NOS. 22-3648, 23-1325

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNION PACIFIC RAILROAD CO.,
Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA,
Respondents,

AMERICAN CHEMISTRY COUNCIL, CORN REFINERS ASSOCIATION, NATIONAL GRAIN AND FEED ASSOCIATION, NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, AND THE FERTILIZER INSTITUTE,
Intervenors.

ASSOCIATION OF AMERICAN RAILROADS,
Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review from the Surface Transportation Board (Docket Nos. EP 665 & 755)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS AND SETTING ASIDE THE FINAL RULE

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INTEREST OF AMICUS CURIAE*

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INTRODUCTION

If it "looks like a duck, walks like a duck, and quacks like a duck" then it "will be treated as a duck even though some would insist upon calling it a chicken." *United States v. Saeugling*, 826 F. App'x 577, 578 (8th Cir. 2020) (per curiam) (quoting *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 128 n.3 (5th Cir. 1983)). This rule bars litigants from defining a term in some nonsensical way just to avoid the consequences

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* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

of using the correct label. For example, one cannot avoid the bar on second or successive habeas petitions by labeling a filing a Rule 60(b) motion. *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). The same holds true for labeling the filing a petition for a writ of *error coram nobis*. *Trenkler v. United States*, 536 F.3d 85, 97-99 (1st Cir. 2008).

The Surface Transportation Board admits that it lacks statutory authority to order parties to arbitrate their rate disputes. So it can't call the Final Rule's new process arbitration. If it called it arbitration, summary vacatur would be proper. The STB instead calls the process Final Offer Rate Review. But the process looks like arbitration, walks like arbitration, and quacks like arbitration. Thus, it is—and must be treated as—arbitration. It does not matter what the STB calls it. The Final Rule therefore exceeds the STB's statutory authority.

Even if the STB had statutory authority to order arbitration of rate disputes, the Final Rule is arbitrary and capricious. The Final Rule is modeled after Major League Baseball's salary-arbitration system. But many things that allow MLB's arbitration system to operate are absent in the Final Rule or in the railroad sector generally. And faults with MLB's arbitration system are also present in the Final Rule and the

railroad sector generally. This means that the Final Rule incorporates the worst part of MLB's salary-arbitration system and casts the best parts aside.

Because the STB lacked statutory authority to issue the Final Rule, which in all events is arbitrary and capricious, this Court should set aside the Final Rule.

SUMMARY OF ARGUMENT

I. Administrative agencies have limited power. The STB admits that its limited power does not include the power to compel arbitration. But that is what the Final Rule does. The Final Rule forces parties to participate in final-offer arbitration, even if the STB gives it the moniker of Final Offer Rate Review.

Congress decided that the STB should use its expertise and independent judgment to choose the maximum reasonable rate for railroad shipping. The Final Rule strips the STB of that power. It gives the parties the ability to set the maximum reasonable rate based on their own self-interests. Because this conflicts with Congress's directive, the STB exceeded its statutory authority by issuing the Final Rule.

II.A. The Final Rule is arbitrary and capricious. Although the Final Rule is based on MLB's salary-arbitration system, some aspects of that system are not in the Final Rule. For example, it is easy to make comparisons using baseball statistics so that parties and arbitrators have a general idea of what the fair salary is. There is no such statistical method available in the railroad industry to make easy comparisons. Second, given how the MLB collective bargaining agreement works, there is artificial pressure for MLB teams to settle with their players. There is no such artificial pressure for shippers to settle cases with the railroads. In fact, shippers are incentivized not to settle.

B. The Final Rule also includes the worst part of MLB's salary-arbitration system. When there is no agreement on a methodology—which will happen in most cases—the STB members lack any objective criteria to use when deciding which rate to pick. Because the parties can't know which criteria the STB will be using, they will present evidence on differing criteria. In other words, the Final Rule incentivizes parties to talk past each other rather than engage each other. This mirrors the small percentage of cases that go to a hearing in the MLB salary-

arbitration system. And it is one reason why people on both sides of the MLB system want it fixed.

ARGUMENT

I. THE STB LACKS STATUTORY AUTHORITY TO REQUIRE PARTIES TO ARBITRATE RATE DISPUTES.

Administrative agencies like the STB "possess only the authority that Congress has provided." *NFIB*, 142 S. Ct. at 665. Congress gave the STB authority to resolve disputes over railroad rates. 49 U.S.C. §§ 10704(a)(1), 10709(c)(1). Congress also provided the STB with rulemaking authority. *Id.* § 1321(a). But the power to issue regulations to carry out an agency's mission does not give it unlimited power. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam); *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Environmental Protection Agency could not issue regulations exceeding its statutory authority).

The STB must decide rate disputes in a way that complies with its statutory mandate. Typically, that means engaging in stand-alone analysis. "Designed to test the reasonableness of railroad rates," this analysis "requires that a carrier's rates may not exceed the rates a hypothetical stand-alone railroad would have to charge in order to

recover the costs of building a rail system to carry the complaining shipper's traffic and earn a reasonable return." *Burlington N. R. Co. v. Surface Transp. Bd.*, 114 F.3d 206, 212 (D.C. Cir. 1997) (cleaned up). This "ensures that the captive shipper is not required to cross-subsidize other traffic." *Bituminous Coal—Hiawatha, Utah, to Moapa, Nev.*, 10 I.C.C.2d 259, 319 n.5 (1994).

The STB admits that it "may not require arbitration of rate disputes under current law." *Final Offer Rate Review; Expanding Access to Rate Relief*, 88 Fed. Reg. 299, 301 (Jan. 4, 2023) (Add. 1; App. 168); *see* 49 U.S.C. §§ 10704(a)(1), 11704(c)(2). It also claims that "it is not doing so here." 88 Fed. Reg. at 301 (Add. 3; App. 170). But that is precisely what it is doing.

According to the preeminent legal dictionary, final-offer arbitration is a form of arbitration. *See* Arbitration, *Black's Law Dictionary* (11th ed. 2019) (final-offer arbitration is "[a]n arbitration in which each party submits a 'final offer' to the arbitrator, who must choose one or the other party's final offer in making the award"). And scholars agree that the Final Rule's process is arbitration. *See* Steven J. Brams & Samuel Merrill III, *Binding versus Final-Offer Arbitration: A Combination is Best*, 32 J.

Mgmt. Sci. 1346, 1346 (1986) (describing two procedures for arbitration); Henry S. Farber & Max H. Bazerman, *The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final-Offer Arbitration*, 2, Mass. Inst. Tech. Working Paper Dept. of Econ. (Oct. 1984) (final-offer arbitration is a "type[] of arbitration"). The STB cannot alter the nature of the proceeding just by changing its label to Final Offer Rate Review. If it looks like final-offer arbitration and behaves like final-offer arbitration, that is what it is, the STB's label notwithstanding. *See Saeugling*, 826 F. App'x at 578; *Turtle Island Foods SPC v. Soman*, 2022 WL 4627711, *15-16 (E.D. Ark. Sept. 30, 2022).

The reasons for barring mandatory arbitration in the rate-review process are sound. "During its [first] sixty-five years of existence the [Interstate Commerce] Commission developed an enviable reputation for honesty, impartiality, and expertness." Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 Yale L.J. 467, 468 (1952). Congress wanted the STB to use its expertise and exercise its independent judgment when deciding maximum reasonable rates. In other words, Congress valued the ICC's hard-earned reputation for fairly adjudicating disputes between

railroads and shippers based on its expert knowledge. So when Congress created the STB as a successor agency, it wanted the STB to use that expertise and independent judgment when settling future rate disputes. The Final Rule strips the STB of the ability to use its independent judgment and expertise when setting the maximum reasonable rate.

Eliminating the STB's expertise and independent judgment is important because rate-setting is a matter of public interest. This public interest is what led Congress to give the STB the authority to set rates. In normal commercial transactions, only private interests are at stake. So parties might agree to final-offer arbitration because resolving disputes efficiently is more important than getting the "right" result. In other words, parties can put themselves in the driver's seat when the result does not affect the public interest. Setting rates for common carriers is different.

The STB cites its three-benchmark methodology to support its argument that the Final Rule still allows it to use its expertise and independent judgment. *See* 88 Fed. Reg. at 301 (Add. 3; App. 170). But that argument rings hollow. As even the STB must admit, the final-offer component "is only one part of the rate reasonableness approach [using

the three-benchmark methodology] as opposed to providing the overall framework, as the" Final Rule provides. *Id.* It is the rest of the three-benchmark methodology that gives the STB the ability to use its independent judgment and expertise when setting the maximum reasonable rate. Under the Final Rule, it is impossible for the STB to exercise independent judgment and deploy its expertise.

If the STB is confident in what the maximum reasonable rate is given the relevant statutory factors and its expertise, it can order that rate only if a party proposes it. The chance of that happening is tiny. What is more likely is for the STB to be forced to pick an unreasonable rate without considering the public interest. That is exactly what Congress sought to avoid by requiring the STB to use its independent judgment and expertise when setting rates. The Final Rule mocks that Congressional choice.

In short, the Final Rule is arbitration in everything but name. As the STB has admitted, it lacks statutory authority to require parties to arbitrate. That alone requires setting aside the Final Rule. But even if the Court were to take the STB at its word and conclude that the Final Rule is not arbitration, it still does not fit Congress's directives on how to

set the maximum reasonable rate. Rather than allow the STB to exercise independent judgment and use its expertise, the Final Rule puts the parties in the driver's seat. That is yet another reason to set aside the Final Rule.

II. THE FINAL RULE IS ARBITRARY AND CAPRICIOUS.

A final rule is "arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view." *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up)). The STB ignored myriad important aspects of how railroad disputes are resolved when compared to MLB salary disputes. It also made a decision that is so implausible that it could not be ascribed to a difference in opinion.

Again, the Final Rule is modeled after MLB's salary-arbitration system. Under this process, players with between three and six years of MLB service time and who lack a long-term contract are eligible for salary arbitration. *See* Darragh McDonald, *MLB Makes Minor Tweaks To*

2023 Rule Changes, MLB Trade Rumors (Mar. 22, 2023), https://tinyurl.com/4m7y884w. The top 22% of players with between two and three years of service time are also eligible for salary arbitration. *See* Darragh McDonald, *Super Two Status Set At 2.128 Years Of Service*, MLB Trade Rumors (Mar. 22, 2023), https://tinyurl.com/5hftjfve.

The process by which players and owners simultaneously exchange figures and the arbiters pick one of the two offers is known as baseball arbitration. Many people view the system as a success because less than twenty percent of eligible players go to arbitration; the parties settle the rest. *See* Mark Feinsand, *Arbitration roundup: 33 exchange figures*, MLB (Jan. 14, 2023), https://tinyurl.com/4s2bhx3x. But all the reasons it is successful are missing from the Final Rule and the railroad industry in general. And all sides agree that the MLB salary-arbitration system could use some tweaks.

A. The Final Rule Lacks The Characteristics That Make MLB's Salary-Arbitration System Work.

The reasons why arbitration leads to so many settlements in MLB are lacking in the context of railroad rates. These differences are what the STB overlooked when issuing the Final Rule. Doing so caused the

STB to make a flawed assumption—that the Final Rule will lead to most disagreements being settled amicably. This was arbitrary and capricious.

1. The Final Rule assumes that the parties know what the maximum reasonable rate is. Because of this common understanding, the parties can make their offers based on the maximum reasonable rate and whether they want to risk submitting a figure far from the maximum reasonable rate. This leads the parties' offers to converge at the maximum reasonable rate.

In MLB, this is a safe assumption. Several websites use statistical models and past arbitration decisions to publish projected salaries for salary-arbitration eligible players. *See* Steve Adams, *Projected Arbitration Salaries For 2023*, MLB Trade Rumors (Oct. 10, 2022), https://tinyurl.com/2p8t7pjp. The final figures that teams and players agree to, or that arbitrators pick, generally track these projections. *See* Matt Swartz, *The MLB Trade Rumors Arbitration Model Had Its Best Year Ever*, MLB Trade Rumors (Feb. 22, 2023), https://tinyurl.com/mbbfxstm. In other words, the parties generally have a good sense for what is a fair salary for MLB players.

The same is not true for the railroad industry. Every time a shipper challenges a rate before the STB there are very few, if any, market-driven comparables that the parties and the STB can use to determine the maximum reasonable rate. There is no wins-above-replacement calculation, batting average, or saves total for the parties to compare to see what the maximum reasonable rate is. In other words, the cases eligible for MLB salary arbitration are more homogeneous than the rate disputes that the Final Rule would cover. Those rate disputes are very heterogeneous, and it is tough to calculate a consensus maximum reasonable rate that the parties can use as an anchor for final-offer arbitration.

This is why the STB's assumption is arbitrary and capricious. It assumes that railroads are more risk averse than shippers. Thus, the railroads' offers will be closer to the maximum reasonable rate than the shippers' offers. Over time, this will lead to downward price pressure until they reach the maximum reasonable rate. In mathematical terms, the offers quickly converge to the limit—the maximum reasonable rate.

But this assumption completely crumbles when there is no easy way to determine the maximum reasonable rate. When the parties and

the STB all have wildly different views on the maximum reasonable rate and no way to predict which party's proposal is closer to the rate the STB considers the maximum reasonable rate, then the railroad's and the shipper's offers do not converge on the maximum reasonable rate. Rather, they continue to bounce around. This makes it impossible for the Final Rule to lead to more settlements closer to the maximum reasonable rate.

The shippers have no incentive to offer high rates under this system. They face a no-lose situation. At worst, they keep paying the rate the railroad is charging them—a rate they believe is too high. At best, the STB adopts their final offer and they see much lower rates for shipping. So the mechanism for reaching the right rate under the Final Rule all depends on the railroads' lowering their rates until they reach what is perceived as the maximum reasonable rate. But again, without a meaningful way for parties to calculate what that maximum reasonable rate is, the process is unlikely to approach the limit of the maximum reasonable rate.

2. The Final Rule also does not match MLB salary arbitration in the effect it has when parties go to arbitration. Typically, negotiations between railroads and shippers are impersonal. They are two large

corporations that are engaging in a business transaction. Although negotiations may get heated, the individuals on both sides of the table are not the ones making the decisions. Rather, it is typically executives that make those decisions while their subordinates negotiate. Thus, there is distance between the negotiators and the people making the decisions.

But even if there were not that distance, company officers and directors have a fiduciary duty to the shareholders of the corporation to do what is best for the corporation. That means setting personal differences aside and not allowing past negotiations to play a role in whether future negotiations will occur. And the railroads don't have a choice on whether to negotiate with the shippers because they are common carriers.

In MLB, however, things get very personal when a case goes to arbitration. The player himself is present during the hearing, as are team executives. Typically, the team is indifferent to what the player argues. This is for the same reason that railroads and shippers are indifferent to negotiation details. The teams are corporate entities that see arbitration as a part of doing business.

The player, however, doesn't feel the same way. The team normally attacks the player's worth during arbitration while trying to show that the arbitrators should choose the lower offer. For example, this winter Corbin Burnes—one of the world's best pitchers—lost his arbitration hearing. He took what the team said in the hearing personally. Todd Rosiak, *Corbin Burnes feels disrespected by the Brewers organization, says relationship damaged after salary arbitration case*, Milwaukee J. Sentinel (Feb. 16, 2023), https://tinyurl.com/3z5hy9ez. As Burnes said after the hearing, "At the end of day, here we are. They won it. But when it came down to winning or losing the hearing, it was more than that for me." *Id.*

The damage to relationships caused by going to arbitration is a big incentive for the teams to reach an amicable agreement before arbitration happens. MLB teams control players for only six years. *Service Time*, MLB, https://tinyurl.com/2p89zk8k (last visited Apr. 16, 2023). After the sixth year, either the third or fourth year a player is eligible for salary arbitration, players become unrestricted free agents and can sign elsewhere. *Id.* Teams do not want to hurt their chances of

re-signing their players because they are fighting over, what to them, amounts to a fraction of their payroll.

Star players, particularly those that rose through a team's minor league system, are worth more than just their on-field contributions. That became evident recently when the New York Yankees signed Aaron Judge to a $360 million contract. *See* Bryan Hoch, *Judge's record deal with Yanks official*, MLB (Dec. 20, 2022), https://tinyurl.com/33fhkjbp. Although the deal probably will not return the normal value in dollars per win above replacement, more merchandise sales and gate revenue will make up for the difference. When fan goodwill is included in the equation, the Yankees may receive a surplus from retaining a star player. This surplus is typically limited to the MLB team that controlled a player through his arbitration-eligible years. The incentive for MLB teams is thus strong to avoid arbitration and reach an agreement before the hearing.

There is no such incentive for shippers and railroads to reach an agreement before going to arbitration. It is not as though the railroads will refuse to move goods for the shippers in a few years. Indeed, railroads must move goods because of their common carrier obligations. The major

internal pressure that leads to agreements in MLB salary arbitration is missing from the Final Rule. And the STB cannot add that pressure. The structure of the railroad industry, combined with federal law, makes the railroad system unfit for an arbitration system that resembles MLB's salary-arbitration system.

The STB's failure to consider this very practical structural difference with the railroad industry is arbitrary and capricious. The STB should have explained how the Final Rule would accomplish the same goals as MLB's salary-arbitration system despite lacking the same incentives for settlement. Its failure to do so requires setting aside the Final Rule and beginning a new rulemaking process.

B. The Final Rule Includes The Features Of MLB Salary Arbitration That Have Caused Problems.

Although MLB salary arbitration works most of the time and the parties often reach an agreement without going to a hearing, sometimes the process breaks down. That is why MLB participants on both the management and labor side dislike the system. *See* Ken Rosenthal, *Rosenthal: Tension over MLB salary arbitration rulings could translate to another battle*, The Athletic (Feb. 20, 2023), https://tinyurl.com/53vfv7ru.

The problem with MLB's salary-arbitration system is that in a few cases no one agrees on the proper methodology. Those cases go to a hearing where three arbitrators pick one side's offer. The problem is that throughout the hearing process neither side knows which metrics a panel of arbitrators will use to pick the winning offer. An example from this year shows how one side may present a case based on one set of values while the other party presents a case based on an entirely different set of values.

Arbitrators use six factors when deciding which offer to pick in MLB salary arbitration. *See* Ryan Thompson, @R_Thompson15, Twitter (Feb. 22, 2023, 9:39 p.m.), https://tinyurl.com/ywue5c7h. But that does not mean that both parties and the arbitrators agree on what the criteria are. The lack of detailed explanation of which factors the arbitrators should consider has led to different focuses during hearings.

Two criteria include performance during the last season and career performance and consistency. Thompson, *supra*. Thompson is a relief pitcher. When discussing these criteria during his arbitration hearing two months ago, he focused on holds (keeping the lead when he pitched) and leverage index (pitching in important situations). *See id.* His team,

on the other hand, focused on blown saves (giving up the lead when eligible for a save entering the game), meltdowns (the chance of winning while the pitcher is in the game decreasing by at least 6%), and how often he faced left-handed hitters. *See id.* The differences were important because they affect a third criterion, salaries of comparable players. Using Thompson's chosen stats, he looks like Brusdar Graterol—one of the better relievers in MLB. But using the team's chosen stats, he does not.

A fourth criterion is history of mental and physical injury. *See* Thompson, *supra*. This may seem straightforward. But it's not. Thompson focused on the number and duration of his injuries. His team focused on when those injuries occurred. Again, the parties could not agree on the rules they were playing by. (Imagine the home team thinking you needed four strikes to strikeout while the visitors think only three strikes are needed.)

The Final Rule's problem is much more pronounced. In MLB there is agreement on methodology over eighty percent of the time. There will rarely be agreement regarding the methodology for calculating railroad rates. Thus, most of the disputes will go to a hearing where the STB will

consider "the [Rail Transportation Policy], the Long-Cannon factors in 49 U.S.C. § 10701(d)(2), and appropriate economic principles." 88 Fed. Reg. at 302 (Add. 4; App. 171). There is so much wiggle room in those factors that a Union Pacific train could drive through it.

Start with Rail Transportation Policy. There are no real criteria for the STB to consider when deciding which rate to pick. STB members and parties may each have a different way they believe that the Rail Transportation Policy should guide rate setting. The same is true of the Long-Cannon factors. But worst of all is the catch-all "appropriate economic principles." 88 Fed. Reg. at 302 (Add. 4; App. 171).

There are lots of economic principles at play in every rate-setting case. Which ones are "appropriate" and which ones are not? No one knows based on the Final Rule. So parties appearing before the STB will have to guess and focus on a few in their presentations to the STB. This means that, just like in MLB salary arbitration, the parties will talk past each other rather than engaging on substance.

The Final Rule includes all the vices of MLB salary arbitration with none of its virtues. The STB did not explain why these concerns that have arisen with MLB salary arbitration will not also plague arbitrations

under the Final Rule. At a minimum, the STB should have set forth detailed criteria that the parties and the STB could rely on when a case goes to an arbitration hearing. Its failure to do so was arbitrary and capricious. The Court should thus set aside the Final Rule.

CONCLUSION

This Court should set aside the Final Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,268 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

Finally, I certify that the electronic version of this brief was scanned with Bitdefender Antivirus Plus and no virus was detected.

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April 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on April 17, 2023, I served all counsel of record via the Court's CM/ECF system.

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April 17, 2023