sheehan II* opinion is a strong affirmation by the Supreme Court that review should be no broader than that permitted by statute.¹⁴⁴ If the Court truly did intend for NRAB decisions to be reviewed under due process, the Court most likely would have said so directly, instead of making a weak and ambiguous implication in the midst of a disposition on the limitation of review.¹⁴⁵ The more reasonable interpretation of the language that is claimed by the Second Circuit to be due process review is simply that of classic dictum.¹⁴⁶ The Court merely indicated that even had the Tenth Circuit had the power to review for violations of due process, which it did not, there was no due process violation in *Sheehan*’s case.¹⁴⁷

138. *Id.*

139. *Id.*

140. Sagers, *supra* note 2, at 475.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

In addition to its interpretation of *Sheehan II*, the *Shafii* court also relied on cases from other circuits to reach its conclusion that due process review of NRAB decisions is appropriate. A brief analysis of each of the cases relied upon by the Second Circuit reveals that the court's cited authority fails to adequately support its position.

The Second Circuit first cited to the Ninth Circuit's 1989 *Edelman v. Western Airlines*¹⁴⁸ decision to support its contention that the *Sheehan II* opinion was ambiguous.¹⁴⁹ In *Edelman*, the Ninth Circuit extensively discussed *Sheehan II* and then relied on an analogous Ninth Circuit decision, *Kicking Woman v. Hodel*,¹⁵⁰ to conclude that due process is proper grounds for judicial review.¹⁵¹ However, while *Kicking Woman* discussed due process as grounds for review, the decision for which the plaintiff sought review in that case was made by an administrative governmental agency, not a private, bargained-for arbitration board like the NRAB.¹⁵² Both the *Edelman* and *Shafii* courts failed to address this important distinction.¹⁵³ It was improper for the *Shafii* court to rely on the Ninth Circuit's *Edelman* decision without accounting for the glaringly disparate factual situation in *Kicking Woman* on which *Edelman* found its authority.

The *Shafii* court also cited to the Seventh Circuit's *Steffens v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees*¹⁵⁴ decision to support its contention that *Sheehan II* did not prohibit due process review. However, the Second Circuit's reliance on *Steffens* is questionable as the Second Circuit accepted that holding without inquiring into the validity of its authority.¹⁵⁵ If the Second Circuit had investigated *Steffens*' foundational cases, it should have

148. *Edelman v. W. Airlines*, 892 F.2d 839 (9th Cir. 1989).

149. *Shafii*, 22 F.3d at 63.

150. *Kicking Woman v. Hodel*, 878 F.2d 1203, 1206-07 (9th Cir. 1989) (supporting the principle that due process protection through judicial review of administrative hearings is required unless otherwise explicitly expressed, specifically as related to Native American Land decisions by the Department of the Interior, a government entity, and in turn relies on due process review of social security act claims by the secretary of health, education, and welfare, another government entity). Though judicial review of a governmental agency's administrative decision may be proper, the court does not provide support that an administrative hearing is analogous to an arbitration board hearing. *Id.*

151. *Edelman*, 892 F.2d at 846. In addition to relying on *Edelman*, the *Shafii* court also cited explicitly to *Kicking Woman*, stating that the Ninth Circuit's analysis in that case was persuasive. *Shafii*, 22 F.3d at 64.

152. *Kicking Woman*, 878 F.2d at 1206-07.

153. *Edelman*, 892 F.2d 839; *Shafii*, 22 F.3d 63.

154. *Steffens v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express and Station Employees*, 797 F.2d 442, 449 (7th Cir. 1989) (concluding that the Court supports due process as a basis for review because *Sheehan II* does not "explicitly disapprove of due process as a basis for review.").

155. *Shafii*, 22 F.3d 63.

been aware of the fact that *Steffens* was not adequately supported by relevant authority.

The *Steffens* court reached its decision by relying on *O'Neill v. Public Law Board No. 550*,¹⁵⁶ *Kotakis v. Elgin, Joliet & Eastern Railway Co.*,¹⁵⁷ and *Elmore v. Chicago & Illinois Midland Railroad*.¹⁵⁸ Both the *O'Neill* and *Kotakis* decisions were rendered prior to the Supreme Court's 1979 *Sheehan II* holding, an opinion directly contrary to those earlier decisions. Furthermore, *Elmore* was a 1986 Seventh Circuit case that relied on *O'Neill* merely to hold, in dicta, that due process *could* form the basis for a claim.¹⁵⁹ However, the court in that case stopped short of deciding the issue because it found that no violation had occurred.¹⁶⁰ In sum, the *Steffens* decision was based on two cases that have been superseded by a subsequent Supreme Court decision and a third that failed to reach a holding on the particular issue of due process review. Contrary to the Second Circuit's understanding, *Steffens* actually provided little support for its conclusion.

A third element of the Second Circuit's conclusion in favor of due process review was its understanding of congressional intent behind the RLA. The Second Circuit first found that the NRAB, while private in fact, is public in name and function because it flowed from the RLA, the scheme erected by Congress to resolve certain disputes in the railroad industry.¹⁶¹ The court reasoned that the NRAB's public nature makes its decisions the acts of the government and subject to the constitutional requirements of due process.¹⁶² The Second Circuit then concluded that prohibiting courts' ability to review the NRAB's procedures for due process violations would be contrary to Congress' intent in enacting the RLA because it would leave a plaintiff's legitimate constitutional rights unprotected.¹⁶³

The Second Circuit's conclusion is objectionable because it is inimical to the RLA's stated purpose of preserving the efficient operation of national transportation industries through stream-lined dispute resolution mechanisms.¹⁶⁴ The RLA's goal of ensuring expeditious dispute resolu-

156. *O'Neill v. Pub. Law Bd. No. 550*, 581 F.2d 692, 694 (7th Cir. 1978) (concluding that review under due process is a viable collateral attack on a NRAB decision).

157. *Kotakis v. Elgin, Joliet & E. Ry. Co.*, 520 F.2d 570, 574 (7th Cir. 1975) (citing *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 604-05 (1959)).

158. *Elmore*, 782 F.2d at 96.

159. *Id.*

160. *Id.*

161. *Shafii*, 22 F.3d at 64 (quoting *Elmore v. Chicago & Ill. Midland R.R.*, 782 F.2d 94, 96 (7th Cir. 1986)).

162. *Id.*

163. *Id.*

164. Prolonged labor struggles in the transportation industry poses a serious threat to na-

tion was made clear in its mandate to “avoid any interruption to commerce or to the operation of any carrier engaged therein [and] to provide for the prompt and orderly settlement of all disputes.”¹⁶⁵ In contrast to the NRAB’s informal and efficient mechanisms, the federal district courts are slow decisionmakers whose overflowing dockets are ill equipped to handle complicated, burdensome and unsettled constitutional litigation regarding administrative agencies.¹⁶⁶ Far from effectuating congressional intent, concluding that the RLA allows due process appeals frustrates the government’s desire to maintain an efficient transportation system and impedes the RLA’s true purpose.¹⁶⁷

The Second Circuit’s holding in *Shafii* to permit the review of NRAB decisions for due process is based on a flawed interpretation of the Supreme Court’s *Sheehan II* decision, relies on unpersuasive authority, and acts directly against Congress’ intent in enacting the RLA.

B. FIFTH CIRCUIT

In *Atchison, Topeka and Santa Fe Railroad Co. v. United Transportation Union*, the plaintiff railroad terminated a union employee for failing two drug tests within ten years.¹⁶⁸ The employee furnished evidence of several prescription drugs that clouded the validity of the most recent test.¹⁶⁹ The railroad’s medical review officer failed to investigate the questionable drug test as required by regulation.¹⁷⁰ The employee appealed to the NRAB which reinstated the employee with back pay and benefits.¹⁷¹ The railroad sought review before the district court.¹⁷²

At trial, the Fifth Circuit noted the RLA’s three grounds for review,¹⁷³ adding that the Fifth Circuit had recognized an additional fourth basis for review on grounds of due process.¹⁷⁴ The court rejected the railroad’s request that the court adopt a fifth basis for review based on public policy.¹⁷⁵ The court granted the union’s motion for summary judgment as the railroad’s claim did not fit into any of the *four* established grounds for

tional interests because a functional national transportation industry is necessary to agriculture, industry, defense, and other national concerns. Sagers, *supra* note 2, at 485.

165. 45 U.S.C. § 151 (a).

166. Sagers, *supra* note 2, at 485.

167. *Id.*

168. *Atchison, Topeka & Santa Fe R.R. Co. v. United Transp. Union*, 175 F.3d 355, 356-57 (5th Cir. 1999).

169. *Id.*

170. See 49 C.F.R. §§ 40.33, 219.707 (2000).

171. *Atchison*, 175 F.3d at 356-57.

172. *Id.* at 357.

173. See 45 U.S.C. § 153 First (p)-(q).

174. *Atchison*, 175 F.3d at 357 (citing *Bhd. of Locomotive Eng’rs v. St. Louis Sw. Ry. Co.*, 757 F.2d 656, 660-61 (5th Cir. 1985)).

175. *Id.*

review.¹⁷⁶

While the Fifth Circuit Court of Appeals affirmed the district court's rejection of review on the basis of public policy, it did not question the district court's stance on reviewing NRAB decisions on grounds of due process, even though the district court had blindly relied on a 1985 case that held contrary to the Supreme Court's 1978 *Sheehan II* holding.¹⁷⁷ The case in question, *Brotherhood of Locomotive Engineers v. St. Louis Southwestern Railway Co.*, held that due process provided a fourth ground for judicial review under the RLA.¹⁷⁸ However, the Fifth Circuit's reliance on *Brotherhood* was misplaced. *Brotherhood* was itself based upon a pre-*Sheehan II* 1967 Fifth Circuit decision, *Southern Pacific Co. v. Wilson*,¹⁷⁹ which in turn cited to a 1966 Seventh Circuit decision, *Edwards v. St. Louis-San Francisco Railroad Co.*, that concluded similarly.¹⁸⁰ As *Brotherhood* relied upon cases that were decided prior to the Supreme Court's directive in *Sheehan II*, the Fifth Circuit should have re-evaluated *Brotherhood's* validity before basing its conclusion on that holding.

C. SEVENTH CIRCUIT

Pokuta v. Trans World Airlines, Inc. involved a dispute regarding the termination of Sandra Pokuta, a thirty-three year employee of Trans World Airlines ("TWA") and the Lead Agent at TWA's Chicago O'Hare's ticket counter.¹⁸¹ TWA terminated her employment following an incident during which she allegedly twisted her co-worker Hernandez's wrist and pushed Hernandez up against a wall while TWA passengers looked on.¹⁸² Pokuta denied this version of the incident and instead alleged that Hernandez pulled Pokuta's hair and repeatedly pummeled Pokuta in the face.¹⁸³ Pokuta, however, could produce no witnesses to confirm her side of the story.¹⁸⁴

Pokuta appealed to the Board, which decided that termination was a just disciplinary measure for her actions.¹⁸⁵ The district court agreed to review the case on due process grounds, but dismissed the case for failure to state a claim.¹⁸⁶

176. *Id.*

177. *Id.*

178. *Locomotive Eng'rs*, 757 F.2d at 660-61 (concluding, without discussing *Sheehan II*, that due process is still a valid basis for judicial review).

179. *S. Pac. Co. v. Wilson*, 378 F.2d 533, 536-37 (5th Cir. 1967).

180. *Edwards v. St. Louis-San Francisco R.R. Co.*, 361 F.2d 946, 953 (7th Cir. 1966).

181. *Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 835 (7th Cir. 1999).

182. *Id.* at 835-36.

183. *Id.* at 836.

184. *Id.*

185. *Id.*

186. *Id.* at 839.

The Seventh Circuit indicated that Pokuta's due process claim fell within the "fourth category of objections that supply jurisdiction over the award."¹⁸⁷ The court affirmed the district court's dismissal for reasons that are unimportant for this discussion.¹⁸⁸

The Seventh Circuit supported its conclusion by citing to the 1993 *Bates v. Baltimore & Ohio Railroad Co.*¹⁸⁹ and the 1987 *Morin v. Consolidated Rail Corp.*¹⁹⁰ decisions. *Morin* is based on *Steffens*, which relies on *O'Neill*, all cases that were cited by the Second Circuit in its *Shafii* holding. *O'Neill* is in turn supported by the 1959 *Price* decision.¹⁹¹ The Seventh Circuit thus based its conclusion to allow due process review in *Pokuta* by relying on a chain of authority that ultimately leads to a 1959 decision that conflicts with the Supreme Court's clear directive in its 1978 *Sheehan II* holding.

Further, the *Price* court's conclusion that due process is proper grounds for judicial review was unreliable even before the *Sheehan II* decision. *Price* relied on *Ellerd v. Southern Pacific Railroad Co.*¹⁹² and *Barnett v. Pennsylvania-Reading Seashore Lines*,¹⁹³ both of which supported judicial review of NRAB decisions under due process grounds.¹⁹⁴ However, both holdings were issued before the 1966 Senate Report¹⁹⁵ and subsequent amendments to the RLA.¹⁹⁶ Directly contrary to the conclusion reached in those cases, the 1966 Report declared that "[t]here is no other provision for judicial review of decisions of the National Railroad Adjustment Board" except for the three grounds expressed in the

187. *Id.* (citing *Morin v. Consol. Rail Corp.*, 810 F.2d 720, 722 (7th Cir. 1987) (per curiam) (concluding that the Seventh Circuit may review a NRAB decision under due process grounds) (citing *O'Neill v. Pub. Law Bd. No. 550*, 581 F.2d 692, 694 (7th Cir. 1978) (concluding that review under due process is a viable collateral attack on a NRAB decision) (citing *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 617 (1959) (determining that allowing judicial review under due process and other grounds requires the assumption that "Congress planned that the Board should function only to render advisory opinions, and intended the Act's entire scheme for the settlement of grievances to be regarded 'as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision . . . [a contention] inconsistent with the Act's terms, purposes and legislative history.'" (alteration in original) (citing *Elgin Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 720-21 (1945)))))).

188. *Id.* at 841.

189. *Bates v. Baltimore & Ohio R.R. Co.*, 9 F.3d 29 (7th Cir. 1993).

190. *Morin v. Consol. Rail Corp.*, 810 F.2d 720 (7th Cir. 1966).

191. *Price*, 360 U.S. at 604-05.

192. *Ellerd v. S. Pac. R.R. Co.*, 241 F.2d 541 (7th Cir. 1957) (holding that if the Union, as representative of an employee, denies that employee of due process by representing the employee against his wish, then the Federal District Court has jurisdiction to hear the case).

193. *Barnett v. Pa.-Reading Seashore Lines*, 245 F.2d 579 (3d Cir. 1957).

194. *Ellerd*, 241 F.2d at 544; *Barnett*, 245 F.2d at 581.

195. S. REP. No. 89-1201, at 2287 (1966), reprinted in 1966 U.S.C.C.A.N. 2285, 2287.

196. See 45 U.S.C. § 153.

Act.¹⁹⁷

The Seventh Circuit's holding in *Pokuta*, finding that due process constitutes a fourth ground of review for NRAB decisions, lacks sufficient support. The court improperly relied on antiquated cases that have been superseded by both the government and the Supreme Court.

D. EIGHTH CIRCUIT

In *Goff v. Dakota, Minnesota & Eastern Railroad Corp.*, locomotive engineer Ronald Goff tested positive for marijuana during a post-accident drug test administered after a derailment.¹⁹⁸ Dakota, Minnesota & Eastern Railroad ("DM&E") terminated Goff, who in turn appealed to the Board.¹⁹⁹ The Board reinstated Goff but withheld back pay.²⁰⁰ Goff appealed to the district court.²⁰¹

The district court heard the case under due process grounds.²⁰² The district court found that the Board had violated Goff's right to due process when DM&E submitted an incomplete transcript of the post suspension hearing.²⁰³

The Eighth Circuit agreed with the basis upon which the district court reviewed the Board's decision, but held that the Board did not violate Goff's right to due process.²⁰⁴ The Goff court did not address the legitimacy of the district court's decision to review the arbitrator's decision on grounds of due process, but like the Fifth and Seventh Circuits, concluded that due process was the fourth basis on which judicial review of a NRAB decision was proper.²⁰⁵

The Eighth Circuit's decision in *Goff* to allow due process review relies on three cases: *Price*,²⁰⁶ *Shafii*,²⁰⁷ and *Armstrong Lodge No. 762 v. Union Pacific Railroad*.²⁰⁸ The limited authoritative value of both *Price* and *Shafii* has been discussed above. The court's reliance on *Armstrong*

197. S. REP. NO. 89-1201, at 2287 (1966), reprinted in 1966 U.S.C.C.A.N. 2285, 2287.

198. *Goff v. Dakota, Minnesota & E. R.R. Co.*, 276 F.3d 992, 994-95 (8th Cir. 2002).

199. *Id.*

200. *Id.* at 995.

201. *Id.*

202. *Id.* at 997 (citing 45 U.S.C. §153 First (i), (j)) ("Under the RLA provisions governing Board hearings, due process requires that : (1) the Board be presented with a 'full statement of the facts and all supporting data bearing upon the disputes,' and (2) the '[p]arties may be heard either in person, by counsel, or by other representatives . . . and the . . . Board shall give due notice of all hearings to the employee.'").

203. The incomplete transcript was not a "full statement of the facts and all supporting data bearing upon the disputes." *Id.*

204. *Id.* at 998.

205. *Id.* at 992.

206. *Price*, 360 U.S. 601.

207. *Shafii*, 22 F.3d 59.

208. *Armstrong Lodge No. 762 v. Union Pac. R.R.*, 783 F.2d 131, 135 (8th Cir. 1986) (con-

also fails to adequately support its conclusion. The *Armstrong* court did not conclude whether due process is adequate grounds for NRAB decision review.²⁰⁹ Rather, it simply addressed whether the plaintiff's due process rights were actually violated in that particular case.²¹⁰ At most, *Armstrong* merely raises an inference that the court deemed due process grounds adequate for review.²¹¹ A tenuous inference such as that raised by *Armstrong* is insufficient to support the Eighth Circuit's *Goff* holding when considered in light of the Supreme Court's strong language to the contrary in *Sheehan II*.

E. NINTH CIRCUIT

In *English v. Burlington Northern Railroad Co.*, Burlington Northern Railroad Co. (BNRR) discharged Anthony English because of a fight between English and a fellow BNRR employee.²¹² English appealed to the NRAB.²¹³ English did not testify in front of the Board because of the ongoing criminal investigation into his actions, and the Board affirmed the discharge.²¹⁴ English then applied for judicial review in district court under the grounds that the NRAB arbitration process violated his due process rights when BNRR asked him to waive his right against self-incrimination during the preliminary investigative hearing.²¹⁵ The district court granted BNRR's motion for summary judgment.²¹⁶

The Ninth Circuit Court of Appeals reaffirmed the district court's jurisdiction to review a NRAB decision, stating, "a constitutional challenge is a permissible fourth ground by which a federal court can review an adjustment Board decision."²¹⁷ On the merits of the due process claim, the court found that the Board complied with the RLA due process requirements.²¹⁸

cluding that the arbitrator violated plaintiff's right to due process without considering whether due process was an adequate ground for judicial review).

209. *Id.*

210. *Id.*

211. *Id.*

212. *English v. Burlington N. R.R. Co.*, 18 F.3d 741, 743 (9th Cir. 1994).

213. *Id.*

214. *Id.*

215. *Id.* at 744.

216. *Id.* at 743.

217. *Id.* at 744 (citing *Edelman v. W. Airlines*, 892 F.2d 839 (9th Cir. 1989) (joining the Seventh and Fifth Circuits against the Eleventh Circuit in the first impression question of whether due process is a fourth grounds for review of a NRAB decision)).

218. *Id.* (citing 45 U.S.C. §153 First (i), (j), "Under the RLA provisions governing Board hearings, due process requires that : (1) the Board be presented with a 'full statement of the facts and all supporting data bearing upon the disputes,' and (2) the '[p]arties may be heard either in person, by counsel, or by other representatives . . . and the . . . Board shall give due notice of all hearings to the employee.'").

The Ninth Circuit relied on its 1989 *Edelman*²¹⁹ decision to hold that a due process claim is a permissible fourth ground by which a federal court can review an adjustment board decision.²²⁰ While *Edelman* extensively discussed the *Sheehan II* decision, the court relied primarily on the analogous Ninth Circuit decision, *Kicking Woman*,²²¹ to conclude that due process is proper grounds for judicial review. As discussed previously in regards to the Second Circuit's reliance on *Kicking Woman* in its *Shafii* opinion, the decision for which the plaintiff sought due process review in *Kicking Woman* was by an administrative governmental agency, not a private, bargained-for arbitration board. Similar to the court in *Shafii*, the Ninth Circuit in *Edelman* failed to recognize this distinction. Considering the importance of this unrecognized factual disparity, the *English* court's reliance on *Edelman* to affirm due process review is questionable.

F. SUMMARY

Circuits that have concluded that due process review is permissible within the context of the RLA have been forced to circumnavigate the Supreme Court's strong language in *Sheehan II* limiting the review of NRAB decisions. These courts have resorted to an illogical and awkward interpretation of *Sheehan II* in order to contrive some measure of justification for their conclusion, failing to acknowledge *Sheehan II*'s prevailing directive to the contrary.

Additionally, unlike the Tenth Circuit's reliance on the Supreme Court's dispositive *Sheehan II* holding, courts that have permitted due process review of NRAB decisions have relied on outdated authority. These circuits have cited to cases that ultimately rely on decisions made prior to *Sheehan II*, imparting limited persuasive power when considered in light of the Supreme Court's later holding. Like a house of cards that collapses when the bottom card is removed, these circuits have constructed an argument that must fail as it has been shown that the chain of authority upon which they rely leads to a foundation comprised of pre-*Sheehan II* holdings.

VII. THE RAILWAY LABOR ACT'S ARBITRATION PROCESS INHERENTLY PROTECTS INDIVIDUALS' DUE PROCESS RIGHTS

Along with constitutional issues too broad to be properly addressed in this note,²²² a primary question regarding the RLA's jurisdictional lim-

219. *Edelman*, 892 F.2d 839.

220. *English*, 18 F.3d at 743.

221. *Kicking Woman*, 878 F.2d at 1206-07.

222. This note does not address the well established doctrine of Legislative Restriction of Judicial Review, the similarly well established suggestion that bargained-for arbitration is proper in labor cases, or whether benefits or employment is "property," thereby triggering due process.

itation is whether the absence of district court review on due process grounds deprives litigants of their right to procedural due process.²²³ The following section will analyze the procedures mandated by the RLA to determine whether the Act's procedural safeguards are sufficient to protect participants' due process rights in NRAB arbitration, thus, obviating the need for due process review.

Procedural due process is a flexible concept that demands a varying level of process depending on the specific facts of each case.²²⁴ It has been well established that the standards necessary in RLA hearings are lower than in many other administrative contexts as the private interests involved are less significant than in other administrative proceedings.²²⁵ However, until the 1970's, courts generally referred to the due process requirement of a "hearing" without further specification of what exactly the requirements of a hearing were.²²⁶ In 1975, Judge Friendly responded to the "due process explosion" of the 1970's by compiling a list of factors, organized roughly in order of priority, that are generally considered the basic elements of a fair hearing.²²⁷ This list identifies the maximum procedural standards necessary in RLA hearings given the balance between the private interests at issue and the government's interests in the RLA's administrative regime.²²⁸ These "core" procedural requirements "serve so many important functions that their provision by an agency should excuse the absence of the more expensive and time-consuming procedures in other classes of disputes."²²⁹ An analysis of the procedures imposed by the RLA on its tribunals makes clear that RLA proceedings have sufficient procedural safeguards to satisfy these core requirements.²³⁰

A. AN UNBIASED TRIBUNAL

An unbiased tribunal is a necessary element in every case where a hearing is required.²³¹ This first core procedural standard is satisfied by the RLA's structural mechanisms.²³² The RLA provides for a thirty-four member NRAB comprised of half carrier representatives and half labor

223. Sagers, *supra* note 2, at 476.

224. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

225. Sagers, *supra* note 2, at 478 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Arnett v. Kennedy*, 416 U.S. 134 (1974)).

226. 2 Richard J. Pierce Jr., *Administrative Law Treatise* § 9.5, at 613 (4th ed. 2002).

227. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270, 1278 (1975); see also *Kinross*, 362 F.3d at 662 & n3.

228. Sagers, *supra* note 2, at 477.

229. *Id.* at 478, 479.

230. *Id.* at 480.

231. Friendly, *supra* note 227, at 1279.

232. Sagers, *supra* note 2, at 480.

representatives.²³³ The NRAB is further split into four divisions of varying sizes to preside over disputes depending on the labor classification of an employee.²³⁴ In the event that the NRAB is deadlocked, the NRAB is to select a neutral person to act as referee to the grievance.²³⁵ The RLA expressly permits a carrier and employee to submit their grievance to the SBA. The SBA is a creature of contract,²³⁶ usually consisting of three members, one each from Labor and Carrier, and one neutral party selected by the parties or the National Mediation Board.²³⁷ As the parties bear the responsibility of selecting a neutral party to hear their claim, the RLA inherently satisfies the unbiased tribunal requirement.²³⁸

B. NOTICE OF THE PROPOSED ACTION AND THE GROUNDS ASSERTED FOR IT

Notice that timely and clearly informs the individual of the proposed action and grounds for it is fundamental to due process.²³⁹ The RLA expressly provides that tribunals shall give “due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.”²⁴⁰ While the Act does not further define the meaning of “due notice,” the basic “notice pleading” attendant of the appellate nature of both NRAB and SBA proceedings ensures that reasonable notice is provided.²⁴¹

C. OPPORTUNITY TO PRESENT REASONS WHY THE PROPOSED ACTION SHOULD NOT BE TAKEN

This fundamental requirement represents the traditional “hearing” element of due process.²⁴² The RLA addresses this concern by providing that the parties “may be heard in person.”²⁴³ As Judge Friendly noted, this condition meets or exceeds the demands of due process as, in some circumstances, a “hearing” may even be satisfied through the exchange of

233. 45 U.S.C. § 153 First (a); *see also* Frank Wilner, *The Railway Labor Act & the Dilemma of Labor Relations* 52-53 (1991) (describing the history of the NRAB).

234. 45 U.S.C. § 153 First (h). Each division is comprised of an equal number of Carrier representatives and Labor representatives. *Id.*

235. *Id.* § 153 First (l). Should the NRAB fail to agree on a neutral member, the Mediation Board shall select the neutral member. *See id.* § 154 et seq.

236. Douglas L. Leslie, *The Railway Labor Act* 282 (1995).

237. *Id.*

238. Sagers, *supra* note 2, at 480.

239. Friendly, *supra* note 228, at 1280.

240. 45 U.S.C. § 153 First (j).

241. Sagers, *supra* note 2, at 481.

242. Friendly, *supra* note 227, at 1281.

243. 45 U.S.C. § 153 First (j).

written materials, much less an oral hearing.²⁴⁴

D. THE RIGHT TO CALL WITNESSES, TO KNOW OPPOSING EVIDENCE, AND A DECISION BASED ONLY ON THE EVIDENCE PRESENTED

While it is questionable whether these closely associated rights are indeed core due process requirements in the RLA context, they have generally been applied to administrative and regulatory actions of all types and, thus, merit discussion.²⁴⁵ The RLA mandates that each Adjustment Board is to base its decisions on a “full statement of the facts and all supporting data” that is provided by each party. To the extent that the parties stipulate to the facts, the rules encourage them to make a “joint statement of the facts.”²⁴⁶ At the very least, each party will be able to ascertain the primary factual differences of their claims. Further, the Board considers only the facts and testimony presented at a hearing.²⁴⁷

E. THE RIGHT TO COUNSEL

Although the right to counsel may not prove as useful in the administrative context as in criminal cases, this right constitutes a well recognized principle.²⁴⁸ While a party may choose to proceed without counsel, the RLA provides that “[p]arties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.”²⁴⁹

F. PRESENTATION OF A RECORD OF THE EVIDENCE

Even though the RLA contains no explicit requirement that proceedings be recorded, the satisfaction of this due process requirement²⁵⁰ may be presumed from the necessities of the appeal process.²⁵¹ Tribunals are required to provide the district court with a record of their proceedings upon appeal.²⁵² To the extent that each hearing may be subject to judicial review, tribunals must operate under the unwritten rule that a transcript must be produced.

244. Friendly, *supra* note 227, at 1270; *see also* Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

245. Friendly, *supra* note 227, at 1282.

246. Sagers, *supra* note 2, at 480.

247. *Id.* at 483. This requirement is presumed from the fact that, upon appeal, a tribunal must provide the district court with a record of its proceedings. *Id.*

248. Friendly, *supra* note 227, at 1287.

249. 45 U.S.C. § 153 First (j).

250. Friendly, *supra* note 227, at 1291. Judge Friendly noted that this particular due process concern is less of a requirement than simply a matter of the American addiction to transcripts. *Id.*

251. Sagers, *supra* note 2, at 483.

252. *Id.*

G. WRITTEN FINDINGS OF FACT

Along with being essential in the case of judicial review, this “justification” requirement is also a powerful preventive of wrong decisions.²⁵³ The RLA meets this requirement by providing that “[t]he awards of the several divisions of the Adjustment Board shall be stated in writing” and that “[a] copy of the awards shall be furnished to the respective parties to the controversy.”²⁵⁴

H. SUMMARY: THE RLA SATISFIES ALL APPLICABLE DUE PROCESS REQUIREMENTS

A comparison of the procedures mandated by the RLA to the core procedural requirements of this administrative setting reveals that the Act’s procedural safeguards are sufficient to protect participants’ due process rights in NRAB arbitration. The RLA not only meets every imposed requirement, but also exceeds the minimum standard, providing greater protection than required. The procedural safeguards inherent in the NRAB arbitration process, including the three grounds for review provided by statute, ensure the constitutional rights of all participants.²⁵⁵ As the *Kinross* court stated, “Congress provided sufficient process to meet these due process requirements when it set forth the three grounds for judicial review in 45 U.S.C. § 153(q).”²⁵⁶ There is simply no need for constitutional review of NRAB decisions; indeed, no court has found that a NRAB decision denied a participant due process.²⁵⁷

VIII. CONCLUSION

The Tenth Circuit’s *Kinross* decision was consistent with both Supreme Court precedent and congressional intent. The Supreme Court in *Sheehan II* forcefully declared that the review of NRAB decisions is limited to those claims permitted by statute. The Court detailed the RLA’s history, explaining its purpose to show how strict adherence to the RLA’s three explicit grounds for review is a fulfillment of congressional intent. By following the Supreme Court’s holding, the Tenth Circuit upheld the quick and efficient resolution of disputes that Congress envisioned when it enacted the RLA.

In contrast, several circuits have found that due process review is appropriate for NRAB decisions. These courts based their opinions on a tortured and illogical interpretation of *Sheehan II*, finding that it author-

253. Friendly, *supra* note 227, at 1291.

254. 45 U.S.C. § 153 First (m).

255. Sagers, *supra* note 2, at 484.

256. *Kinross*, 362 F.3d at 662 & n.3.

257. Sagers, *supra* note 2, at 484 & n.112.

ized due process review despite the Supreme Court's emphasis on the limitations of review in the RLA arena. Additionally, these circuits relied on unpersuasive authority. On the one hand, they relied on decisions which were made before *Sheehan II* and are superseded by the Court's contrary holding. On the other hand, they relied on decisions with factual settings that are dissimilar to the RLA's unique dispute resolution framework.

Finally, an analysis of the RLA's arbitration process demonstrates that the system's procedural safeguards are sufficient to protect individual due process rights, rendering judicial review of independent due process challenges unnecessary. The NRAB arbitration process has built in measures to protect individuals from due process violations. Affording review grants an aggrieved party with what amounts to a second chance in court.

The Supreme Court in *Sheehan II* found that Congress enacted the RLA specifically so that minor disputes between railroad companies and employees could be resolved quickly and efficiently, ensuring the continued vitality of our nation's transportation system.²⁵⁸ Expending precious time and resources for the litigation of delicate constitutional questions is entirely inconsistent with the RLA's congressional purpose. Courts which allow review of NRAB decisions on due process grounds circumnavigate Congress' intent to expedite the resolution of disputes through binding arbitration under the RLA.

258. *Sheehan II*, 439 U.S. at 94.

