SELECTING THE CORRECT STANDARD FOR JUDICIAL REVIEW OF AIRLINE GRIEVANCE ARBITRATION DECISIONS

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I. THE ISSUE

Judicial review of grievance arbitration in the railroad industry is governed by the Railway Labor Act's specific standards; in those industries regulated by the Labor Management Relations Act, a standard of judicial review of grievance awards has been crafted by the Supreme Court. Although the Railway Labor Act provides the labor-management relations law for air carriers, the Act's separate grievance arbitration provisions for that industry can be construed to exclude it from the statute's judicial review standards. On October 3, 2005, the United States Supreme Court denied a petition for a writ of certiorari to decide what standard of review should apply when courts are asked to set aside a grievance arbitration award in the airline industry.1 Because the federal courts remain divided respecting the judicial review standard to be applied in such cases, eventually the Court or Congress will have to resolve that question. This Article offers guidance for the analysis of that decision.

II. THE SETTING

The events leading to the 2005 decision denying the petition for certiorari began when an aircraft maintenance mechanic, who had almost

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ten years of service with Continental Airlines, was terminated from
employment for gross misconduct because he had registered 0.115 on a
random breathalyzer test. The parties' collective agreement contained
specific provisions addressing the consequences of positive alcohol tests
including the requirement of an Employee Assistance Program (hereinafter
"EAP") evaluation and successful completion of an EAP prescribed
rehabilitation program. Many employers provide employee assistance
programs that typically allow employees, at employer expense, to obtain,
on a confidential basis, psychiatric or other counseling including treatment
for drug and alcohol abuse. Under the collective agreement between
Continental and the employees' bargaining agent, an employee who tested
positive was subject to a five-year period of no-notice testing. The
collective agreement also specified that if a subsequent test showed an
alcohol concentration of 0.04 or greater the employee would "be forever
barred from working as a Technical Services employee" with the airline "or
from performing any other safety sensitive duties" at the airline. Employees
were to be suspended during the rehabilitation period and paid
for the rehabilitation themselves, but could use applicable insurance
benefits to assist in that funding.

After the Continental mechanic filed a grievance through his
collective bargaining agent, the union and airline settled the dispute by
agreeing to reinstate him, subject to a Last Chance Agreement signed
by him, management, and union representatives. This agreement subjected
the mechanic to surprise alcohol testing for a five-year period and called
for his immediate dismissal if he ever tested in excess of a blood alcohol
level of 0.04. Unlike the possibility implied in the collective agreement,
the Last Chance Agreement did not allow for his transfer to a non safety-
sensitive job. The Last Chance Agreement further required the mechanic

2. Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters, 391 F.3d 613, 615 (5th Cir. 2004).
3. Id.
(No. 04-1249).
5. Id.
6. Id.
7. When an employee is guilty of a serious disciplinary infraction that likely justifies
discharge, the parties sometimes settle a grieved dismissal by means of a 'last chance
agreement' which allows the worker to return to work on the condition that dismissal will be
automatic if the infraction is repeated or if the worker commits other serious misconduct.
Such agreements often are used in substance abuse situations with the completion of a
rehabilitation program being made a condition of continued employment. Dennis Nolan,
Standards for Discipline and Discharge, in THE COMMON LAW OF THE WORKPLACE, §6.3
(Theodore J. St. Antoine ed., 2005). See Peter A. Bamberger & Linda H. Donahue,
Employee Discharge and Reinstatement: Moral Hazards and the Mixed Consequences of
8. Cont'l, 391 F.3d at 615.
to submit to the airline's EAP for its evaluation of his problem and to complete, at his own expense, the terms and conditions of any rehabilitation program recommended by the EAP. Most importantly, the settlement agreement (referred to hereinafter as the "Last Chance Agreement") stated that the mechanic's employment would be terminated if he failed "to satisfy any of the terms of this Agreement or of the rehabilitation directed by EAP." In addition, the Last Chance Agreement said: "[H]is right to challenge such termination through the grievance process shall be waived." Also, the Last Chance Agreement was accompanied by a signed resignation letter that was to become effective if he violated the Agreement. Finally, it stated that the mechanic acknowledged that "he will have no right to file a grievance concerning the Company's acceptance and execution of his letter of resignation and/or termination of employment."

The EAP prepared an Alcohol/Drug Rehabilitation Agreement (referred to hereinafter as the "EAP Agreement"), which was signed by the mechanic and by management representatives. It stated that the mechanic's "continued employment at Continental is contingent on [the mechanic's] satisfactorily meeting the Company's performance/attendance standards and [the mechanic's] agreement and completion of the following terms and conditions." The EAP Agreement thereafter imposed specific rules stating that use of any alcohol or illicit drugs was a violation and that this prohibition included the participant's use of mouthwash or medications that might contain alcohol. It further directed that if the participant's physician prescribed medication containing alcohol or narcotics, the participant was to inform the EAP staff "of such medication." Although the EAP Agreement specified that the mechanic would be subject to no-notice testing for between one and five years, it did not mention the 0.04 threshold specified in the Last Chance Agreement. The EAP Agreement was not signed by the union. Additionally, the record does not indicate that the labor organization participated in establishing any of its terms.

About seven months after his reinstatement, the mechanic tested 0.029 on a breathalyzer test (which was less than the 0.04 threshold specified in the Last Chance Agreement). The reading was attributed to alcohol in an over-the-counter cough medicine he had taken. The evidence showed he had done this with the oral approval of his personal physician and had

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10. Id. at 60a.
11. Id.
12. Id. at 63a.
13. Id.
14. Id. at 1a-71a.
15. Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters, 391 F.3d 613, 616 (5th Cir. 2004).
phoned the regional EAP manager to say he was taking the medication.\footnote{His message identified the brand of cough medicine but did not state that it contained alcohol or was being taken with his physician's approval. The record does not reveal whether there was a connection between his telephone call to the EAP and the decision to administer a blood alcohol test. Response Brief of the Int'l Bd. of Teamsters at 4, Cont'l v. Int'l Bd. of Teamsters, 391 F.3d 613 (5th Cir. 2004) (No. 04-20136), 2004 WL 3960174.}

Even though he had not exceeded the 0.04 threshold established by the collective agreement and the Last Chance Agreement, he was dismissed on the ground that he violated the Last Chance Agreement and the EAP Agreement because he had used a substance containing alcohol without proper authorization.\footnote{Petition for a Writ of Certiorari, \textit{supra} note 4, at 7.}

The collective agreement between Continental and the union established a System Board of Adjustment\footnote{System Board of Adjustment and System Board are the terms generally used in the airline industry to refer to a structure for arbitrating grievances. \textit{THE RAILWAY LABOR ACT}, supra note 18, at 290.} for resolving grievances. Under the collective agreement, the System Board consisted of two persons selected by the airline and two by the union.\footnote{Id. at 30a-57a}

In the event of a deadlock, the collective agreement stated the dispute would be submitted to arbitration by a tripartite tribunal. It would consist of an arbitrator selected by the union, an arbitrator selected by the airline, and an impartial arbitrator selected through a process of elimination from a list provided by the National Mediation Board. The National Mediation Board is the federal agency that administers the Railway Labor Act—the statute that regulates union-management relations in the rail and air industries. The mechanic challenged his dismissal. The System Board, which convened in the three member format described above, heard and decided the case.\footnote{The role of the impartial member of a system board with respect to the evidentiary hearing varies depending on the requirements set out in the parties' collective agreement. In some board procedures the party representatives conduct the hearing. If the parties' representatives do not thereafter reach an agreed result, an impartial member is selected to review the case on the recorded evidence and cast the deciding vote. \textit{THE RAILWAY LABOR ACT}, \textit{supra} note 18, at 290.}

In the airline industry, under such a tripartite arrangement, the arbitrators typically conduct an executive session at the decisional phase by request of any member.\footnote{Herbert L. Marx, Jr., \textit{Tripartite Arbitration}, in \textit{LABOR AND EMPLOYMENT ARBITRATION} §§ 7.04(2), (5) (Tim Bornstein, Ann Gosline, Marc Greenbaum eds., 1997); \textit{FRANK ELKOURI \& EDNA ASPER ELKOURI}, \textit{HOW ARBITRATION WORKS} 160-164 (6th ed., 2003).} Either after that session, or without it, the impartial arbitrator prepares a decision and circulates it to the other two members.\footnote{Id. at 30a-57a}
sometimes are submitted to the impartial arbitrator or, at the request of one or both of the party-arbitrators, an executive session is held to discuss the draft. These sessions are for the purpose of correcting agreed errors of fact or representation, clarifying complexities for the impartial arbitrator, or weighing proposals to modify portions of the opinion in order not to inadvertently create new disputes. After the impartial arbitrator makes any needed changes in the opinion, it is signed by one of the party-arbitrators and becomes the tribunal’s award. If desired, a dissent is prepared by the losing side and circulated with the prevailing decision.23

In its presentation to the System Board, Continental asserted that the only issue for the arbitrator was whether the mechanic “violated any term of either the Last Chance or Rehabilitation Agreement.”24 The System Board ruled that while the Last Chance Agreement may have differed from the terms of the collective agreement, it was binding. Although the System Board determined25 that the matter in dispute was subject to its authority, it did not directly explain why the Last Chance Agreement’s grievance waiver language did not preclude the filing of the grievance. The explanation for its silence can be found in the fact that the airline’s statement of the issue to be decided had implicitly treated the “no grievance” provision as inapplicable to the question of whether the mechanic had violated the terms of the Last Chance Agreement. In addition, the testimony contained a management admission that the parties had agreed to submit the case to the arbitrator.26 Addressing the merits of the case, the System Board concluded that the mechanic had not violated the Last Chance Agreement because he had fulfilled his responsibilities by alerting the EAP to the fact that he was taking over-the-counter cough medicine and the EAP staff did not attempt to warn him that doing so could place his job in jeopardy. Accordingly, it ordered the mechanic reinstated and made whole for any wages and benefits lost as a result of his dismissal.27

Continental filed an action in federal district court to set aside the System Board award.28 This required the federal court to determine the degree of deference it should allow for the fact findings and rulings in an award issued by a grievance arbitration tribunal established by a collective agreement between an airline and the collective bargaining agent of its employees. In order to fully analyze the merits of the federal court’s

23. Marx, supra note 22; ELKOURI & ELKOURI, supra note 22.
24. Petition for a Writ of Certiorari, supra note 4, at 38a.
25. The union-designated arbitrator joined the decision of the impartial arbitrator and, thereby, provided the necessary majority vote for a System Board decision.
26. Petition for a Writ of Certiorari, supra note 4 at 48a-49a.
27. Petition for a Writ of Certiorari, supra note 4 at 57a.
resolution of that question, it is necessary to understand the history of grievance arbitration in the airline industry.

III. HISTORY OF GRIEVANCE ARBITRATION LAW IN THE AIRLINE INDUSTRY

Initially the Railway Labor Act (RLA) regulated only rail transportation. Eventually, however, most of its provisions were extended to cover air transportation as well. Because RLA doctrines respecting enforcement of arbitration awards evolved through a series of judicial decisions and statutory enactments, the Railway Labor Act's guidance concerning the process for resolving airline disputes can be best understood by tracing the RLA's development.

A. Rise of the Statutory Regulation of Railroad Arbitration

During the late 19th Century, railroads provided the primary means of transcontinental and long-distance regional transportation. Railroading attracted many speculative investors whose success was subject to the very volatile economic swings of early industrial growth. In the early 1870s, railroads attempted to reduce financial pressures by increasing employee work loads and cutting wages.

In July 1877, management hired replacements when Baltimore and Ohio Railroad workers walked off their jobs in reaction to substantial wage cuts. This prompted mass protests by rail workers and their sympathizers, enraged at the railroads' use of replacement workers. In response, the railroads sought and received judicial and military assistance to keep the trains rolling. Police and troops quelled the protests and in the initial confrontation, ten workers were killed and many were wounded in West Virginia. The violence fueled further protests that spread and eventually encompassed about two-thirds of the nation's rail mileage. More violence ensued which resulted in the loss of dozens of more lives and substantial amounts of property damage. In the aftermath, little was done to improve the workers' conditions. However, in the next decade union organizing efforts among the various railroad craft groups intensified and work stoppages became a formidable threat.

In 1888, Congress attempted to reduce rail-industry strikes and lockouts by encouraging peaceful means for achieving mutual

29. See generally George Douglas, ALL ABOARD!: THE RAILROAD IN AMERICAN LIFE 207-10 (1992) (detailing the social history of the railroad in America).
30. Id. at 193-213 (describing how the railroads were vilified in the late 19th century).
31. Id. at 207-208.
32. Id. at 209.
accommodation. Its first effort was the adoption of a statute known as the Arbitration Act which provided the structure for an arbitration mechanism that could be used voluntarily as a means of resolving “differences or controversies”33 between railroads and their employees. The voluntary procedure consisted of a tripartite board with an “impartial and disinterested”34 arbitrator selected by each side and a third impartial arbitrator selected by the other two. Decisions were to be by majority vote and the arbitrators were to issue written findings of fact. The Act did not establish a means of selecting the third arbitrator if the two selected by the parties reached an impasse over that choice. Additionally, the only enforcement mechanism provided by the Act was for the U.S. Commissioner of Labor to publish the arbitrators’ decision. Furthermore, the Act did not contain a provision for judicial review of the arbitrators’ award.35 Although strikes had become commonplace in the industry, the Act’s procedure went unused.36

A decade after the Arbitration Act’s adoption, a presidential commission appointed to investigate the 1894 Pullman strike offered recommendations for more effective governmental intervention to stabilize the industry’s labor relations.37 Guided in part by those recommendations, Congress repealed the earlier law and replaced it with the Erdman Act,38 a more comprehensive statute that acknowledged the representative role of labor organizations and introduced the mechanism of mandatory mediation as a tool for aiding the parties’ settlement efforts. The Erdman Act also encouraged arbitration of deadlocked disputes “concerning wages, hours of labor, or conditions of employment”39 by providing for an arbitration board similar in structure to that described by the 1888 legislation. As with the earlier statute, resort to arbitration was dependent on the parties’ mutual agreement, but once established, the federal government was to compensate the board members for their services, and, if the parties agreed to arbitrate but their designated arbitrators failed to make timely appointment of the third arbitrator, the Labor Commissioner and Chair of the Interstate Commerce Commission were to make that selection. Additionally, the resulting award was to be filed in the U.S. Circuit Court and “be final and conclusive upon both parties, unless set aside for error of law apparent on

34. Id. § 1.
35. Id.
36. THE RAILWAY LABOR ACT, supra note 18, at 14; Harry E. Jones, RAILROAD WAGES AND LABOR RELATIONS 1900-1952, 32 (1953).
39. Id. § 2.
the record." The Act, however, was unclear respecting the consequences of disobeying an arbitral award.

In addition to providing machinery for resolving impasses respecting conditions of employment, the Erdman Act made it a federal crime for a railroad or its agents to discriminate against employees because of their union membership. When a supervisor on the Louisville and Nashville Railroad Company was fined one hundred dollars, after being found guilty of terminating the employment of a worker because of union membership, the Supreme Court reviewed the constitutionality of this Erdman Act provision. In *Adair v. United States*, the Court ruled, six to two, that it violated the supervisor's rights under the Fifth Amendment's due process clause by interfering with his "liberty" to select whomever he wished to employ. However, the Court's decision did not affect the Erdman Act's arbitration provisions.

The railroads declined requests to use the Act's arbitration machinery for almost a decade, but by the time of the *Adair* decision they were becoming more receptive to arbitral resolution of disputes. Unions, on the other hand, had become disillusioned with the process because of their growing perception that arbitrators knew little about the industry's working conditions and were biased against railroad workers because the arbitrators came from the same elite class as the owners.

A threatened major railroad strike in 1913 caused Congress to modify the federal law. Legislators claimed that the changes made arbitration more attractive to the parties (though it did little in that direction) and more effective as a means of peaceful intervention. Known as the Newlands Act, one change allowed for an enlarged tribunal of six arbitrators. As with the Erdman Act, submission to arbitration was voluntary and awards were to be filed in the U.S. Circuit Court and would "be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record." Additionally, the Newlands Act made it clear that the courts were to use their injunctive powers to enforce

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40. Id. § 3.
41. Id. § 10.
42. 208 U.S. 161 (1908). The Fifth Amendment does not speak of liberty of contract but the Court found this protection implicit in the provision's broadly worded protection of "liberty."
45. Newlands Act, ch. 6, 38 Stat. 103 (1913).
46. Id. § 3.
47. Id. § 4.
compliance with awards (other than by compelling involuntary work).48

The United States entered the First World War in April, 1917. On December 26, 1917, exercising his authority as Commander-in-Chief, President Wilson took control of the railroads, an action Congress ratified with its adoption of the Federal Control Act, which regulated the takeover and limited its duration.49 Control of the railroads was delegated to the U.S. Railroad Administration which, among other things, established Adjustment Boards to resolve deadlocked disputes over the interpretation of collective agreements between the railroads and their unions, as well as all disputes involving discipline or other employee grievances. The boards consisted of an equal number of representatives designated and compensated, respectively, by the engine and train service employees' unions and by the railroads. A government official, the Director General of Railroads, determined the result in deadlocked cases.50

After the war ended, the Transportation Act,51 adopted in 1920, provided for the return of the railroads to private control and for the resolution of pending disputes arising out of the wartime measures.52 Title III of that Act, known as the Esch-Cummins Law, created a Railroad Labor Board consisting of three persons designated by the railroads, three by the labor organizations, and three appointed by the President with the advice and consent of the Senate. It also provided for Boards of Labor Adjustment to be established by the parties to hear and decide "dispute[s] . . . likely substantially to interrupt commerce."53 The boards could hear such disputes on their own initiative, the application of a labor organization or railroad, or the petition of at least one hundred employees.54 Under this law, arbitration was compulsory and the scope of the mandate appeared to encompass both disputes involving proposed modification of the terms and conditions of employment and grievances asserting that management had violated contractual rights of employees. However, unlike the Newlands Act, the only penalty for disobedience of an award was the authority of the Railroad Labor Board to make the decision public; no provision was established for judicial review or enforcement of an award.55

Pursuant to the Esch-Cummins law, the Railroad Labor Board initially

48. Id. § 8.
49. Federal Control Act, ch. 25, 40 Stat. 451 (1918); THE RAILWAY LABOR ACT, supra note 18, at 24-33.
50. THE RAILWAY LABOR ACT, supra note 18, at 33; Jones, supra note 36, at 57-58.
52. THE RAILWAY LABOR ACT, supra note 18, at 33-35.
53. 41 Stat. 456 § 303-304.
54. Id. § 303.
approved a portion of wage increases that had been sought by labor organizations but were turned down by the railroads. However, the popularity it thereby won with organized labor was dissipated when the Labor Board granted railroad requests for wage reductions after the nation went into a financial recession.\textsuperscript{56}

In 1922, the latter action resulted in a work stoppage by hundreds of thousands of railroad workers.\textsuperscript{57} In response, the railroads hired striker replacements who the railroads insisted could be retained even after the strikers offered to return to work. At the request of the Department of Justice, asserting that the strike interfered with interstate commerce, a federal court enjoined the stoppage and some, but not all railroads, allowed peaceful strikers to return to their jobs even though they had been replaced during the walkout.\textsuperscript{58} A few years later, a management group sought to set aside a settlement forced on a railroad by strike threats, but the Labor Board declined to intervene and declared that labor organizations had a right to strike in support of their contractual demands.\textsuperscript{59} By now, both sides were dissatisfied with the new law and began lobbying for changes.\textsuperscript{60}

Early in 1925, Congress adopted the Federal Arbitration Act,\textsuperscript{61} a statute designed to make enforceable pre-dispute arbitration provisions in contracts involving commercial transactions in interstate commerce.\textsuperscript{62} The Arbitration Act also provided for judicial enforcement of awards issued pursuant to such agreements including allowing for limited judicial review of the arbitral awards.\textsuperscript{63} However, the Federal Arbitration Act expressly excluded employment contract disputes between railroads and their employees.\textsuperscript{64}

The next year, competing proposals for new railroad labor legislation were presented to Congress. At the urging of President Coolidge, the railroad employers’ association and the heads of the railroad unions reached a compromise and Congress adopted the jointly sponsored proposals under the title: the Railway Labor Act of 1926.\textsuperscript{65}

\textsuperscript{56} Jones, \textit{supra} note 36, at 79-81.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 84-85.
\textsuperscript{60} Id. at 86.
\textsuperscript{62} Id. § 2.
\textsuperscript{63} Id. § 9.
\textsuperscript{64} Id. § 1 ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.")
Labor law practitioners and commentators distinguish between disputes that involve establishing or modifying the rules or standards that govern an employment relationship (interests disputes\(^66\)) and disputes that involve the interpretation or application of previously established rules to a specific set of facts (grievances). The earlier railroad labor legislation focused primarily on interests disputes but established procedures that were available for resolving grievances as well. Under the Railway Labor Act, the first category, interests disputes, has come to be referred to as “major disputes” and the second category, grievances, as “minor disputes.”\(^67\)

While the Railway Labor Act of 1926 encouraged negotiated settlements for both types of disputes, different impasse resolution procedures were established for each of the two dispute categories.

One change made by the Railway Labor Act of 1926 was to replace the Railway Labor Board with a new federal agency, the Board of Mediation.\(^68\) The new Board’s responsibility included encouraging and assisting the parties to reach voluntary settlements and to use voluntary arbitration, in lieu of work stoppages, in the event of a major dispute impasse.\(^69\)

In contrast, in the event of a minor dispute, section 3 First of the Act called for the two sides to establish their own board of adjustment with equal numbers of employer and union designated members.\(^70\) The statute made no provision for an impartial party to be added to the board. On the other hand, at section 7 the Act described the machinery for voluntary tripartite arbitration of deadlocks of such boards and set out procedural requirements for such tribunals.\(^71\) In addition, section 9 First provided for judicial enforcement of the award of such an arbitration tribunal, and at

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\(^66\) Most writers characterize these as “interest disputes”, with the word “interest” in the singular. I use the plural, both because seldom is a single issue involved in such disputes and the plural reduces the possibility that neophytes (including judges) will become confused by assuming that the term refers to disputes regarding rent charged for the use of money or credit.

\(^67\) These terms, not found in the statute, became commonplace in the industry and eventually in the courts. They are intended to differentiate the nature of the dispute, not its magnitude. See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-24 (1945) (describing the difference between major and minor disputes); The Railway Labor Act, supra note 18, at 257 n. 7.

\(^68\) 44 Stat. 577 § 4 (1926).

\(^69\) Id. § 5.

\(^70\) Id. § 3.

\(^71\) Id. § 7. The enforceability and exclusivity of the statutory arbitration procedures was upheld in Bell v. W. Ry. of Ala., 153 So. 434 (Ala. 1934) (stating employees must first present grievances to the board), Transcon. & W. Air, Inc. v. Koppal, 345 U.S. 653 (1953) (citing Bell with approval and requiring employees exhaust administrative remedies), and Slocum v. Del., L. & W. R.R., 339 U.S. 239 (1950) (describing the purpose of the Act is to provide administrative remedies to settle disputes).
section 9 Third of the Act set forth the scope of judicial review by specifying that the award could be impeached if it:

   a) did not conform to the substantive requirements of the RLA, or “the proceedings were not substantially in conformity with” the RLA; or
   b) did not confine itself to the stipulations of the agreement to arbitrate; or
   c) a member of the tribunal was guilty of fraud or corruption or a party engaged in fraud or corruption that affected the result. 

The last provision, (c), also directed the courts to construe awards liberally with a view to favoring their validity and not set them aside for trivial irregularities or errors going only to form and not to substance.

Congress’ guidance in the RLA respecting judicial review of arbitration awards was similar but not identical to the standard it established the previous year for awards governed by the 1925 Federal Arbitration Act. The latter stated (and still states) that an award can be vacated:

   (1) Where the award was procured by corruption, fraud, or undue means.
   (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
   (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
   (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

In addition, the 1925 Federal Arbitration Act permitted (and still permits) a court to correct or modify an award:

   (1) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
   (2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
   (3) Where the award is imperfect in matter of form not affecting the merits of the controversy.

72. 44 Stat. 577 § 9 (1926).
74. Id. § 11. This provision is unchanged from the original 1925 Act.
A comparison of the two sets of review standards presents some interesting differences. First, while the Federal Arbitration Act is silent in respect to conformity with statutory substantive or procedural rights, the RLA lists non-conformity with statutory substantive or procedural rights as the first grounds for vacating an award. Inasmuch as the Federal Arbitration Act was adopted in the context of arbitrating disputes arising under commercial contracts, Congress likely understood the arbitrator’s sole role to be as a finder of fact and interpreter of the parties’ contract and not a decider of statutory or common law rights. Accordingly, Congress had no reason to anticipate that, decades later, the Supreme Court would use the Federal Arbitration Act to allow arbitration to displace the judiciary in determining statutory rights. The RLA, on the other hand, was adopted to create and preserve a variety of statutory employee rights including the right to organize for collective representation and the right of the bargaining agent to negotiate with the railroads. Hence, it is understandable that Congress would want the RLA to include language intended to thwart any effort to use the arbitration process as a means of evading those statutory rights.

Both the Federal Arbitration Act and the Railway Labor Act’s provisions respecting judicial review of arbitration awards lack any suggestion of judicial authority to overrule an arbitrator’s reasoning or remedy, and review of fact findings are addressed only in the Federal Arbitration Act’s provision for correcting or modifying an award for “an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.” Nevertheless, in drafting the RLA, but not the FAA, Congress expressly directed the courts to construe awards liberally with a view to favoring their validity and not set them aside for trivial irregularities or errors going only to form and not to substance. It thereby gave additional emphasis to its intention that RLA arbitration awards should be characterized by finality.

75. 44 Stat. 577 § 9 (1926).
76. See Matthew W. Finkin, "Workers' Contracts" Under The United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282 (1996) (arguing that Congress was concerned with commercial contracts, not contracts of hire).
77. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (holding that a cause of action that arose under federal antitrust laws must be arbitrated due to the presence of an arbitration clause that was included in the parties’ private contract); Southland Corp. v. Keating, 465 U.S. 1 (1984) (stating that by enacting the Federal Arbitration Act, Congress withdrew the power of the states to require a judicial forum for claim resolution where the parties contractually agreed to resolve the dispute through arbitration).
78. 44 Stat. 577 §§ 2 (Third), 6.
79. Id. § 11(a).
B. Establishing the Current System of Rail Industry Grievance Arbitration

In 1934, Congress amended the Railway Labor Act. The amendments created a new federal agency, the National Mediation Board, to substitute for the Board of Mediation. The National Mediation Board (hereinafter “NMB”) was given broader powers, including authority to determine the placement of employees in a bargaining unit, and ascertain which labor organization or bargaining agent has support from the majority of employees and, therefore, authority to bargain on behalf of the bargaining unit.

Section 3 of the amended Act also established the National Railroad Adjustment Board (hereinafter “NRAB”) which operates through four national divisions, each given authority over specified occupational groups. The NRAB and its divisions consist of members appointed in equal numbers by the railroads and the unions, and has the authority to resolve grievances. The amended Act also provides a procedure for selecting an impartial referee, compensated by the NMB, for cases in which the NRAB is deadlocked. These changes continue the original Act’s policy of compelling the parties to submit their minor disputes for an adjudicative resolution by persons familiar with the nature of railroad employment. The 1934 amendments, however, transformed the process by ensuring that a majority decision would be reached either by vote of a bipartite board or the vote of a tripartite body. The Supreme Court subsequently observed that the NRAB process is a form of compulsory grievance arbitration.

Section 3 First specified certain requirements for NRAB hearings including, in paragraph (j), notice to all persons and parties involved in a submitted dispute. Additionally, paragraph (m) required that awards be in writing and characterized the awards as “final and binding” upon the

81. Id. § 3(h).
82. Id. § 3(a).
83. See id. § 3(f) (stating that the findings of the board shall be final and binding).
84. Id. § 3(l).
85. Although there was some opposition to this change, it was generally supported both by management and by labor organizations that represented the affected workers. Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R., 353 U.S. 30, 39 (1957) (quoting a railroad labor spokesman’s testimony that although railway labor organizations have traditionally opposed compulsory determination of their disputes, they are now ready to have their grievances determined by a board).
86. See id. at 40-42 (holding that the relevant amendments mandated compulsory arbitration).
parties to the dispute. However, in paragraph (p) it also stated that the Board’s findings and award "shall be prima facie evidence of the facts therein stated", language that, as discussed below, was pregnant with the possibility that the judiciary could review the correctness of those findings.

Section 9 of the 1926 Act, as previously noted, provided for judicial review of board arbitration decisions and it had not been repealed or changed by the 1934 legislation. Because the NRAB did not exist under the 1926 Act, the standards of review set out in section 9 could not be expected to reference NRAB decisions. Nevertheless, section 7 of the Act describes “board of arbitration” decisions and includes in that description settlement “by the appropriate adjustment board.” Accordingly, because the section 9 judicial review standards are concerned with judicial oversight of the procedures described in section 7, looking at the face of the statute as amended in 1934, it can be argued that an NRAB decision was within the scope of those decisions whose judicial review is governed by the section 9 standards.

On the other hand, it also can be argued, based on the 1934 language, that the section 7 “appropriate adjustment board” language did not encompass the NRAB process for resolving “minor disputes” inasmuch as a proviso to section 7 First states that refusal to submit a controversy to arbitration shall not be construed as a violation of the RLA. This provision has been part of that section since the original Act. Thus, because the RLA clearly makes mandatory the processes for resolving minor disputes, while the arbitration provisions regarding major disputes is voluntary, arguably sections 7 and 9 should be construed as referring only to major disputes.

A provision of the 1934 RLA amendments for resolving minor disputes allowed a claimant to sue in federal district court if a carrier refused to pay a monetary award granted by the NRAB. Because the Act declared that the NRAB’s findings were to be “prima facie evidence of the facts stated therein,” this was thought to open the door for de novo trial court review of the merits of the claim. As an alternative to bringing a suit

87. 48 Stat. 1185 § 3(m).
88. Id. § 3(p).
90. See 48 Stat. at 582 § 7 (using the original language in the current codification in § 157).
91. See Elgin, Joliet & Easter R.R Co. v. Burley, 325 U.S. 711, 722–23 (1945) (stating that it is clear from distinctions made in the act, the legislative history of the act, and common treatment of disputes in the railway industry, that the act was intended to make a distinction between major and minor disputes).
92. 48 Stat. 1185.
93. Id. § 3(p).
to enforce an NRAB award, the parties initially assumed that unions could resort to a work stoppage if a railroad failed to promptly pay money due under a "minor dispute" award--a means of nullifying or by-passing judicial review of any damages found owing.\textsuperscript{94} It was generally thought that the desire to avoid such stoppages was responsible for the railroads' general practice of complying with NRAB awards.\textsuperscript{95} However, the Supreme Court's decision in \textit{Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.} eased that concern since it held that RLA Section 3 implicitly outlaws strikes over minor disputes that are pending before the NRAB.\textsuperscript{96} More significantly for our discussion, a few years later, in \textit{Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.}, the Court expanded that ban to include strikes undertaken to enforce NRAB awards.\textsuperscript{97} This meant that monetary awards, if resisted by management, could be enforced only by means of de novo review in a district court.

These judicial developments in part led to the 1966 amendments to the Railway Labor Act, which eliminated the special treatment of monetary awards and substituted a general provision for judicial enforcement of all NRAB awards.\textsuperscript{98} Additionally, the 1966 amendments refined the standard for limited judicial review of NRAB awards.

C. Bringing Airline Industry Labor Management Relations Under the RLA

Before examining the legislative history and substance of the judicial review standard adopted by Congress in 1966, it is important to examine the history of the legislation that brought the airline industry within the scope of the Railway Labor Act. When Congress adopted the 1934 amendments to the Railway Labor Act, labor-management relations in other industries were subject to the authority of the National Labor Board (not to be confused with the National Labor Relations Board) established

\textsuperscript{94} Jones, \textit{supra} note 36, at 105.


\textsuperscript{96} 353 U.S. 30, 35 (1957) (explaining that the legislative history showed that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§101-15, were not intended to restrict judicial authority to protect the integrity of mandatory labor dispute resolution procedures established by Congress).

\textsuperscript{97} 373 U.S. 33, 41 (1963) ("[T]o allow one of the parties to resort to economic self-help at this point in the process would violate [the Railway Labor Act's] direct statutory command.").

under the National Industrial Recovery Act (NIRA). However, the constitutionality of the NIRA was under attack on the ground that it exceeded Congress’s power to regulate interstate or foreign commerce because it included businesses that only indirectly affected that commerce. However, in 1930 Congress’ authority to regulate labor-management relations in interstate transportation industries had been upheld when the Supreme Court rejected an attempt to declare the Railway Labor Act unconstitutional. Because the airline pilots’ union desired statutory recognition as a bargaining agent, as early as 1932 it adopted the constitutionally safer strategy of trying to bring the fledgling industry within the coverage of the RLA. Resistance by the airlines thwarted that early effort and did so again when the RLA was amended in 1934.

Accordingly, Congress’s adoption of the National Labor Relations Act in 1935 encompassed the airline industry. However, the uncertainty of that law’s constitutionality prompted the pilots to continue to press for coverage under the Railway Labor Act. By this time, the airline industry decided to drop its opposition to the pilots’ efforts, and in 1936 the airline industry’s labor-management relations were brought under the Railway Labor Act.

When the 1936 legislation was being discussed in Congress, it was evident that the airline industry did not fit within the structure of the National Railroad Adjustment Board. An alternative was to establish a separate but similar national system for the resolution of airline industry grievance disputes. However, based on existing practices, the industry

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100. See Schecter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (holding that the attempted regulation of intrastate commerce which only indirectly affects interstate commerce is not a valid exercise of federal power).
101. Tex. & New Orleans Ry. Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 571 (1930) (holding that the RLA is not inconsistent with the constitution and stating that since carriers have no constitutional right to interfere with rights of employees to select their own representatives, they cannot challenge the statute on constitutional grounds).
104. See Kahn, supra note 102, at 101–102 (explaining ALPA’s progress at persuading Congress to give pilots the benefits drawn from federal acts, first through the Air Mail Act of 1935 and then through the RLA in 1936). See also THE RAILWAY LABOR ACT, supra note 18; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding the NLRA to be within the scope of Congressional power to regulate activity that is of a class that has a substantial affect on interstate commerce).
preferred a company-by-company approach with the result that the 1936 legislation did not impose on air carriers a national board of adjustment system. Accordingly, the Act expressly excluded airlines from Section 3 of the RLA, the provision which establishes and regulates the National Railroad Adjustment Board. The 1936 legislation instead required airlines to establish, individually or in groups, their own boards of adjustment subject to special provisions for their operation. In addition, anticipating the possibility that the parties might not agree upon the shape of such boards, the amendments gave the National Mediation Board authority to establish a national board of adjustment for the entire airline industry; an option the NMB has never exercised. Although air carriers are expressly excluded from section 3 coverage, the amendments requiring the industry to establish its own system of boards refers to section 3 as specifying the jurisdictional limits of airline industry boards and in structuring a national adjustment board for the industry if the NMB elects that option. This suggests that Congress intended that exclusionary language to apply only to the section 3 provisions governing the railroad industry's NRAB's jurisdiction.

D. 1966 Amendments to RLA's Minor Dispute Resolution Mechanisms

In addition to being prompted by concerns expressed over the impact of the Supreme Court's decisions in Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co. and Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co., the 1966 amendments to the RLA were, in part, a legislative response to Elgin, Joliet & Eastern Railway Co. v. Burley, a case that involved efforts by individual employees to challenge an NRAB award in which the Board concluded that a prior union-management settlement of the same basic grievance was binding on all parties. The Supreme Court had ruled that under the RLA, despite the NRAB award, individual employees could bring suit in federal court based

106. Id. § 204.
107. Charles M. Rehmus, The First Fifty Years--And Then?, in THE RAILWAY LABOR ACT AT FIFTY: COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES 241, 249 (1977) (noting that unlike the NRAB system, the parties fully finance the operations of airline arbitration procedures).
on their statutory or contractual rights. Despite this holding, the Court still emphasized the importance of giving great deference to NRAB awards. It observed:

[W]hen an award of the Adjustment Board involving an employee’s individual grievance is challenged in the courts, one who would upset it carries the burden of showing that it was wrong. Its action in adjusting an individual employee's grievance at the instance of the collective bargaining agent is entitled to presumptive weight. For, in the first place, there can be no presumption either that the union submitting the dispute would undertake to usurp the aggrieved employee’s right to participate in the proceedings by other representation of his own choice, or that the Board knowingly would act in disregard or violation of that right. Its duty, and the union's, are to the contrary under the Act. 110

The Court added:

[T]he Board is acquainted with established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies. Its expertise is adapted not only to interpreting a collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage. 111

More directly related to the issue of the standards for judicial review of grievance arbitration awards under the Railway Labor Act was the Court’s decision in Gunther v. San Diego & Arizona Eastern Railway Co. 112 That case arose when a federal district court refused to enforce an NRAB award which held that a seventy-one year old engineer was entitled to reinstatement with backpay because, contrary to the findings of the railroad’s physicians, the majority report of a tripartite panel of physicians established by the Board’s order determined that he was physically qualified to continue working. 113 The Court observed:

The Railroad Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry’s

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110. 327 U.S. 661, 664 (1945) (footnote omitted).
111. Id. at 664-65 (footnote omitted).
113. Id. at 258–60.
language, customs, and practices.\textsuperscript{114}

The Supreme Court rejected the lower courts' efforts to construe the collective bargaining agreement based on normal rules of contract interpretation. Finding that "it cannot be said that the Board's interpretation was wholly baseless and completely without reason[,]"\textsuperscript{115} the Court held that the lower courts had gone "beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement."\textsuperscript{116} It observed:

Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field.\textsuperscript{117}

Additionally, the Court rejected the notion that courts are authorized to review the merits of NRAB decisions. Citing earlier cases which arose in a different context, it proclaimed:

This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. In \textit{Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.}, the Court gave a Board decision the same finality that a decision of arbitrators would have. In \textit{Union Pacific R. Co. v. Price}, the Court discussed the legislative history of the Act at length and pointed out that it "was designed for effective and final decision of grievances which arise daily" and that its "statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . ." Also in \textit{Locomotive Engineers v. Louisville & Nashville R. Co.}, the Court said that prior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered . . . "the complete and final means for settling minor disputes," and "a mandatory, exclusive, and comprehensive system for resolving grievance disputes."\textsuperscript{118}

Accordingly, the Court ruled that the NRAB had not gone beyond its appropriate sphere of authority in appointing a tripartite medical panel to advise it respecting the grievant's health condition.

\textsuperscript{114} \textit{Id.} at 261.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 261-62.
\textsuperscript{118} \textit{Id.} at 263-64 (citations omitted).
Interestingly, nowhere in its *Gunther* discussion did the Court reference the review standards set out in section 9 of the RLA, nor did it explain the origin of the “wholly baseless and completely without reason” standard it adopted for reviewing the arbitral award. On the other hand, in an earlier decision the Court observed, without ruling on the question, that lower courts had recognized a due process right to a fair hearing where an RLA grievance award was being challenged. The “wholly baseless” test set out in *Gunther* could, of course, be explained as a due process protection against the arbitrary exercise of government sanctioned authority.

Of additional significance was case law that had developed by that time under the Labor Management Relations Act (LMRA) which regulates collective labor relations in all other private sector industries. Although that statute encourages arbitration as a means of resolving labor-management disputes, unlike the RLA it does not compel grievance arbitration and does not have specific provisions governing the enforcement of arbitration awards. Nevertheless, in *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Supreme Court held that implicit in the Labor Management Relations Act is a grant of authority to the federal courts, guided by both the language and the underlying policies of that Act and related federal legislation, to discern a federal substantive law governing collective agreements.

Thereafter, in 1960, the Supreme Court issued three decisions on the same day, popularly known as the *Steelworkers Trilogy*, which announced the standards to be followed in enforcing arbitration provisions and arbitration awards arising under LMRA regulated collective agreements. In the course of those decisions the Court explained:

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and

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120. See infra text accompanying footnotes 145-146, 190-91 (discussing state action).
content are given to the collective bargaining agreement.\textsuperscript{123}

More specifically, the Court observed:

The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties’ objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.\textsuperscript{124}

Much like some of the testimony and discussions that led to the adoption of the RLA and its amendments, the Supreme Court explored the ways in which the negotiation and administration of collective agreements differs from bargaining and enforcement of common contracts. This includes: the parties’ mutual, continuing statutory duty to bargain with each other; the relative complexity of the relationship; the choice often made to use vague language or leave gaps in the contract as a means of avoiding the industrial strife accompanying a bargaining deadlock; the expected continuation of customary employee relations practices in the industry or in the particular workplace; the parties’ mutual reliance on the grievance-arbitration system to facilitate an amiable, productive atmosphere; and the role of arbitration as an integral part of the continuing bargaining relationship.\textsuperscript{125} The Court similarly noted the special attributes a labor arbitrator is expected to bring to the decisional process including familiarity with the dynamics of how collective agreements are negotiated and administered, knowledge of general and particular industrial relations practices, and awareness of the potential impact a decision has on the parties’ broader mutual interests in maintaining a productive relationship.\textsuperscript{126} The Court concluded: “Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be

\begin{itemize}
  \item \textsuperscript{123} United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 581 (1960).
  \item \textsuperscript{124} Id. at 582.
  \item \textsuperscript{125} Id. at 578-81.
  \item \textsuperscript{126} Id. at 581-82.
\end{itemize}
deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.\textsuperscript{127} Providing further emphasis, the Court restated this principle in additional language:

It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.\textsuperscript{128}

On the other hand, the Court inserted a qualification to its endorsement of arbitral awards when it added:

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.\textsuperscript{129}

As in the Gunther case, neither the Lincoln Mills nor Steelworkers Trilogy decisions make any reference to the Railway Labor Act's sections 3 or 9 language respecting the federal standard of judicial review of grievance arbitration awards.\textsuperscript{130} Instead, the Court acknowledged the industrial relations reality that arbitration functions as an extension of the collective agreement with its central purpose of establishing and maintaining stable employment relations. Thus, arbitral rulings can refine the parties' agreement so that their relationship can continue without the need to reopen contract negotiations with all of its inherent risks of resumed economic warfare.

An often critical issue not explicitly addressed in the Steelworkers Trilogy is the degree of deference owed the impartial decision-maker's fact findings. However, the Court's observations regarding the presumed special expertise brought to bear by the mutually selected person to whom the parties have submitted their dispute indicates that the Court expected judges to give the highest level of deference to those fact findings. Interestingly, similar dicta respecting the deference owed arbitral findings

\textsuperscript{129} Id. at 597.
had been offered by the Supreme Court in an earlier decision, *Order of Railway Conductors of America v. Pitney*, that had applied the Railway Labor Act but made no reference to RLA's arbitration language.  

A few years after deciding the *Steelworkers Trilogy*, but prior to the adoption of the 1966 Railway Labor Act amendments, the Court was faced with the issue of judicial enforcement of airline industry minor dispute awards in a case that arose when Central Airlines terminated the employment of six employees who refused to attend disciplinary hearings without the presence of a representative of their certified bargaining agent. The dismissals were grieved and, under the parties' collectively bargained agreement, the dispute was submitted to a board of adjustment established in the collective agreement. When the four-member board deadlocked, the National Mediation Board appointed an impartial referee, as was stipulated under the terms of the agreement. An award was then reached which reinstated the six employees without loss of seniority and with back pay. The airline refused to comply with the award and the bargaining representative sued in federal district court requesting an order compelling compliance. The district court, affirmed by the court of appeals, dismissed the suit on the ground that it lacked jurisdiction because the RLA provisions requiring submission of minor disputes to airline boards of adjustment did not describe a system of judicial enforcement of such awards. The Supreme Court reversed stating that the legislative history demonstrated that when Congress expanded the RLA to include the airline industry, it acted under the assumption that the federal courts would enforce grievance awards. More specifically it explained:

> Congress has long since abandoned the approach of the completely unenforceable award which was used in the 1920 Act. Adjustment board decisions were expressly made final and binding in the 1926 Act, the National Railroad Adjustment Board awards were made enforceable in the federal courts by the 1934 amendments, and the awards under voluntary arbitration agreements were likewise made expressly enforceable by the statute. There is no reason to believe that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes under existing contracts or that it contemplated awards by adjustment boards the enforceability of which depended entirely upon the desires of the parties or upon state statutes or court decisions. Quite the contrary, the Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide

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131. See *Order of Ry. Conductors of Am. v. Pitney*, 326 U.S. 561, 567 (1946) (holding that the lower court should not have interpreted the collective agreements between the parties, but rather should have applied to the adjustment board for an interpretation).

airline contract disputes, it "intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice."

However, because the lower court had not had an opportunity to examine the merits of the petition to enforce the grievance award, the Court simply remanded the case for further consideration by the district court and did not discuss the standard of judicial review to be applied by the lower court when it re-examined the award.

It was not until 1965 that the Supreme Court dealt with the standard of judicial review applicable when a court is asked to enforce a grievance arbitration award covered by the RLA's procedures; however, several lower court decisions had discussed this question and in some of those cases had dismissed NRAB awards. At the heart of many of these decisions was the contention that the language in Section 3(p) of the Act, respecting the prima facie status of the NRAB's findings and award, prevailed over the Section 3(m) declaration that the NRAB's decision was final and binding. Some courts reasoned that to give the awards conclusive authority would encroach on the constitutional role of the judiciary. These courts chose to treat enforcement suits as de novo proceedings in which the NRAB's actions and findings were "probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony." The Supreme Court's holding in Gunther, of course, overruled that line of decisions.

Among other reasons given by lower federal courts for rejecting NRAB awards prior to 1966 was that the award was excessively vague or, in the court's view, not based on a valid substantive statutory or contractual claim. A narrower basis on which enforcement was denied to some awards was that it failed to specify a time limit for compliance. This latter ground had support in the RLA since § 3 First (p) stated: "If a carrier does

133. Id. at 694-95 (1963) (citations omitted).
134. Id. at 696.
139. See, e.g., Allain v. Tummon, 212 F.2d 32, 37 (7th Cir. 1954) (holding that the findings of an award should be sufficiently definite to support a plea of res judicata); Virginian Ry. Co. v. Sys. Fed'n No. 40 of Ry. Employees, 131 F.2d 840 (4th Cir. 1942) (assessing whether the award was too vague but concluding it was not); Sys. Fed'n No. 59 of Ry. Employees v. Louisiana & A. Ry. Co., 119 F.2d 509 (5th Cir. 1941) (noting the court will not enforce an award that does not make specific findings regarding the rights that have been violated or the relief to be given); Knudsen v. Chi. & Nw. Ry. Co., 106 F. Supp. 48 (N.D. Ill. 1952) (refusing to enforce an indefinite order in the award).
not comply with an order of a division of the Adjustment Board within the
time limit in such order,” the petitioner could seek relief in federal court. From this, the courts concluded that an award lacking a time limit for compliance was unenforceable.140

On the other hand, arguing that federal courts should not lightly set aside NRAB awards, even when poorly crafted, one federal appellate court stated: “We think courts should take the findings of these divisions of the Railroad Adjustment Board as they come and do what they can with them.”141 However, in the same decision, the appellate court held that despite the deference owed NRAB awards, a carrier could refuse to comply with an award on the ground that “employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board.”142

The right of interested parties to procedural fairness finds statutory support in RLA § 3 First (j) which states “the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.”143 It had been explained that issuing an award without having given interested parties such notice and an opportunity to participate in the NRAB hearing not only violates the statute but also deprives the adversely affected employees of their constitutional due process right to be heard.144

The claim of a constitutional right to a fair hearing in the arbitral process arises from the fact that minor dispute awards are the product of a governmentally imposed requirement that such disputes be arbitrated through the NRAB system. Hence, under the so-called state action doctrine, the government has sufficient involvement in the proceeding, including mandatory resort to the procedure and prescribing the tribunal structure and basic process, to implicate 5th Amendment due process standards.145

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140. R.R. Yardmasters of N. Am., Inc. v. Ind. Harbor Belt R.R. Co., 166 F.2d 326, 328 (7th Cir. 1948).
141. Kirby v. Penn. R.R. Co., 188 F.2d 793, 796 (3d Cir. 1951). Accord, Charman v. Pan Am. Airways, Inc., 188 F.2d 875 (9th Cir. 1951) (explaining that the Board’s resolution gave the court sufficient guidance to ascertain what rights and benefits were due individual claimants).
142. Kirby, 188 F.2d at 799.
143. 45 U.S.C.A. § 153 First(j)(2007). See, e.g., The Order of R.R. Telegraphers v. New Orleans, T. & M. Ry. Co., 229 F.2d 59, 61 (8th Cir. 1956) (holding that failure to notify the labor organization whose members would lose jobs to the grieving work group violated RLA § 3 First (j)).
144. Bhd. of R.R. Trainmen v. Templeton, 181 F.2d 527, 534 (8th Cir. 1950); Hunter v. Atchison, Topeka & S.F. Ry., 171 F.2d 594, 596 (7th Cir. 1948).
The Supreme Court's use of the state action (or government action) doctrine for imposing constitutional standards on seemingly private actors has ebbed and waned. However, on several occasions the doctrine has persuaded the Court to find standards of fairness implicit in Congress' statutory intent respecting rights and duties established by the Railway Labor and Labor Management Relations Acts. In this manner, the Court has avoided reaching the issue of whether governmental involvement constitutionally compels such protection.

The courts also set aside NRAB awards due to lack of statutory authority to hear a particular class of dispute. This, too, is a constitutional contention because due process encompasses the requirement that adjudicative power cannot be exercised to decide a dispute where the adjudicator has not been granted jurisdictional authority.

Some courts went further and took it upon themselves to review the merits of NRAB decisions. For example, in one case a Board determined that the appellee railroad had violated its collectively bargained agreement by unilaterally changing the nature of a daily train run. As a means of vindicating the union's right to be consulted about such changes, it granted a full day's pay to each claimant employee even though no monetary loss had been suffered by the workers. The appellate court sustained the lower court's decision to reduce the monetary award to nominal damages of a dollar per claimant. The court explained that the Board decision did not state the basis for the award, there was no explicit language in the collective agreement supporting the award of liquidated or punitive damages, and there was no proof of a long established and accepted industry custom to pay such damages, a rationale that would appear to have been overruled by the Supreme Court's decision in Gunther v. San

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150. Id. at 409.
Diego & Arizona Eastern Railway,\textsuperscript{151} which recognized the NRAB's expertise respecting industry practices.

The standard of judicial review was also discussed in some cases in which the award was upheld. For example, in an airline industry case, the Court of Appeals for the Fifth Circuit indicated that an award would be set aside if it was so arbitrary and capricious as to deprive a party of due process.\textsuperscript{152} In the same case, the dissenting judge contended that the award should have been set aside for an error of law.\textsuperscript{153}

\textit{Gunther}, decided in 1965, offered the Supreme Court an opportunity to provide more precise guidance respecting the standard of judicial review of NRAB decisions.\textsuperscript{154} As previously noted, there it ruled that the NRAB's interpretation of a collective agreement should not be rejected unless "wholly baseless and completely without reason."\textsuperscript{155} However, that vague statement did not address all of the issues respecting the proper judicial review standard and left much to be fleshed out.

\textbf{E. 1966 RLA Amendments Respecting Judicial Review of Grievance Awards}

With the adoption of the 1966 Amendments to the Railway Labor Act, Congress enhanced the stature of NRAB decisions by eliminating the reference to the prima facie status of NRAB findings and instead stated that in a suit to enforce an Adjustment Board award, the NRAB's findings are "conclusive" and shall be enforced except for failure "to comply with the requirements of this [Act], 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."\textsuperscript{156} The amendments also changed the Act to expressly provide that a disappointed party can obtain judicial review if an NRAB award dismisses the claim or if the party disputes the terms of an award.\textsuperscript{157} However, giving emphasis to the judiciary's narrow role when reviewing NRAB awards, this paragraph reiterates that the findings of an NRAB award are conclusive and the court can set aside or remand the award, in whole or in part, only for failure "to comply with the requirements of this [Act], 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

\begin{footnotes}
\item[151] 382 U.S. 257 (1965).
\item[152] Sigfred v. Pan Am. World Airways, 230 F.2d 13 (5th Cir. 1956).
\item[153] \textit{Id.} at 27 (Brown, J. dissenting).
\item[154] 382 U.S. 257.
\item[155] \textit{Id.} at 261 (1965).
\end{footnotes}
In proposing the 1966 changes that established these standards of judicial review for NRAB awards, the House Committee Report said: "The foregoing three tests are the tests traditionally applicable to awards of arbitration tribunals, as set out in section 9 of the Railway Labor Act." That statement was inaccurate because, in truth, there was no established set of review standards "traditionally applicable to awards of arbitration tribunals." The 1925 Federal Arbitration Act had been a departure from state court standards, and, as previously observed, judicial decisions prior to the 1966 amendments had not fully or consistently established standards for judicial review of grievance awards. Moreover, the § 3 First judicial review provisions added in 1966 did not fully duplicate the previously examined judicial review language found in § 9 of the Railway Labor Act. This can be seen in the comparison of the two sections below:

RLA § 3 First (p), (q)-- Grounds to Set Aside an NRAB Award (1934, 1966)

[Bracketed numbers and letters, below, are not in the statutory text]

[1] the findings and order of the division of the Adjustment Board shall be conclusive on the parties,  
[2] such order may not be set aside except  
[a] for failure of the division to comply with

RLA § 9--Grounds to Set Aside a Board of Arbitration Award (1926)

[Bracketed numbers and letters, below, are not in the statutory text]

[1] An award . . . shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration [unless impeached for the reasons below]

[2] [A petition to

158. Id.
160. Id.
162. 45 U.S.C. § 153(p) (2000). Section 153 Second makes these provisions applicable, as well, to enforcement of awards by boards jointly established by the parties.
the requirements of this chapter,

[b] for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or

[c] for fraud or corruption by a member of the division making the order.\textsuperscript{162}

impeach an award of a board of arbitration shall be entertained by a court only on the grounds

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration

[3] [If a petition to set aside is based on alleged uncertainty,]

[a] the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter

[b] an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and... no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.  

Thus, the 1966 amendments provide a narrower scope of judicial review than does Section 9 of the Act inasmuch as Section 3 First does not require that an award be set aside if procured through fraud or corruption other than a board member's corruption, nor for setting aside an award that goes beyond the scope of the questions submitted to the tribunal except to the extent that it is beyond the NRAB division's statutory authority. Additionally, when we examine the then-existing case law, we find that Section 3 First does not specify that an award should be rejected if the proceedings lacked fundamental fairness or the award is too broad or vague to allow a reasonable person to know what benefit has been granted or denied.

Moreover, depending on the definition of "traditionally applicable," Section 3 First does not on its face give courts the discretion to set aside an award that is "wholly baseless and completely without reason" (the Court's language in Gunther) nor allow the award to be set aside if it fails to "draw its essence from the collective bargaining agreement" (the Court's language in Enterprise Wheel & Car).

In the legislative proceedings that led to adoption of Section 3 First's express standards for judicial review of NRAB awards, Senate committee hearings included discussion of a railroad industry proposal that would have allowed a court to set aside an award if it was:

(a) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"
(b) "contrary to constitutional right, power, privilege, or immunity;"
(c) "in excess of statutory jurisdiction, authority, or limitations,

164. Thus, bribery of a witness would not appear to be grounds to set aside the award. Of course, a civil damages action may be available against those who thereby corrupted the proceedings.
or short of statutory right;"
(d) was issued "without observance of procedure required by
law;" or
(e) was "unsupported by substantial evidence."

Union spokesmen opposed the amendment on the ground that some of the
proposed changes already were covered by the standards in the pending
legislation and that the rest were unnecessary or unwise. The latter
observations emphasized the wisdom of not allowing courts to substitute
their interpretation of collective agreements or their assessment of the facts
for those made by the arbitration tribunal which consists of board members
selected by the parties based on their intimate understanding of the industry
and its practices.

In response to the Senate Committee’s request for advice, Secretary of
Labor W. Willard Wirtz, who prior to his appointment had established a
national reputation as a labor law scholar and labor arbitrator, informed the
committee that "[t]he principles embodied in this [bill as it stood, including
those concerning judicial review,] are consistent with present-day
procedures ...." His broad statement was perhaps directed to the core
concepts in the recent Supreme Court decisions and the general
understanding among labor-management arbitrators and practitioners that,
except in extraordinary circumstances, arbitral awards were to be treated as
final and binding. Under that approach, the differences between section 9
and the proposed amendment of section 3 First were of little practical
importance. Moreover, he was speaking not as a scholar parsing the
details, but as a Presidential appointee encouraging Congress to reject the
proposed broadened standard of review and pass the version of the
amendments that had the Administration’s support.

Ultimately, the Senate committee did not accept the proposed
expansion of the standard for judicial review. Rather, its report observed:
"[B]ecause the National Railroad Adjustment Board has been characterized
as an arbitral tribunal by the courts, the grounds for review should be
limited to those grounds commonly provided for review of arbitration
awards." As had the House Committee, the Senate Committee also

167. Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on
Labor of the S. Comm. on Labor and Public Welfare, 89th Cong. 2d Sess., 16-66, 123-44,
303-16 (1966), reprinted in 4 THE RAILWAY LABOR ACT OF 1926, A LEGISLATIVE HISTORY
(M. Campbell & E. Brewer, eds., 1988).
168. Id. at 65-66, 305-306.
169. Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on
from W. Willard Wirtz, Secretary of Labor), reprinted in 4 THE RAILWAY LABOR ACT OF
THE S. COMM. ON LABOR AND PUBLIC WELFARE, 93D CONG. 2ND SESS., LEGISLATIVE
stated that the standard for judicial review for NRAB decisions was the same as under RLA § 9. It then noted that it had rejected a proposal to add "arbitrariness or capriciousness" as grounds for setting aside an award and explained:

The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which they disagreed as being arbitrary or capricious. *This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly [sic] without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power.*

Most significantly for this discussion, the 1966 amendment to RLA § 3 First says nothing about the airline industry’s adjustment boards. In the course of the House Hearings that led to the 1966 amendments, the spokesperson for the Air Transport Association of America described the grievance resolution activities in the airline industry and the industry’s satisfaction with how the process was working, but made no mention of judicial review of grievance awards in that industry.

F. Post-1966 Decisions

Since 1966, courts have had ample opportunity to determine what affect, if any, the judicial review language in RLA sections 3 and 9 has upon enforcement of grievance awards in the airline industry. However, as will be shown, in such cases the lower courts often give more attention to the judicial review standards set forth by Supreme Court decisions in cases controlled by the Labor Management Relations Act than to the Railway Labor Act’s specific language respecting review of arbitration awards.

1. Post-1966 Developments Under the Railway Labor Act

In the period shortly after the adoption of the 1966 amendments to the RLA, some courts accepted the proposition that there are grounds available
for vacating a grievance arbitration decision in addition to those specified in the Act.\textsuperscript{173} For example, in 1969, the Court of Appeals for the Fifth Circuit, based on a careful review of the legislative history of the amendments, stated that a court asked to enforce an award must additionally decide “whether the award . . . was so unfounded in reason and fact, so unconnected with the wording and purpose of the collective bargaining agreement as to ‘manifest an infidelity to the obligation of the arbitrator’.”\textsuperscript{174} The court thereby adopted the reasoning of the above quoted observation contained in the Senate Committee report.\textsuperscript{175} Arguably, this added standard of judicial review substantively does no more than ban wholly arbitrary decisions or those that disregard the parties’ collective agreement and, thereby violate the Fifth Amendment Due Process guaranty which, because the arbitration procedure is mandated by Congress, is applicable under the state action doctrine.\textsuperscript{176}

It was not until a dozen years after adoption of the 1966 RLA revisions that the Supreme Court granted a writ of certiorari in a case construing the new statutory standards for judicial review of NRAB awards. In \textit{Union Pac. R.R. Co. v. Sheehan}, at issue was whether a federal court violated the RLA when it set aside an NRAB decision that had dismissed a grievance as time barred.\textsuperscript{177} The Court reinstated the NRAB award, stating:

\begin{quote}
The dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. Section 153 First (q) 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\end{quote}

\textsuperscript{173} See \textit{Bhd. of Ry., Airline and S.S. Clerks, v. Kan. City Terminal Ry. Co.}, 587 F.2d 903, 908 (8th Cir. 1978) (noting that a court may determine whether a board decision is rationally inferable from the collective agreement); \textit{Diamond v. Terminal Ry. Ala. State Docks}, 421 F.2d 228, 233 (5th Cir. 1970) (explaining that a court can set aside an award that is not “rationally explainable as a logical means of furthering the aims” of the collective agreement).


\textsuperscript{175} See \textit{House Committee Report supra} note 171.

\textsuperscript{176} See \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528, 541-42 (2005) (stating that decisions that are clearly arbitrary run afool of the Due Process Clause); \textit{State Farm Mutual Auto. Ins. Co. v. Campbell}, 538 U.S. 408, 416-17 (2003) (arbitrary or grossly excessive tort remedies violate due process); \textit{Martinez v. California}, 444 U.S. 277, 282 (1980) (due process protects individuals from state action that is wholly irrational and arbitrary); \textit{Vaca v. Sipes}, 386 U.S. 171, 182 (1967) (grave constitutional issues would be raised if the representational authority of a union was permitted to allow it to arbitrarily alter an employee’s rights).

\textsuperscript{177} 439 U.S. 89 (1978) (per curiam).
therein. We have time and again emphasized that this statutory language means just what it says.\textsuperscript{178}

The Court said nothing about any other basis for vacating an NRAB award.

In the years after this decision, federal appellate courts have split respecting the extent to which \textit{Sheehan} forecloses all other grounds for review of NRAB awards. Thus, a recent Tenth Circuit opinion reported that three other circuits (the Third, Sixth, and Eleventh) allow no other grounds for review.\textsuperscript{179} Although the Tenth Circuit decision accepted the constitutional proposition that NRAB decisions must satisfy the fundamental principles of due process, it concluded that the three grounds set forth in RLA section 3 First (q) for vacating such decisions satisfy the requirements of due process.\textsuperscript{180}

Among the decisions from other circuits that the Tenth Circuit referenced as allowing only the section 3 First (q) criteria for setting aside an NRAB decision, particularly noteworthy is the cited Eleventh Circuit case, \textit{Henry v. Delta Air Lines}, since the decision involved an air transportation grievance award. In \textit{Henry}, although the court expressly relied on the language of both RLA section 3 First (q) and \textit{Sheehan},\textsuperscript{181} it did not explain why section 3 First (q) is applicable when section 201 of the Railway Labor Act\textsuperscript{182} expressly excludes air carriers from section 3's coverage.\textsuperscript{183} Of added interest is that the \textit{Henry} opinion also stated that an award cannot be upheld unless "it draws its essence from the collective bargaining agreement\textsuperscript{184}--a test that, as discussed below, was developed under the Labor Management Relations Act and goes beyond the three situations specified in 45 U.S.C. \textsection{153} First (q) as grounds for setting aside an NRAB decision.

At one time the Eighth Circuit was among those declaring that judicial review of airline grievance awards is governed by section 153 First (q) of

\begin{flushleft}
\textsuperscript{178} Id. at 93 (alteration in original).
\textsuperscript{179} Kinross v. Utah Ry. Co., 362 F.3d 658 (10th Cir. 2004). The referenced authorities are United Steelworkers of America v. Union R.R. Co., 648 F.2d 905 (3d Cir. 1981); Jones v. Seaboard System R.R., 783 F.2d 639, (6th Cir. 1986); and Henry v. Delta Air Lines, 759 F.2d 870 (11th Cir. 1985). In \textit{Jones v. St. Louis-S.F. Ry. Co.}, 728 F.2d 257, 261 (6th Cir. 1984), the appellate court construed \textit{Sheehan} as having overruled a district court's rejection of an award on due process grounds. However, that was a misreading of the issue since the question of whether a tribunal must toll a contractual period of limitations for filing a grievance does not concern either procedural or substantive constitutional due process.

\textsuperscript{180} Kinross, 362 F.3d at 662 n.3.

\textsuperscript{181} \textit{Henry}, 759 F.2d at 873.

\textsuperscript{182} 45 U.S.C. \textsection{181} (2006).

\textsuperscript{183} "All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce . . . ." 45 U.S.C. \textsection{181}.

\textsuperscript{184} 759 F.2d at 872 (quoting Johns-Manville Sales v. Intern. Ass'n of Machinists, 621 F.2d 756, 758 (5th Cir 1980)).
\end{flushleft}
the Railway Labor Act. It relied on the legislative history of the Act to find that Congress wanted the courts to use the same standards for reviewing rail and air industry awards. However, without explanation, it later abandoned that position.

Those courts that continue, even after Sheehan, to review grievance arbitration awards issued under the RLA based on requirements not specified in section 153, contend that Sheehan did not dispose of all possible grounds for setting aside an award. Accordingly, some courts continue to cite Central of Georgia Ry. Co. among other cases, and explain that an arbitration decision under the RLA may be reversed "where the arbitration board's order 'does not draw its essence from the collective bargaining agreement' . . . or its interpretation of the contract is 'wholly baseless and completely without reason . . . '". Typically, such statements are accompanied by words of caution emphasizing the expected finality of an arbitral award. As Judge Posner has explained: "[A]n arbitrator's award may be overturned only if the reviewing court is convinced that he was not trying to interpret the collective bargaining contract but that instead he resolved the parties' disputes according to his private notions of justice. The test is not error; it is ultra vires."

A constitutionally based explanation for this proposition is that because the RLA provides a governmentally mandated process, the procedure leading to the award must not violate fundamental due process principles. As explained by Judge Posner:

The National Railroad Adjustment Board . . . 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. Since the kind of tenured employment that a railroad worker whose seniority rights have vested . . . is considered property within the meaning of the due process clause of the Fifth and Fourteenth Amendments, the deprivation of that employment by the National Railroad Adjustment Board would be a deprivation by the federal government of property without due process of law and would therefore be subject to the Fifth

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186. Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employees, 733 F.2d 556 (8th Cir. 1984) (per curiam).
188. Norfolk and Western Ry. Co. v. Transportation Commc'ns Int'l Union, 17 F.3d 696, 700 (4th Cir. 1994) (citing the language used in Enterprise Wheel & Car. and Gunther).
Amendment.\textsuperscript{190} Moreover, one principle of due process is that there must be a rational connection between the enforcement of a legitimate legal standard and the facts underlying an adjudicative determination.\textsuperscript{191}

A competing position holds that the last sentence of the second paragraph of Article III, Section 2 of the Constitution\textsuperscript{192} gives Congress the power to limit the authority of judicial review\textsuperscript{193} and that is what is accomplished by the limited list of grounds for review of arbitration awards set forth in RLA section 3.\textsuperscript{194}

An answer to the latter proposition is that the Supreme Court long has insisted that Congressional intent to preclude judicial review will not be lightly assumed.\textsuperscript{194} Therefore, of particular significance in the RLA's legislative history is the statement in Senate Report on the 1966 amendment where it explained "that a Federal court would have the power to decline to enforce an award which was actually and indisputedly [sic] without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power."\textsuperscript{195} Accordingly, judicial review

\begin{footnotesize}
\begin{enumerate}
\item Elmore v. Chi. & Ill. Midland Ry., 782 F.2d 94, 96 (7th Cir. 1986). Accord English v. Burlington N. R.R. Co., 18 F.3d 741, 744 (9th Cir. 1994) (finding that it was the carrier, not the Adjustment Board that committed the alleged violation of the employee's rights).
\item Shuttlesworth v. Birmingham, 382 U.S. 87, 95 (1965) (finding that a conviction without any credible evidence violated due process rights); Thompson v. Louisville, 362 U.S. 199, 199 (1960) (lack of evidentiary support of charges was a violation of due process rights); Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 239 (1957) (holding that prior membership in the communist party and other political conduct more than 15 years earlier did not demonstrate that he currently lacked good moral character). The applicability of due process standards in cases involving a labor organization's statutorily approved representational status has been implicitly recognized by the Supreme Court. See Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998) (stating that a decision in such a case cannot be arbitrary); Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 78 (1991) ("the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'") (internal citations omitted); Comm'rn Workers of Am. v. Beck, 487 U.S. 735, 762 (1988) (observing that in construing the authority employers and unions are given by the NLRA, courts should try to avoid interpretations that would grant power to restrict constitutional liberties). See also Vaca v. Sipes, 386 U.S. 171, 182 (1967); Railway Employes' Department v. Hanson, 351 U.S. 225, 238 (1956); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 198-99 (1944) (discussing the Constitutional prohibition against the government discriminating against a class of people).
\item "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2
\item JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 40 (7th ed. 2004); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 270-80 (3d ed. 2000).
\item See Webster v. Doe, 486 U.S. 592, 599 (1988) (discussing sections of the APA concerned with Congressional intent to preclude judicial review).
\item Senate Committee Report supra note 170, at 1339.
\end{enumerate}
\end{footnotesize}
of constitutional challenges to an RLA grievance award cannot be assumed, lightly or otherwise, to have been intentionally precluded by Congress (or at least not by one of its houses).

A more fundamental reason for rejecting the notion that RLA section 3 First precludes the federal judiciary from setting aside an award on constitutional grounds is that, contrary to the Supreme Court's controversial decision in *Ex parte McCord*, the second paragraph of Article III, section 2 does not give Congress the authority to curb the power of the federal judiciary to engage in such review. After setting out the Supreme Court's original jurisdiction, that provision states, "In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." On its face, that sentence addresses the power of Congress to modify only the scope of the Supreme Court's judicial review authority, not the appellate authority of other federal courts. More importantly, the sentence is ambiguous inasmuch as it is unclear whether the Exceptions and Regulations clauses are meant to modify all that precedes it--Law and Fact--or only the last reference to Fact. The ambiguity was resolved by Alexander Hamilton's Federalist Paper No. 81, which made it quite clear that the Exceptions and Regulations clauses were intended to address only the authority to review matters of fact, not the entire scope of the power of judicial review.

When the Constitution was adopted, the traditions of equity, admiralty and common law courts differed respecting the deference owed to lower court fact findings, and state appellate practices varied concerning the deference given to trial court fact findings and evidentiary rulings. As explained in Hamilton's paper, in establishing the system of federal appellate review, rather than trying to resolve such differences concerning the review of lower court fact findings, the Constitutional Convention delegated that power to Congress. Thus, while Congress can prescribe rigorous or relaxed standards of deference to the fact findings of lower level tribunals,


199. *Id.* at 9 (noting the distinction in certain courts as to the scope of appellate authority).

200. *Id.*
it was not authorized by the Constitution to eliminate the Supreme Court's constitutionally bestowed power of appellate review of lower court determinations of law.

Opinions issued by the courts of appeals for the Second,\(^{201}\) Fifth,\(^{202}\) Seventh,\(^{203}\) Eighth\(^{204}\) and Ninth\(^{205}\) Circuits have stated that federal courts may review due process claims arising from Adjustment Board decisions. For example, in \textit{Shafii v. PLC British Airways}, the grievant asserted he had been denied a fundamentally fair hearing because the arbitrator refused to let additional witnesses testify, saying he had "heard enough" and had a plane to catch.\(^{206}\) The district court treated that contention as irrelevant. Although \textit{Shafii}, like \textit{Henry}, involved airline industry employees, the court looked to the RLA's section 3 provisions respecting judicial review of NRAB awards. After noting the very limited grounds for review set forth in section 3, the \textit{Shafii} court stated: "Because the arbitrator occupies the position of the statutorily-created NRAB, he or she is subject to the same statutory and constitutional constraints as the NRAB."\(^{207}\) The appellate court remanded the case to the district court to decide whether those standards had been violated. On remand, the district court, after weighing the possible impact of the arbitrator's alleged failure to allow certain evidence to be introduced into the hearing, concluded that there had not been a due process violation, a result that was accepted on appeal.\(^{208}\)

\(^{201}\) \textit{Shafii v. PLC British Airways}, 22 F.3d 59, 64 (2d Cir. 1994).

\(^{202}\) \textit{Atchison, Topeka and Santa Fe Ry. Co. v. United Transp. Union}, 175 F.3d 355, 357 (5th Cir. 1999) (dicta); \textit{Hall v. E. Air Lines, Inc.}, 511 F.2d 663, 663-664 (5th Cir. 1975); \textit{Rosen v. E. Air Lines}, 400 F.2d 462, 464 (5th Cir. 1968).

\(^{203}\) \textit{Kotakis v. Elgin, J. & E. Ry.}, 520 F.2d 570, 573-574 (7th Cir. 1975); \textit{Pokuta v. Trans World Airlines, Inc.}, 191 F.3d 834, 839 (7th Cir. 1999) (dicta); \textit{Bates v. Baltimore & Ohio R.R. Co.}, 9 F.3d 29, 31 (7th Cir. 1993) (dicta); \textit{Morin v. Consol. Rail Corp.}, 810 F.2d 720, 722 (7th Cir. 1987) (per curiam) (dicta); \textit{Elmore v. Chi. & Ill. Midland Ry.}, 782 F.2d 94, 96 (7th Cir. 1986) (dicta).

\(^{204}\) \textit{Goff v. Dakota, Minn. & E. R.R. Corp.}, 276 F.3d 992, 997 (8th Cir. 2002) (dicta); \textit{Armstrong Lodge No. 762 v. Union Pac. R.R.}, 783 F.2d 131, 135 (8th Cir. 1986) (dicta).


\(^{206}\) 22 F.3d 59, 61 (2d Cir. 1994).

\(^{207}\) \textit{Id.}

\(^{208}\) Shafii v. British Airways, 872 F. Supp. 1178 (E.D.N.Y. 1995), aff'd, 71 F.3d 404 (2d Cir. 1995). On remand, the trial court stated: "The Court of Appeals for the Second Circuit has held that in the context of a statutory scheme invoking compulsory arbitration, "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.' Due process in the arbitration context typically requires no more than provision of a 'fair hearing.' The courts consider an arbitration proceeding fair if, in general, each party has had 'sufficient opportunity to prepare its case ... and the opportunity to call and cross-examine witnesses and to present pertinent evidence in support of its case.'" \textit{Shafii}, 872 F. Supp. at 1181 (citing Lyeth v. Chrysler Corp., 929 F.2d 891, 895 (2d Cir. 1991) and NLRB v. Washington Heights Mental Health Council, Inc., 897 F.2d 1238, 1244 (2d Cir. 1990)) (citations omitted). The court in \textit{Shafii} concluded: "[The
As had been the situation in *Henry* and other cases, the Shafii court did not bother to explain why the RLA’s section 3 standards of judicial review were applicable in light of the section 181 exclusion of air transportation grievance proceedings from the coverage of section RLA 3. However, that question has been examined by other appellate courts. For example, in *Hunt v. Northwest Airlines, Inc.*, the court found guidance in the Supreme Court’s discussion in *Central Airlines*, and asserted that the Act’s legislative history revealed that “Congress intended to extend to the airline industry the same benefits and obligations applicable to the railroad industry.” From this, the appellate court concluded that “[t]herefore, congressional intent requires identical court treatment of airline board decisions under section 184 and railroad board decisions under section 186...”

Although the Act’s legislative history offers no specific guidance as to Congress’ intent concerning the standard for judicial review of airline grievance awards, it is clear that the exclusionary language found at RLA section 181 respecting non application of RLA section 3 was directed solely at avoiding imposing national boards on the airline industry. Hence, there is no reason to treat section 3 as irrelevant to deciding what standard of judicial review should govern airline grievance awards. Moreover, nothing in the Act excludes air carriers from RLA section 9 which establishes a similar, though not identical, narrow standard for reviewing the award of a board of arbitrators. Thus, as previously discussed, that provision is applicable to airline grievance awards on its face. However, since section 3 was more specifically directed at shaping the judiciary’s role in reviewing arbitral type grievance awards, the court’s conclusion in the *Hunt* case would appear to best reflect what Congress most likely would have expected had this issue been raised when the pertinent amendments were being discussed.

plaintiff’s] allegations regarding the admission and construction of evidence, however, offer ‘no more than an attack on the [arbiter’s] conclusions, and such challenges are not cognizable’ under 45 U.S.C. § 153 First (q). Shafii’s bald, conclusory allegations that the arbitrator ignored facts favorable to plaintiff and detrimental to defendant’s case, without more, allege no more than disagreement with evidentiary findings, an insufficient basis upon which to rest a Section 153 First (q) challenge.” 872 F. Supp. at 1183 (quoting *Steffens v. Bhd. of Ry., Airline and S.S. Clerks*, 797 F.2d 442, 447(1986))(citations omitted).

209. See, e.g., *Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834 (7th Cir. 1999).

210. 600 F.2d 176 (8th Cir.) (per curiam) (1979).  *Accord Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1355-56 (9th Cir. 1981) (holding that an airline employer was due the same rights as the railroads) (overruled on other grounds).


213. *Id.*
2. Post-1966 Developments Under the Labor Management Relations Act

The frequency with which U.S. Courts of Appeals had been setting aside labor arbitration awards under the Labor Management Relations Act, despite the narrow review standards enunciated in the Steelworkers Trilogy, eventually caused the Supreme Court to revisit the issue.\(^{214}\) However, because lower federal courts have demonstrated great resistance to curbing their propensities to second guess the factual evaluations and contract interpretations of labor arbitrators, the Court has had to revisit this issue more than once.

The *W. R. Grace* case, which was decided in 1983, involved a conflict arising out of an employer's actions in returning female workers to their jobs under a court approved settlement of a case in which the employer had been accused of engaging in gender discrimination, and an effort to arbitrate a grievance by other employees who said their seniority rights were violated when the employer laid them off to make room for the returning female workers.\(^{215}\) The Supreme Court observed:

As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . If the contract as interpreted . . . violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'\(^{216}\)

Since the employer would have violated a court order if it laid off the female workers in favor of adhering to its seniority commitments to the other workers, the Court noted, "[t]he Company committed itself voluntarily to two conflicting contractual obligations."\(^{217}\) The Court went on to find, however, that nothing in the arbitrator's award called for the female workers to be placed on layoff. Accordingly, though it would be costly to the employer, it could comply with the arbitration award without violating the court approved settlement agreement. In effect, the Court was saying that the arbitration award has the same effect as a settlement reached by the parties and will be enforced so long as a settlement containing the same terms would itself be enforced by the courts. This restriction on judicial enforcement powers is based on the well-established doctrine that a


\(^{216}\) *Id.*

\(^{217}\) *Id.* at 767.
court is without power to require unlawful conduct.\textsuperscript{218}

The \textit{Misco} case, which was considered by the Supreme Court a few years later, arose when, in an employer's parking lot, police found a burning marijuana cigarette in the front seat of a vehicle at a time when a machine operator was seated in the back seat.\textsuperscript{219} The employer dismissed the machine operator on the ground that being in a car with a lit marijuana cigarette violated a company rule against possessing an illegal substance on company property.\textsuperscript{220} The police had also found marijuana gleanings in the machine operator's own vehicle but the employer did not know this at the time it dismissed him.\textsuperscript{221} The union grieved the dismissal and the case was heard by a labor arbitrator.\textsuperscript{222} The arbitrator rejected the evidence regarding the marijuana found in the machine operator's own vehicle, because his dismissal by the employer could not have been based on that information.\textsuperscript{223} The arbitrator concluded that being in someone else's vehicle in which marijuana was found did not constitute possession in violation of the company's rule and he reinstated the worker with full back pay, but the District Court vacated the arbitrator's decision on the ground that it violated "the public policy 'against the operation of dangerous machinery by persons under the influence of drugs.'"\textsuperscript{224} That decision was reversed by the Supreme Court which, after repeating the \textit{Enterprise Wheel & Car} requirement regarding the arbitrator drawing the essence of the decision from the contract, explained:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.\textsuperscript{225}

Nor, the Court added, does a court have authority to disagree with an arbitrator's honest judgment of the appropriate remedy.\textsuperscript{226} However, it left open a narrow window of review.

\textit{[A]}s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not

\textsuperscript{218} Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that a court cannot enforce racially discriminatory housing covenants).
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 37-38.
\textsuperscript{226} Id. at 38.
suffice to overturn his decision. Of course, decisions procured by
the parties through fraud or through the arbitrator's dishonesty
need not be enforced.227

In its Misco decision, the Supreme Court specifically addressed the
lower courts' "public policy" rationale for rejecting the arbitrator's award
and explained that a court's refusal to enforce an arbitrator's interpretation
of a collective agreement "is limited to situations where the contract as
interpreted would violate 'some explicit public policy' that is 'well defined
and dominant, and is to be ascertained by reference to the laws and legal
precedents and not from general considerations of supposed public
interests.'"228 It explained that although the public policy cited by the
lower courts prohibited operation of dangerous equipment by a person
under drug influence, the arbitrator had not found that the machine operator
ever had been or would be under the influence of marijuana while he was
on the job operating dangerous machinery.229 The Court concluded that the
parties had bargained for the arbitrator to find the facts, not the court, and,
therefore, the purported public policy violation had to be assessed based on
that fact-finding.230 Finally, it observed that it was not addressing the
contention that the only time a court may refuse to enforce an award on
public policy grounds is when the award itself violates a statute, regulation,
or other manifestation of positive law, or compels conduct by the employer
that would violate such a law.231 A concurring opinion by Justices
Blackmun and Brennan emphasized that the Court had not reached the
question of whether the only time a court may refuse to enforce a labor
arbitration award is when the award violates positive law or requires
unlawful conduct.232

When the Supreme Court stated in Misco that courts do not sit to hear
questions of factual error by an arbitrator, it explained that rule on the
ground that the parties had bargained for the arbitrator, not the court, to
serve as fact-finder. Based on the doctrine set forth in Lincoln Mills, the
Court could have also relied on the RLA's section 3 First requirement that
facts found by the grievance arbitration tribunal are "conclusive."233

Additionally, the principle that courts should not set aside an
arbitrator's fact findings has support in more general concerns respecting
judicial review of purported factual errors. Where, as often is the case in

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227. Id.
228. Id. at 43 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
229. Id. at 31.
230. Id. at 45.
231. Id. at n.12.
232. Id. at 46.
("the substantive law to apply . . . is federal law, which the courts must fashion from the
policy of our national labor laws").
arbitral proceedings, testimony is not transcribed, a reviewing court has a limited ability to review fact findings. Even when a transcript is available, a reviewing court does not have the advantage of assessing credibility by observing demeanor.\footnote{Universal Camera v. NLRB, 340 U.S. 474, 496 (1951).} Nor does a reviewing court have the familiarity an arbitrator sometimes will have with past testimony from the same witnesses or with the nature of relationships and loyalties. More importantly, because credibility often turns on the credulity of an account, the arbitrator’s general or even specific familiarity with work settings and normal practices, provides a superior benchmark for assessing whether testimony strayed so far from the participants’ likely conduct as to strain belief.

If the Supreme Court thought \textit{Misco} would remove federal courts from the role of second guessing the merits of labor arbitration decisions, it was soon to be disappointed. A detailed study of appealed labor arbitration awards between July 1991 and March 2001 reveals a post-\textit{Misco} reduction from about fifty percent to about thirty percent of federal court decisions that vacated a labor arbitration award--some success in achieving greater deference, but still rather limited.\footnote{Michael H. LeRoy & Peter Feuille, \textit{Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems}, 17 \textit{OHIO ST. J. ON DISP. RESOL.} 19, 84-88 (2001) (reporting that Southern circuits and district courts set aside such awards much more frequently than do other federal courts). A recent review of Fifth Circuit decisions reached a similar conclusion but argued that in that circuit the controlling factor in deciding whether to set aside an arbitration award is which side it benefits. \textit{See} Stephen K. Huber, \textit{The Arbitration Jurisprudence of the Fifth Circuit, Round II}, 37 \textit{TEX. TECH L. REV.} 531, 570 (2005) (“In grievance matters, the nature and extent of judicial review by the Fifth Circuit is quite intrusive, at least when an arbitration award favors the union.”)} Due to the marked lack of deference toward labor arbitration decisions prior to \textit{Misco}, that reduction still left a high portion of reviewed cases in which the arbitrator’s decision was set aside. This is made evident by comparing the frequency with which labor arbitration awards have been set aside post-\textit{Misco} with the frequency with which federal appellate courts set aside National Labor Relations Board orders.\footnote{NLRB, 2005 \textit{Annual Report} at Table 19A.}

When comparing the reversal rate for NLRB decisions and labor arbitration awards, it is of some significance that the selection of NLRB members is a national political decision whereas labor arbitrators are chosen by the parties for the specific case or life of the specific collective agreement, and selection generally is the product of examining the arbitrator’s biographical information and reputation, past decisions involving the type of issue to be heard, the parties’ prior experiences with the arbitrator, and reports from other advocates respecting the arbitrator’s performance. Factors weighed in the selection process include his or her style of conducting a hearing and writing an award, known or perceived...
values, and track record respecting the type of issue being presented.\textsuperscript{237} Moreover, the awareness of the ease with which parties can find others to do their job imposes considerable pressure on arbitrators to adhere to the highest standards of integrity and diligence. Thus, given the advocates’ ability to scrutinize who will be selected and the need for the parties to mutually agree upon who will arbitrate their dispute, there is no reason to assume that those selected as labor arbitrators are less competent fact-finders than are the members of the NLRB.

Nevertheless, appellate courts reverse those decisions with about the same frequency as they reverse labor arbitration awards.\textsuperscript{238} Yet, the statutory standard for judicial review of NLRB orders is the much less deferential rule of requiring that to be upheld, fact findings must have the support of substantial evidence on the record taken as a whole. In addition, when reviewing NLRB decisions, courts can substitute their own legal determinations for those of the agency unless the agency acted within the sphere of its delegated quasi-legislative discretion.\textsuperscript{239} Hence, one would expect reversals of NLRB decisions to be significantly more common than reversals of labor arbitration awards. Accordingly, it would appear that regardless of the Supreme Court’s effort to clarify the very limited standard for judicial review of arbitral awards, federal courts persist in evading the specified high degree of restraint on their authority.

Faced with this appellate court resistance to its mandate, a little over a dozen years after \textit{Misco}, the Supreme Court revisited the issue for a third time in \textit{Eastern Associated Coal Corp. v. United Mine Workers of America},\textsuperscript{240} another case in which an arbitrator had reinstated an employee involved in drug use.\textsuperscript{241} Describing the proper approach to judicial review


\textsuperscript{238} NLRB, 2005 Annual Reports at Table 19A.


\textsuperscript{240} 531 U.S. 57 (2000).

\textsuperscript{241} The employee in this case, who drove heavy vehicles, previously had been discharged after testing positive for marijuana. In that instance he was reinstated with a partial loss of back pay and was required to participate in a substance-abuse program and submit to random drug tests for five years. A little over a year later he again tested positive and was dismissed. Citing the driver’s seventeen year longevity and treating a serious
in such cases, the Court explained: “[W]e must treat the arbitrator’s award as if it represented an agreement between [the parties] as to the proper meaning of the contract’s words ‘just cause.’”\textsuperscript{242} The Court further explained: “We must then decide whether a contractual reinstatement requirement would fall within the legal exception that makes unenforceable ‘a collective-bargaining agreement that is contrary to public policy.’”\textsuperscript{243} The Court’s opinion added:

[O]f course, the question to be answered is not whether . . . drug use itself violates public policy, but whether the agreement to reinstate him does so. To put the question more specifically, does a contractual agreement to reinstate [the employee] . . . with specified conditions . . . run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?\textsuperscript{244}

The Court then hedged, stating: “We agree, in principle, that courts’ authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law. Nevertheless, the public policy exception is narrow and must satisfy the principles set forth in \textit{W. R. Grace} and \textit{Misco}.\textsuperscript{245} This prompted Justice Scalia to write, in a concurring opinion,

I do not endorse . . . the Court’s statement [quoted above] . . . . No case is cited to support that proposition, and none could be. There is not a single decision, since this Court washed its hands of general common-lawmaking authority [in \textit{Erie}, where] we have refused to enforce on “public policy” grounds an agreement that did not violate, or provide for the violation of, some positive law.\textsuperscript{246}

Nor did the \textit{Eastern Associated Coal} opinion fully corral the propensities of some federal judges to venture into the intricacies of construing collective agreements--especially those judges who are determined to ascertain a collective agreement’s “true” meaning.\textsuperscript{247} That

\textsuperscript{242} Id. at 60-61.
\textsuperscript{243} Id. at 62.
\textsuperscript{244} Id. (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)).
\textsuperscript{245} Id. at 62-63.
\textsuperscript{246} Id. at 63.
\textsuperscript{247} Id. at 67-68 (citation omitted) (Scalia, J. concurring).
subject, however, is beyond the scope of this Article.

3. Post-1966 Air and Rail Industry Arbitral Awards Reviewed
Under LMRA Standards

When addressing the standard for judicial review of minor disputes in the airline industry, the narrow judicial review language of the RLA has been of little concern to a number of federal judges when they disagree with the wisdom of grievance awards (especially if drugs or alcohol is involved). Instead, Misco and related LMRA decisions are cited as the governing authorities. For example, in Zeviar v. Local No. 2747, Airline, Aerospace and Allied Employees, an Eighth Circuit decision, after stating that the RLA’s narrow statutory review standard was applicable in an airline case, the court then recited and applied the judicial test under the LMRA to determine whether there were grounds to set aside a grievance award. Indeed, even when railroad industry grievance awards are appealed, some judges give more attention to LMRA standards than to the RLA’s statutory standard of judicial review. Moreover, in the course of insisting that their decisions conform to the Misco standard of judicial review, some courts misapply the “draw their essence from the contract” and “public policy” tests announced in the Enterprise Wheel & Car Corp. and Misco line of cases.

An example is found in Union Pac. R.R. Co. v. United Transp. Union,
which involved a railroad switchman who had been placed on suspension after he set a track switch incorrectly and was required to take a urine test.\textsuperscript{252} A week later the railroad conducted a hearing at which the hearing officer accused the switchman of reeking of alcohol and asked others in the room to confirm the accusation.\textsuperscript{253} They said they smelled something but did not know if it was alcohol.\textsuperscript{254} Several days after the hearing, on January 24, 1989, the switchman was dismissed for violating the company's policy prohibiting drug and alcohol use.\textsuperscript{255} The dismissal was appealed to the parties' tripartite arbitration panel\textsuperscript{256} which, on a date not disclosed in the court decision, found that the switchman had been denied a fair hearing and, therefore, ordered him reinstated subject to normal back-to-work examinations.\textsuperscript{257} It also reduced his back-pay by ninety days on the grounds that having admitted that he had set the switch incorrectly, he was subject to such a suspension. The arbitration panel did not decide whether the urine test, which reported the presence of cocaine, marijuana and alcohol, had been reliably conducted.\textsuperscript{258}

After describing the \textit{Sheehan} decision, the appellate court observed that the Supreme Court had not addressed the question of whether a federal court can vacate an arbitration award under the RLA for public policy reasons but found that in \textit{Misco},\textsuperscript{259} the Court held it can do so.\textsuperscript{260} The fact that \textit{Misco} was decided under the LRMA, which, unlike the RLA, does not specify standards for judicial review of arbitral decisions, seemed to be of no interest to the court. Rather, the Eighth Circuit panel proceeded to cite a Supreme Court decision that held that a lower court cannot refuse to allow land to be transferred in violation of a racially restricted deed covenant and ruled that a federal court may vacate an arbitration award under the Railway Labor Act if the award violates well-defined and dominant public policies.\textsuperscript{261} The court stated: "[W]e hold that a court may refuse to enforce the parties' agreement where a public policy would be violated by enforcing the agreement, whether expressed in the form of a private contract or an arbitration award under either the National Labor Relations Act or the Railway Labor Act."\textsuperscript{262}

\textsuperscript{252} 3 F.3d 255 (8th Cir. 1993).
\textsuperscript{253} \textit{Id.} at 257.
\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} See 45 U.S.C. § 153 (2000) (allowing the parties to bypass the NRAB and use a review board consisting of an arbitrator selected by each side and an impartial arbitrator).
\textsuperscript{257} 3 F.3d at 257.
\textsuperscript{258} \textit{Id.}
\textsuperscript{260} 3 F.3d at 259.
\textsuperscript{261} \textit{Id.} at 259-260.
\textsuperscript{262} \textit{Id.} at 260.
As its basis for asserting that the award violated a public policy, the appellate court cited a variety of federal regulations prohibiting railroad employee usage of controlled substances and concluded that "there exists a well-defined and dominant public policy against a railroad's employment of individuals whose impaired judgment due to the use of drugs or alcohol could seriously threaten public safety." It also called attention to a series of federal regulations respecting drug and alcohol testing of railroad employees and quoted Title 49 Code of Federal Regulations section 219.104(a), which requires a railroad to "immediately remove the employee from covered service" if it receives a positive test result from its Medical Review Officer. Additionally, it cited section 219.104(d) which states a railroad may not return an employee to service following a positive test until the employee has been evaluated for alcohol or drug dependence, has successfully completed a program of counseling or treatment, and has tested negative for the presence of alcohol or controlled substances. The difficulty with the appellate court's reliance on those provisions is that they were added to the Code of Federal Regulations almost a year after the switchman had been dismissed. The appellate court's opinion did not indicate that it was aware of the fact that these regulations were not in existence when the alleged misconduct occurred, nor examine why the retroactive application of the amended regulatory requirements was mandatory or even permissible. It is noteworthy, however, that the appellate court did not go so far as to substitute its assessment of the case for that of the National Railroad Adjustment Board. Instead, it sent the case back to the district court with directions to remand to the Board so that the Board could conduct any added fact finding it thought necessary and determine what remedies were appropriate. Presumably, that review could inquire into whether there were jobs to which the employee could be assigned, pending rehabilitation, that did not pose a threat to safety (that is, did not constitute covered work) and did not require drug testing.

If one accepts the proposition that the RLA provides statutory

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263. Id. at 261.
265. Id. § 219.104(d).
266. Control of Alcohol and Drug Use, 54 Fed. Reg. 53, 259 (Dec. 27, 1989) (codified at 54 C.F.R. § 219). The Public Board decision was issued on June 20, 1991. Public Law Board No. 4689 Award No. 28 - Case No. 35. However, neither the majority nor dissenting opinion of the Board discussed the impact of either the earlier or the revised testing and use regulations.
267. 3 F.3d at 264. Accord, Bhd. of R.R. Signalmen of Am. v. S. Ry. Co., 380 F.2d 59 (4th Cir. 1967) (stating that remand is appropriate to give the Board an opportunity to reconsider and amplify awards in light of a case which was not decided when the awards were made).
guidance respecting the standard for judicial review solely for the rail industry, resort to LMRA standards for reviewing arbitration awards can, of course, more readily be justified in air carrier cases than in rail carrier cases. Without discussing the proper source for such review, the LMRA standard was adopted in *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, a case that involved a pilot who drank heavily the previous evening and up to at least 12:30 a.m. the evening before flying a 7:05 a.m. commercial flight. When the pilot arrived at the aircraft minutes before departure time, he was physically assisted into the cockpit, his face was very red, his eyes were glassed over, and he appeared disoriented. One witness testified that she could smell alcohol on his breath as he passed by and another that he had difficulty getting into his cockpit seat. Contrary to regulations, the cockpit crew disconnected the cockpit voice recorder for five minutes while discussing the concerns expressed by flight attendants regarding the pilot's condition. The pilot, nevertheless, continued to fly and land the plane. After landing, a blood-alcohol test was administered to him. By extrapolating the amount registered based on the time when it was administered, it was determined that his blood-alcohol level while flying was well above the level then generally used as the threshold for finding motor vehicle drivers guilty of operating under the influence of the drug. After his employment was terminated for violating government and airline regulations respecting the use of alcohol before flight time and prohibiting flying while intoxicated, the pilot entered a rehabilitation program which diagnosed him as an alcoholic.

The pilot grieved his dismissal. By a 3-2 decision, the arbitration board, established by the parties' collective agreement, decided that although the pilot's conduct was a dischargeable offense, he was to be reinstated without back pay or related benefits, but the airline was ordered to pay for the costs of the alcohol rehabilitation program in which he had participated. Affirming a district court's decision to set aside the award, the Court of Appeals for the Eleventh Circuit cited the *Misco* decision as the controlling authority and asserted that the award must be judged on the facts that existed at the time the pilot was dismissed. Hence, it treated his post-dismissal rehabilitation as irrelevant and any arbitral consideration given to such actions as constituting an imposition of the arbitrator's brand of justice in violation of *Misco* and the *Steelworkers* cases. The court did not explore whether the parties or industry had a bargaining history of giving weight to post-disciplinary rehabilitation efforts—facts that would indicate that the arbitral tribunal's action was based on standards that were implicit in the parties' collective agreement.

268. 861 F.2d 665 (11th Cir. 1988).
269. Id. at 669.
Additionally, the appellate court justified its position based on its finding that there is a "clearly established public policy which condemns the operation of passenger airliners by pilots who are under the influence of alcohol." The court then pronounced that if a public policy disfavors conduct that is integral to the performance of employment duties, an arbitrator must treat the employee’s violation of that public policy as just cause for dismissal. However, nothing in the appellate court’s decision asserted that law or regulations made it unlawful for a union and airline to agree to reinstate an alcoholic pilot who successfully completes a program of rehabilitation. Yet, that, of course, is the only situation in which, as explained by the Supreme Court in *Eastern Associated Coal Corporation*, the *Misco* decision’s public policy reference permits a court to set aside a grievance arbitration award.

Another air carrier decision that followed *Misco*’s guiding language was *American Eagle Airlines, Inc. v. Air Line Pilots Association*. The pilot in that case was dismissed for making ethnically disparaging remarks to a cleaning and catering employee working on the pilot’s aircraft, for bringing a knife with a three and a half inch blade onto an aircraft, and for sleeping while on board an aircraft. The System Board found insufficient evidence to support the accusation regarding sleeping but found the pilot guilty of the other violations and noted that the airline had a duty to rid the workplace of such conduct.

As part of its defense, the union asserted that the airline had been guilty of violating the collective agreement by not giving the pilot an opportunity to be heard or issuing a written decision prior to imposing the final disciplinary action. The airline, in response, argued that the failure to hold such a hearing was irrelevant because the collective agreement stated that if the employer failed “to provide a written decision to the pilot . . . or hold a required hearing within the time limits specified, the pilot and the Association may consider the grievance denied.” The System Board found merit in the union’s argument and reduced the dismissal to a ten-week suspension without pay.

A federal district court set aside the System Board award on the ground that the only consequence of the failure to provide the prescribed hearing was to contractually deem the grievance denied and that since the pilot was found guilty of serious wrongdoing, the airline had a contractual right to terminate his employment. In effect, the district court ruled based on its own interpretation of the collective agreement.

270. Id. at 671.
271. Id.
273. 343 F.3d 401 (5th Cir. 2003).
274. Id. at 403 (quoting section 20(g)(2) of the collective bargaining agreement).
In reviewing that decision, the appellate court, relying on *Eastern Associated*, observed:

Judicial review of a labor-arbitration decision by this Court, or by the district court, is extremely limited. Where the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority the fact that a court is convinced he committed serious error does not suffice to overturn that decision." Thus, if there is ambiguity as to whether an arbitrator is acting within the scope of his authority, that ambiguity must be resolved in favor of the arbitrator, as the mere "inference" of *ultra vires* action is an insufficient "reason for refusing to enforce the award."²⁷⁵

Moreover, as the Supreme Court further explained in *Enterprise Wheel & Car Corp.*: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."²⁷⁶

Nevertheless, in a 2-1 decision, the appellate court upheld the district court while failing to explain why it was not following earlier circuit precedent by applying the Railway Labor Act's standard of review for an airline industry grievance award.²⁷⁷ Additionally, the appellate court's rationale demonstrated that the deciding judges did not understand the concept of 'just cause' as that term is used in collective agreements.

When the phrase 'just cause', 'proper cause', 'good cause', or simply 'cause', is used in a collective agreement to describe the limitation of management's authority to dismiss or otherwise penalize an employee for misconduct, it is negotiated and adopted within the context of a long history in which most labor arbitrators construe the concept as having two dimensions. First, it requires the employer to prove by clear evidence that the worker was guilty of misconduct. Second, it requires the arbitrator to

²⁷⁵. *Id.* at 405 (citations omitted) (quoting E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57 (2000) and United Steelworkers of Am. v. Enter. Wheel & Car Co., 363 U.S. 593 (1960)).

²⁷⁶. 363 U.S. at 599.

²⁷⁷. *See* Air Line Pilots Ass'n v. E. Air Lines, Inc., 632 F.2d 1321, 1323 (5th Cir. 1980) (stating that judicial review of Board decisions is among the narrowest known to law and applying the same standard as it did in the *Eastern Airlines* case); E. Air Lines, Inc. v. Transp. Workers Union, 580 F.2d 169, 172 (5th Cir. 1978) (stating that a court may only set aside the Board's determination when the Board fails to comply with the Railway Labor Act, when there is fraud or corruption, or when the Board's order fails to confine itself to matters within the Board's jurisdiction); Hall v. E. Air Lines, Inc., 511 F.2d 663 (5th Cir. 1975) (stating that the Board's decision is final and not subject to review unless the petitioner alleges a denial of fundamental due process); Wells v. S. Airways, Inc., 517 F.2d 132 (5th Cir. 1975) (holding that the lower court exceeded its authority when it set aside the Board's determination absent denial of fundamental due process).
assess whether the magnitude of the discipline, in light of all of the circumstances of the employment relationship and the events at issue, was proportional to the misconduct and the principle that the primary objective of industrial discipline is correction, not punishment.278 This standard is analogous to requiring a party that has terminated a contract to justify its action by showing both that the other side breached its obligations and that the breach was sufficiently material to give rise to the discharge of its obligations under the contract.279

Thus, the Court of Appeals for the Fifth Circuit erred in American Eagle even under the Misco standard of judicial review. Not only did the court displace the arbitrators' interpretation with its own concerning the intended contractual consequences of violating the collective agreement's procedural requirements, the court additionally ignored the arbitrators' authority, under the just cause principle, to reduce discipline found to be excessive under all of the circumstances.

IV. STANDARD OF REVIEW IN THE CONTINENTAL AIRLINES CASE

We can now return to Continental Airlines, the case described at the beginning of this Article. It will be recalled that the airline maintenance mechanic was dismissed when, while working under a last change agreement, he admitted he had used an over-the-counter cough syrup that contained alcohol but thereafter was reinstated by the System Board because he had informed the Employee Assistance Program that he was taking the cough medicine and the EAP staff did not warn him that such conduct could place his job in jeopardy. The airline declined to abide by that decision and, instead, sued in federal district court to vacate the Board's award.

The district court's decision began by citing the Railway Labor Act's standards for judicial review of grievance awards but then, without explanation, shifted to the Enterprise Wheel & Car Corp. and Misco "essence of the contract" language. Emphasizing the holdings in various Supreme Court decisions that note the high degree of deference owed arbitral findings and contract interpretations, the district court rejected the motion to vacate and, instead, granted the union's counter-motion to enforce the award, a result that would have been equally supportable had the court applied the standard of judicial review set forth in RLA §§3 First

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279. 13 Sarah Howard Jenkins, Corbin on Contracts § 68.2 (Joseph M. Perillo ed., 2003) (discussing the discharge or suspension of a duty by the other party's breach of contract); John Edward Murray, Jr., Murray on Contracts § 107 (4th ed. 2001) (discussing different approaches to dealing with material breach of contract).
Continental appealed that decision and it was reversed by the Court of Appeals for the Fifth Circuit, the same court that decided the previously discussed American Eagle case.

Based on the authority of the American Eagle decision, the panel in Continental, after reciting the grounds for setting aside an award specified in RLA § First 3(q), quoted Misco's "must draw its essence from the contract" language and stated that that decision sets the standards for judicial review of RLA awards. The court then asserted: "The parties treat the EAP Agreement as though it were a part of or an addendum to the LCA, which it is. Thus, we treat the EAP and LCA as a part of the same agreement." The problem with that assertion is that it is not supported by the record. The System Board did not make such a finding. Nor was there any legal basis for stating that the EAP Agreement was part of or an addendum to the Last Chance Agreement since the Last Chance Agreement and EAP Agreement are separate and very different types of documents. Nor did the Last Chance Agreement incorporate the EAP Agreement by express reference.

The Last Chance Agreement was negotiated and signed by the employer, the grievant, and the union; as such, it was a modification or extension of the collective agreement. In contrast, the EAP Agreement was signed by the grievant and two members of management. It was neither negotiated nor signed by the union. Thus, the union was not a party to the EAP Agreement and did not consent to the employer and mechanic adopting rules that would supersede the Last Chance Agreement. Moreover, because the union had not agreed to the EAP Agreement and it did not exist until after the Last Chance Agreement was signed, the EAP Agreement was not part of and could not be merged into the Last Chance Agreement. Thus, it was an individual employment contract between the airline and the employee, not a collective agreement. Because it is well

281. Id. at 617 n.4.
282. Kathleen Birkhofer, Note, Last Chance Agreements: How Many Chances is an Employee Entitled To?, 2005 J. Disp. Resol. 467, 472-73 (2005) (stating that side agreements serve to clarify, add to, or change the collective bargaining agreement. Through these processes, these agreements become a part of the original agreement).
283. Petition for Writ of Certiorari, supra note 9.
284. The Last Chance Agreement was signed on September 5, 2000; the EAP Agreement was signed on November 10, 2000.
285. McKee v. City of Geneva, 627 S.E.2d 555, 557-58 (Ga. 2006) (stating that one document cannot be incorporated into another by reference if the document that is being sought to be incorporated did not exist at the time the other was created); Kleveland v. Chi. Title Ins. Co., 46 Cal. Rptr. 3d 314, 316 (Cal. Ct. App. 2006) (stating that an agreement cannot be said to incorporate another agreement by reference if the agreement that is sought to be incorporated was not made when other document was created).
settled that an agreement of an individual employee cannot supersede a collective agreement, the determination of whether the mechanic had failed to satisfy the conditions of his rehabilitation program had to be evaluated under the Last Chance Agreement, not the EAP Agreement.

While it is true that the Last Chance Agreement said the mechanic would undergo evaluation by the EAP and complete rehabilitation recommended by it “including all continuing terms and conditions attached to such course of rehabilitation,” and would be terminated if he failed “to comply with the provisions of the conditions of his continuing employment,” the Last Chance Agreement did not say that the EAP administrator would have the power to make a final determination of whether he was “satisfying the applicable requirements and conditions” of the course of rehabilitation or had failed “to comply with the provisions of the conditions of his continuing employment.” Nor was such a provision even contained in the employer-employee EAP Agreement. Moreover, the EAP Agreement itself called for the employee to “satisfactorily” complete the specified terms and conditions of the rehabilitation program, an adverb indicating that judgment would be exercised in assessing the mechanic’s conduct as contrasted to a narrow, rigid mechanical evaluation of his compliance or non compliance.

The System Board, accordingly, construed the Last Chance Agreement and the parties’ action in submitting the case for the Board’s decision as giving it final authority to determine whether the mechanic’s telephone call to the EAP satisfied the conditions attached to his course of rehabilitation. That decision was both an interpretation of the collective agreement (the Last Chance Agreement) and of the parties’ mutual intentions in submitting to the Board’s jurisdiction.

Accordingly, the Board then made the necessary fact finding of resolving whether the conditions of rehabilitation were satisfied when the mechanic relied on his doctor’s affirmative response that he could treat his cough with an over-the-counter cough medication. In weighing that finding, it considered his conduct in light of the failure of the EAP staff to warn him against such conduct after he left a message stating what he was doing. As the System Board explained: “The fact that the doctor approved the use of cough medicine . . . surely means that the Grievant did not take it upon himself to somehow circumvent the purpose of the Last Chance requirement by unsupervised self-medication.” In other words, the

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286. J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 336 (1944) (stating that an individual hiring contract is subsidiary to the terms of a collective bargaining agreement).
287. Petition for Writ of Certiorari, supra note 4.
288. Id.
289. Id.
Board found that, under the circumstances, the mechanic's conduct was satisfactory compliance with the conditions that had been imposed by the EAP.

In 1960, when it decided *Warrior & Gulf Navigation*, the Supreme Court warned: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."291 The accuracy of that observation is revealed by the ineptness with which the Fifth Circuit's panel in *Continental* reached its judgment. Despite its recitation of the *Misco* rules regarding the deference owed to arbitral decisions,292 the appellate panel rejected that System Board interpretation of the facts and the Board's assessment of the mechanic's conduct under the rehabilitation program. Rather than defer to the arbitral decision, the appellate court offered its own version of what was required of the mechanic, what events had taken place, and how the mechanic's conduct stacked-up against the program requirements:

The record establishes that Johnson contacted his doctor's office to schedule an appointment, that he spoke with a member of the doctor's staff, and that the staff member informed Johnson that the doctor could not prescribe medicine without an appointment, but approved his taking over-the-counter cough medicine until his appointment date. There is no evidence of any kind that Johnson or a member of the doctor's staff spoke with the doctor regarding Johnson's situation, or that the doctor, either directly to Johnson, or indirectly to his staff, instructed Johnson to take over-the-counter cough medicine which contained alcohol. Thus, the uncontested evidence is that Johnson's doctor never approved the use of the cough medicine he took, either orally or by a formal prescription. Because Johnson's doctor did not prescribe him medicine containing alcohol, his notification to the EAP director, and that person's not calling him back, is irrelevant. The LCA and EAP do not require a call back to Johnson. By failing to require proof of a doctor's order, the Board's interpretation effectively reads "doctor" out of the EAP Agreement. Such an interpretation is not an arguable construction of the agreements; thus, the Board exceeded the

331 (No. 04-1249) 2005 WL 1353214.
292. *Misco*, 484 U.S. at 38 (stating that an arbitrator's award is to be upheld as long as the arbitrator "is even arguably construing or applying the contract"). Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters, 391 F.3d 613, 620 (5th Cir. 2004), *cert. denied* 126 S. Ct. 331 (2005) (stating that an arbitrator's decision is to be upheld as long as the arbitrator is "even arguably construing or applying the contract").
scope of its jurisdiction in fashioning its award.\textsuperscript{293}

Thus, even though the EAP Agreement was not a contract between the union and management from whose essence \textit{Misco} requires that a governing rule be drawn, the appellate court looked to its wording in insisting that only if a physician ordered the use of the over-the-counter cough medicine could there be compliance with the rehabilitation program. And, although the EAP Agreement spoke of “satisfactorily” meeting the terms of the agreement, the court did not explain why the mechanic’s actions could not reasonably be construed by the System Board to constitute satisfactory fulfillment of his obligations. True, there is ambiguity in the EAP Agreement respecting whether “satisfactorily” modifies only the performance/attendance requirement or both that requirement and the requirement that he complete the terms of the agreement. That, of course, poses an issue for contract interpretation and, as the Supreme Court has emphasized, “the question of interpretation of the collective bargaining agreement is a question for the arbitrator.”\textsuperscript{294}

Nevertheless, in \textit{Continental}, the Court of Appeals for the Fifth Circuit offered no explanation as to whether, in interpreting the collective agreement’s requirement of adherence to the prescribed rehabilitation program, it had considered the significance of the provision’s adverb “satisfactorily” and, if so, why it construed the mechanic’s conduct as being beyond what could be judged by the System Board as acceptable fulfillment of that requirement. Hence, the appellate court supplanted the System Board’s role as the reader of what the appellate court mistakenly treated as the collective agreement. The appellate court, then, not only based its reasoning on a source other than the parties’ mutual collective agreement, in proclaiming to be applying the collective agreement it disregarded the recited rule that placed that responsibility in the hands of the arbitral tribunal. In short, the appellate court ignored the Supreme Court’s caution in the \textit{Warrior & Gulf} case where it said:

\begin{quote}
The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.\textsuperscript{295}
\end{quote}

Clearly, then, even if \textit{Misco} provides the controlling standard for judicial review in such cases, the Fifth Circuit panel revealed its ineptness

\textsuperscript{293} \textit{Continental Airlines}, 391 F.3d at 620.
\textsuperscript{295} \textit{Warrior & Gulf Navigation Co.}, 363 U.S. at 581-82.
as a reader of collective agreements, its lack of understanding of the significant difference in labor law between a collectively bargained agreement (the Last Chance Agreement) and an individual employment contract (the EAP Agreement), and its unwillingness to do more than give lip service to the repeated rulings by the Supreme Court respecting the very high degree of deference to be given to a labor arbitrator's findings and interpretations.

V. CONTINENTAL RECONSIDERED IN LIGHT OF THE RLA’S STANDARD OF REVIEW

Because there is no specific language respecting enforcement of labor arbitration awards in the Labor Management Relations Act (the foundation for the so-called Misco standard), the Supreme Court found it necessary to declare that the governing law for such cases is to be derived from the broader policies of federal labor laws. However, the same need does not exist with respect to airline grievance awards since the process for resolving these minor disputes is a by-product of the system of industrial relations imposed by the Railway Labor Act, which specifies the standards for judicial review of such awards.

The legislative history of the Railway Labor Act, and the Act’s cross reference to the section 3 jurisdictional restrictions, included in the airline provision mandating establishment of grievance tribunals, reveal that the only limitation intended by Congress when it brought the airline industry within the Act was to allow continued use of enterprise arbitration tribunals rather than impose an industry-wide adjustment board system. In all other respects the RLA’s policies were to be equally applicable to the airline industry. And, since the RLA contains an explicit standard for judicial review of arbitral awards, there is no justification for courts to take upon themselves the development of a variant of that standard. Nor have any of the courts that have intruded upon the Railway Labor Act in this manner offered a justification for rejecting that statutory standard. Therefore, the greater force of history and logic favors the conclusion reached by those courts that apply the RLA’s Section 3 First standards when reviewing airline industry grievance awards.

Had the appellate panel in Continental applied only the three criteria specified in RLA section 3 First (q) for setting aside an award, it is doubtful that it could have done anything other than enforce the award since: a) nothing about the award or the System Board’s procedure failed to comply

with the Railway Labor Act, b) the decision did not go beyond the question submitted to the System Board, and c) there was no evidence of fraud or corruption by a Board member. Moreover, since RLA section 3 First (q) makes the award’s fact findings “conclusive,” the court was without authority to second-guess the System Board’s finding regarding whether the mechanic’s physician had authorized his use of the cough medicine. Hence, abiding by RLA section 3 First (q) would have prevented the court from exceeding its competence by favoring its own fact-findings and interpretations for those of the decision maker selected by the parties.

The virtues of the limiting judicial review to the statutorily specified criteria are that they maximize the stability of collective bargaining relations by ensuring that grievances will be resolved with the specialist’s insight provided by the impartial decision makers mutually selected by the parties and that grievances will be resolved promptly with finality. Those who regard grievance settlement as one of the bulwarks of sound labor-management relations, therefore, would prefer to confine judicial review to the three very narrow statutory standards stated in RLA section 3 First.

However, as previously discussed, the legislative history of the RLA, as well as fundamental principles of constitutional law, require the bench to additionally ensure that a System Board not violate the litigants’ constitutional rights. Obviously, subsumed within the Fifth Amendment’s due process requirement is the need to abide by such fundamental rules of procedural fairness as the opportunity to present relevant evidence and arguments, confront the other side’s evidence, have an independent spokesperson, and have a trier who is independent and impartial.297 Also, due process requires that a decision be within the scope of decisional authority bestowed on the decision maker and that courts refrain from enforcing awards that require illegal conduct.298 Finally, although the Constitution does not guarantee that fact-findings or contractual interpretations are correct,299 a wholly arbitrary decision is inconsistent

298. See Evans v. Newton, 382 U.S. 435 (1970) (holding that where private actors take on governmental functions, they become instrumentalities of the state that are subject to the due process requirements of the Fourteenth Amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (holding that although privately owned, if property is devoted to community activities its use cannot interfere with fundamental liberties). See also, supra notes 145-46, 176, 190-91 and accompanying text (discussing due process).
with due process.\textsuperscript{300}

While the very narrow scope of review added by due process constraints would be insufficient to permit honest, diligent judges from venturing into substituting their own fact-finding and contract interpretations for that of a System Board selected by the parties, the Fifth Circuit panel's opinion in \textit{Continental} reveals no such reticence. As previously noted, after substituting its own version of the facts and governing agreements, it rejected the System Board's reasoning stating: "Such an interpretation is not an arguable construction of the agreements; thus, the Board exceeded the scope of its jurisdiction in fashioning its award."\textsuperscript{301} Accordingly, even had it applied the correct standard of judicial review, this particular judicial panel very well may have persisted in ignoring the Supreme Court's clear warning in \textit{Enterprise Wheel & Car} that: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."\textsuperscript{302}

In summary, the stability of airline industry arbitration awards should be increased if the Supreme Court announces that judicial review is limited to the RLA section 3 First criteria plus those due process constraints essential to the legitimacy of government actions. (Indeed, in light of the explicit statutory authority supporting this approach, it might also be the preferable guidepost for the Supreme Court's efforts to fashion judicial review formulas under the LMRA). Although the arrogance of power may cause some judges to continue to fall victim to the temptation of imposing their personal brand of wisdom as the ultimate benchmark for resolving all disputes, perhaps they, too, will gain the needed self-discipline if the Supreme Court also specifically cites the renegade circuits in which jurists

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persist in substituting their findings and interpretations for those of the parties' selected contract enforcers.