No. 09-1212

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BILLY GROVES, INDIVIDUALLY,
DBA SAVANNAH RE-LOAD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The United States does not deny that the Petition presents a square, acknowledged conflict of authority. Pet. 22-26. The rule "for several decades" was that a warehouseman "shown as a consignee in the bill of lading" was "subject to demurrage or detention charges." U.S. App. 5a, 6a. In the decision below, which the United States does not defend, the Eleventh Circuit departed from that "well accepted" rule. *Id.* 5a; see *id.* 6a-7a; U.S. Br. 7-8. Fundamentally, therefore, the national rail system now is governed by different rules in different States: A railcar moving from Pennsylvania to Georgia operates under different demurrage rules than a railcar traveling in the opposite direction. The United States does not deny that this conflict implicates the movement of more than a million railcars and billions of tons of freight per year. Pet. 10. In fact, it agrees that "[t]he efficiency of railroads and the prevention of undue detention of railcars are matters of national importance." U.S. Br. 3; see Pet. 17, 25-26 (discussing importance of the issue and consequences of the decision below); AAR Br. 3-7 (same). These are the traditional reasons to grant certiorari, and that is what the Court should do.

The United States' sole basis for recommending denial of certiorari is that the STB has "issued an Advance Notice of Proposed Rulemaking" (ANPR). U.S. Br. 8. Although the STB "has long been involved in resolving demurrage disputes," U.S. App. 3a, and "[t]he decision below was rendered over a year ago," U.S. Br. 18, the STB first determined to "explore" the issue, U.S. App. 9a, one week before the United States filed its invitation brief. The ANPR provides no basis to deny certiorari. By its terms, the STB has

not committed to take any action at all. Even if some rulemaking were to ensue, it is unclear when that might happen. And, there is no reason to believe that any action the STB does take will "resolve" the conflict. *Id.* 9-10. For instance, the courts of appeals (including especially the Eleventh Circuit) may well disagree with any conclusion the STB reaches. Presumably for these same reasons, the Court in the past has granted certiorari notwithstanding possible action by another branch of government.[1] It should do likewise here.

1. First and foremost, it is far from clear that the STB will take any action to resolve the circuit split (even if it could, *infra* 7-8). Its action to date is purely tentative: The STB did not issue even a standard Notice of Proposed Rulemaking, but rather only an *Advance* Notice of Proposed Rulemaking. U.S. App. 1a. An ANPR is "a third stage to the rulemaking process ... that solicits comments on a general problem but proposes no solution." Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1065 (1986); see James T. O'Reilly, *Administrative Rulemaking* § 5:6, at 136 (2d ed. 2010) (an ANPR "announces the agency's general ideas and approaches on a topic, and opens a period of informal public

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[1] *Compare, e.g.*, *Knight* v. *Comm'r*, 551 U.S. 1144 (2007) (granting certiorari), *with* Reply Br. *4-7, *Knight*, 2007 WL 1594328 (discussing draft NPR the United States asserted as a basis for denying certiorari); *and Wis. Dep't of Health & Family Servs.* v. *Blumer*, 553 U.S. 927 (2001) (granting certiorari), *with* U.S. Br. as *Amicus Curiae*, *Blumer*, 2001 WL 34136615 (HHS "plans promptly to promulgate regulations addressing the question presented here"). *See also Rush Prudential HMO* v. *Moran*, 533 U.S. 948 (2001) (granting certiorari notwithstanding pending legislation); *Thomas* v. *Outboard Marine Corp.*, 479 U.S. 811 (1986) (same).

comments"). This ANPR follows that pattern. Far from promising rulemaking, the "agency's intent" is to "adopt a rule *or policy statement*." U.S. App. 1a (emphasis added). The STB is "instituting this proceeding to explore *whether* [it] should look to a new way of determining the liability of warehousemen for demurrage." *Id.* 9a (emphasis added).

In short, there is no reason to assume that the STB will issue any new rules. Like other agencies, the STB in the past has issued ANPRs that did not result in NPRs,[2] and NPRs that did not result in rules.[3] See generally Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 Yale J. on Reg. 1, 40-41 (1989) ("Agency administrators can use the [ANPR] process, which can last from six months to a year, to avoid hard decisions. Invoking the ANPR process demonstrates some movement by the Agency, but does not necessitate any final decisions."). Nothing in the United States' brief is to the contrary. It states that the STB has "recently *initiated* a rulemaking *proceeding*." U.S. Br. 5 (emphases added). It floats the possibility of actions the STB might take—for instance,

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[2] *E.g.*, *Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads*, Ex Parte No. 647, 2006 STB LEXIS 772 (Dec. 15, 2006); *Petition For Rulemaking—Invoiceless Billing Transactions*, Ex Parte No. 55 (Sub-No. 95), 1997 STB LEXIS 65 (Apr. 15, 1997).

[3] *E.g.*, *Interpretation Of The Term "Contract" In 49 U.S.C. 10709*, Ex Parte No. 669, 2007 STB LEXIS 138 (Mar. 29, 2007) (NPR); 2008 STB LEXIS 131 (Mar. 12, 2008) (declining to adopt rules; discontinuing proceedings); *Rail Transportation Contracts Under 49 U.S.C. § 10709*, Ex Parte No. 676, 2008 STB LEXIS 763 (Jan. 6, 2009) (further, related NPR); 2010 STB LEXIS 19 (Jan. 22, 2010) (declining to adopt rules; discontinuing proceedings).

that the STB "is open to reconsidering" prior decisions of the Interstate Commerce Commission, see *id.* 17. That the Solicitor General is left to speculate in this fashion only confirms the inherent uncertainty about whether the ANPR will lead to meaningful agency action.

That speculation stands in direct contrast to the absolute certainty that unless this Court acts, the important conflict will persist, leaving the national rail system to operate under different rules depending upon location. The Third Circuit properly embraces the rule—which, the STB acknowledges, long ago "became well accepted," U.S. App. 5a; see Pet. 13-16 & nn.9-11—that a consignee that accepts a shipment is liable for demurrage. This rule makes good sense—consignees do not receive railcars by accident. They are businesses served by railroad tracks and, obviously, railroads deliver shipments that the consignee contracted to receive. The consignee is receiving freight from the shipper, not the railroad: "[T]he warehouseman is the one who has the relationship with the shipper, and it should not be the carrier's responsibility to investigate whether the relationship described in the bill of lading accurately reflects the de facto status of the parties." U.S. App. 8a; AAR Br. 14-15 & n.13. The Eleventh Circuit squarely rejects this rule, Pet. App. 17a, holding instead "that a party shown as a consignee in the bill of lading is not in fact a consignee unless it expressly agreed to the terms of the bill describing it as a consignee." U.S. App. 6a; see Pet. App. 19a.

At best, the result is intolerable disuniformity, directly contrary to the longstanding congressional policy of "uniformity in charges for transportation." *Pittsburgh, C.C. & St. Louis Ry.* v. *Fink*, 250 U.S. 577, 582 (1919). At worst, the Eleventh Circuit's er-

roneous rule will govern nationwide if, as a simple matter of business reality, the need for uniform procedures forces railroads to investigate the status of the named consignee to comply with the Eleventh Circuit's notification rule. The United States effectively concedes that such dislocations may result, speculating that problems "could perhaps be mitigated by ... carriers through modifications of their notification procedures." U.S. Br. 18-19. But, as the STB itself acknowledges, the Eleventh Circuit's approach "is unsatisfying in various ways," and "it should not be the carrier's responsibility to investigate." U.S. App. 8a; see also AAR Br. 13-14 (identifying potential problems with implementing a solution).[4]

2. Not only is it unclear how, if at all, the STB will act; it also is unclear *when* it might do so. The United States says "the Board intends to act quickly." U.S. Br. 19. That is not quite right. The STB has asked for comments *related to the ANPR* by late February. U.S. App. 1a. But an actual rulemaking could not be completed for months or years, if at all. Following the ANPR, the STB would have to issue an NPR, then undertake the lengthy process of drafting and issuing actual rules. O'Reilly, *supra*, at 136

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[4] Elsewhere the United States downplays the significance of the circuit split, asserting that "[l]itigation ... has been relatively sparse." U.S. Br. 18. This is only true because previously, there was an "accepted rule," U.S. App. 6a, whereas now, there is "legal uncertainty," U.S. Br. 10. That alone merits this Court's review, *see* Sup. Ct. R. 10(a), and particularly where the Eleventh Circuit has drawn a roadmap for every warehouseman to contest previously settled liability. Moreover, warehousemen in the Eleventh Circuit now have no incentive to return cars in a timely fashion, U.S. App. 8a, which will have significant implications for transportation throughout the Eastern half of the United States.

(ANPR is "a preparatory step, antecedent to a potential future rulemaking"); Morrison, *supra*, at 1065 (ANPR "adds a further layer of delay onto every rulemaking effort"); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. Pitt. L. Rev. 589, 636 (2002) (when an ANPR issues, "[a]gencies must delay in-depth analysis of specific proposals and will ultimately need to complete multiple rounds of notice and comment"). For example, in a previous rulemaking addressing demurrage, the ICC issued an ANPR in December 1985; an NPR six years later; and ultimately the STB dismissed the proceeding another four years after that.[5] Here, the United States confesses that the STB has gone more than two years without resolving an adjudicatory proceeding presenting nearly the same issue. U.S. Br. 5, 15 n.3.

The prospect of such delay and uncertainty is further reason not to await potential agency action. There is an immediate need to maintain a national rail system for which uniformity is longstanding congressional policy. Permitting the rail system to be subject to inconsistent and conflicting rules dictated

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[5] *See Exemption Of Demurrage From Regulation*, Ex Parte No. 462, 50 Fed. Reg. 51,565 (Dec. 18, 1985); 57 Fed. Reg. 14,688 (Apr. 22, 1992); 61 Fed. Reg. 14,200 (Mar. 29, 1996).

On another occasion, more than four years passed between the ANPR and the final rule. *Safe Implementation of Board-Approved Transactions*, Ex Parte No. 574, 6 S.T.B. 129, 131 (2002). *See also supra* 3 n.3 (three years between NPR and ultimate dismissal of proceeding without rulemaking). The STB's docket currently includes at least one rulemaking in which an ANPR has been pending nearly two years without further agency action. *See Class I Railroad Accounting And Financial Reporting—Transportation Of Hazardous Materials*, Ex Parte No. 681, 74 Fed. Reg. 248 (Jan. 5, 2009).

by location until the STB acts—if it ever does—is unjustifiable.

3. Such delay is all the more unacceptable because it is far from clear that the STB's action will "resolve the issue," *id.* 9. The STB itself makes no such promise; as discussed above, it simply commits to study it. *Supra* 2-3; see generally U.S. App. 10a-12a. There are multiple reasons to doubt whether the agency will act in a way that could take this issue out of the courts.

First, a tentative action such as issuing a "policy statement," U.S. App. 1a, would not resolve this conflict. The United States invokes *Chevron*, U.S. Br. 17-18, but an ANPR, a policy statement, or other preliminary agency action is unlikely to merit such deference. See *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000); cf. Stern, *supra*, at 634 ("The ANPR does not qualify as a proposed rule and therefore is not subject to the requirements of the APA. In addition, because an ANPR is not a final rule, it is generally not subject to judicial review because it is not ripe for such review.").

Indeed, there is serious reason to question whether the STB could or would undertake the type of proceeding (such as notice-and-comment rulemaking) that would deserve significant deference. This is because the ICC Termination Act mandates that it is the rail carriers that must establish demurrage rates and rules:

> A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges ....

49 U.S.C. § 10746.[6] Those rates are contained in tariffs that the STB reviews for reasonableness on a case-by-case basis,[7] and never has the STB (or its predecessor the ICC) established rules governing the reasonableness of demurrage on an industry-wide basis. That undoubtedly is why the STB here has not committed to do anything more than solicit comment to consider the issue. Thus, even if the STB ultimately issues rules, their validity may well be challenged, thereby further delaying resolution of an issue that this Court could put to rest by June 2011.

Second, even if the STB did ultimately decide to promulgate rules, it is uncertain whether the Eleventh Circuit and courts employing its reasoning would defer to the agency. The Eleventh Circuit held—as a "tenent [sic] of contract law," Pet. App. 18a—that "a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named," *id.* 19a. If such notice is now required as a tenet of contract law and as an aspect of the definition of "consignee," notwithstanding the definition in a railroad's tariff, then even decisive and definitive action by the STB would not necessarily cause the Eleventh Circuit to reverse course. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("[P]rior judicial construction of a statute trumps an agency construction ... if the prior court decision holds that its construction follows from

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[6] Here, the Norfolk Southern tariff was by its plain terms applicable: It assesses demurrage charges "against the ... consignee at destination," and defines consignee as "[t]he party to whom a shipment is consigned." Pet. 9.

[7] *See* 49 U.S.C. § 10704(a)(1) ("the Board, after a full hearing," may "decide[] that a rate charged or collected by a rail carrier for transportation ... does or will violate this part").

the unambiguous terms of the statute."); *Sierra Club* v. *EPA*, 479 F.3d 875, 880-81 (D.C. Cir. 2007) (declining to defer to subsequent agency interpretation).

On the contrary, the Eleventh Circuit's approach raises serious question whether a statement by the agency would carry the day. Under the statute, any evaluation of a tariff's reasonableness is committed "exclusive[ly]" to the agency. 49 U.S.C. § 10501(b); see Pet. 28 & n.24. Interpretation of the railroad's tariff is for the Board; a federal court has only limited jurisdiction "to enforce liability" "for payment of rates," 49 U.S.C. § 10743(a), (c).[8] Here, however, the Eleventh Circuit took it upon itself to determine when demurrage charges may be assessed against a named consignee, notwithstanding the plain terms of the tariff. There is little reason to think that a court

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[8] The United States does not contest that the Board's jurisdiction here was exclusive, nor that this jurisdictional issue is nonwaivable. U.S. Br. 12. It recites the rule of *Pejepscot Industrial Park* v. *Maine Central Railroad*, which held that the STB does not have exclusive jurisdiction to consider a different issue arising under a different provision of the ICC Termination Act. 215 F.3d 195, 197, 205 (2000) (discussing 49 U.S.C. § 11101). Conspicuously, the United States does not embrace *Pejepscot*; it simply says the issue does not independently merit review. But it confesses that "if the Court were to grant review on the substantive question of demurrage liability, it would be appropriate to grant review on this threshold question as well." U.S. Br. 12.

The United States questions the scope of Norfolk Southern's position on exclusive jurisdiction, *see id.* 12 n.1, but any uncertainty stems from the decision below, not the Petition. The Eleventh Circuit rejected the plain terms of Norfolk Southern's tariff, effectively ruling them to be unreasonable as a matter of federal law. But, the reasonableness of tariff terms is committed exclusively to the STB. *Supra* 9. That the Eleventh Circuit did not speak explicitly in such terms is a function of its radical departure from the statutory scheme.

that has made this most basic error will find it necessary or appropriate to follow the Board.

The United States' repeated invocation of "specialized industry knowledge" is misplaced. *E.g.*, U.S. Br. 15. Such expertise may be relevant to "establish[ing] a comprehensive demurrage policy," *id.*, but that is not the question presented here. The simple question before the Court is whether the statute requires a court to disregard the plain terms of Norfolk Southern's tariff. This is a garden-variety question of law that is within the heartland of this Court's supervisory authority. The United States observes, in the height of understatement, that "[t]his is not to say that courts have no role to play in the regulation of demurrage." *Id.* 18. But courts are not limited to judicial review of agency action, *id.*; it is particularly within this Court's "role" to resolve whether the Eleventh Circuit erred when it answered the question presented in direct conflict with the Third Circuit. Doing so will not, as the United States intimates, prevent the STB from "get[ting] an accurate picture of industry practices," "adopt[ing] revised bill-of-lading practices," or "reconsider[ing] old regulatory precedent." *Id.* 16-17. The STB can consider such issues regardless whether this Court grants review. In the meantime, however, there exists a square and acknowledged conflict of authority on a basic question of law, concerning the accrual of liability across the national rail system for holding rail cars, which this Court should promptly resolve.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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