NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 16-6761/6763/6772

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS WALTER GREENE, Plaintiff-Appellant, v. FROST BROWN TODD, LLC; MARK FRANCIS SUMMER; TONY C. COLEMAN (16-6761); INDEPENDENT PILOTS ASSOCIATION; ROBERT TRAVIS, in his capacity as President of the Independent Pilots Association; ERICK GERDES, in his capacity as Vice President of the Independent Pilots Association; THOMAS KALFAS, in his capacity as Secretary of the Independent Pilots Association; BILL CASON, in his capacity as Treasurer of the Independent Pilots Association; HARRY TREFES, in his capacity as At Large Representative of the Independent Pilots Association (16-6763);	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

IPA/UPS SYSTEM BOARD OF ADJUSTMENT; UNITED PARCEL SERVICE CO.; INDEPENDENT PILOTS ASSOCIATION (16-6772),

Defendants-Appellees.

ORDER

(Filed Dec. 4, 2017)

Before: GILMAN, ROGERS, and SUTTON, Circuit Judges.

Douglas Walter Greene, a pro se plaintiff, appeals the district court's judgment granting summary judgment to the defendants in the above-captioned cases. These cases have been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. 34(a).

Greene was a pilot for United Parcel Service (UPS) from 1994 until November 2013. In 2013, Greene became embroiled in a dispute with UPS over a note in the Exception History Report (EHR) of his personnel file that recorded an incident in which he was discovered carrying small grooming scissors in his bag after flying "jumpseat" with FedEx. The scissors were prohibited by FedEx regulations but not by the Transportation Safety Administration. The EHR was critical of Greene's conduct, but the Independent Pilots Association (IPA), the collective bargaining unit that represents pilots employed by UPS, did not file a grievance on Greene's behalf because EHR notations are

considered non-disciplinary under the collective bargaining agreement (CBA). The IPA, however, was successful in persuading UPS to supplement the EHR with a note from FedEx's chief pilot that stated that Greene was courteous to FedEx's security team during the incident. Greene nevertheless became fixated on the incident, and UPS received complaints from some pilots that he was harassing and intimidating them in an attempt to get information about Assistant Chief Pilot Jim Psiones, who first spoke to Greene about the incident.

UPS suspended Greene from flight operations based on his behavior in this incident, as well as claims that Greene made in a subsequent meeting that UPS and the IPA were conspiring against him with regard to some ongoing tax matters he had with the State of Kentucky. UPS's investigation prompted the chief pilot to order Greene to undergo a medical examination based on a CBA provision that authorizes UPS to order a non-routine medical examination "[i]f there is objective medical evidence indicating that a crewmember has a medical problem which could interfere with his ability to safely function as a crewmember." UPS terminated Greene for insubordination after his third refusal to submit to an evaluation.

Greene filed twelve grievances related to his suspension from flight duty, the collateral consequences of his suspension, and his termination. The IPA and UPS agreed to hold all but Greene's termination grievance in abeyance because some of his grievances concerned non-disciplinary matters and because his termination

grievance was potentially dispositive of other grievances. The IPA retained outside counsel to represent Greene because of prior conflicts that Greene had had with IPA officials. The IPA also permitted Greene to be represented by his own attorney. Greene's termination grievance proceeded to an evidentiary hearing before an arbitrator. The arbitrator ruled that Greene's erratic behavior, coupled with other statements that he had made that suggested that he was taking pain medication to treat a back injury, gave UPS sufficient reason to believe that Greene had a medical problem that could affect his ability to function as a pilot, and that Greene's refusal to submit to a medical evaluation provided just cause under the CBA for UPS to terminate him for insubordination. The arbitrator therefore upheld Greene's termination.

Mark Sommer, an attorney who was representing Greene in state tax matters, joined the Frost Brown Todd (FBT) law firm during the pendency of Greene's arbitration proceedings. Tony Coleman, who was also an attorney employed by FBT, represented UPS in Greene's termination and arbitration proceedings. Coleman belatedly recognized that FBT had a conflict of interest with Greene and withdrew from representing UPS. But, as the district court noted, "for nearly two months, Coleman, a FBT attorney, represented UPS in its termination of Greene, a FBT client."

In Case No. 16-6761, Greene filed a state-law legal-malpractice complaint against FBT, and attorneys Coleman and Sommer, alleging that their conflict of interest caused UPS to terminate his employment

because of his state tax matter and prolonged the resolution of that case. The district court granted summary judgment to the defendants because: (1) Greene could not prove that the defendants' conflict of interest caused UPS to terminate him in light of the arbitrator's decision upholding UPS's decision to dismiss Greene for refusing to submit to a medical evaluation was entitled to preclusive effect; (2) the record showed that UPS was aware of Greene's tax problems before FBT's conflict of interest arose; and (3) Greene failed to present expert testimony that showed that FBT's conflict of interest caused Sommer not to act as a reasonably prudent attorney would in seeking to resolve his tax dispute. The district court therefore granted summary judgment in favor of FBT, Coleman, and Sommer.

In Case No. 16-6763, Greene filed a complaint against the IPA and several individual officers of the IPA, alleging that the IPA breached its duty of fair representation under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, in several ways, and that the IPA violated the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 *et seq.*, by retaliating against him because he was critical of the union and because he had supported an opposition candidate for union president. The district court concluded that Greene's fair-representation claims failed because he did not produce evidence showing that the IPA's representation was arbitrary, discriminatory, or in bad faith, and that Greene's LMRDA-retaliation claim failed because he was not subjected to formal discipline by the

IPA. The district court therefore granted summary judgment to the defendants.

In Case No. 16-6772, Greene filed a complaint against the IPA/UPS System Board of Adjustment to vacate the arbitrator's award upholding his termination. The district court granted motions to intervene filed by the IPA and UPS. The district court granted summary judgment to the IPA and UPS because Greene failed to establish any of the grounds available under the RLA for vacating the arbitrator's award.

Greene filed a timely notice of appeal in each of these cases, and we consolidated them for disposition.

We review a district court's order granting summary judgment de novo. *See Wheat v. Fifth Third Bank*, 785 F.3d 230, 236 (6th Cir. 2015). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In order to dispose of the issues presented in a logical manner, we address Greene's appeals out of numerical sequence.

A. Case No. 16-6763

Greene claimed that the IPA breached its duty of fair representation to him under the RLA in a number of ways, including prohibiting him from contacting union staff about his grievances, refusing to prosecute eleven of his grievances, refusing to disclose documents from its Professional Standards Committee,

refusing to assist him in correcting his EHR report, and failing to keep him apprised of various procedural matters in the arbitration proceedings. Greene also claimed that the IPA violated the LMRDA by retaliating against him for participating in political activities within the union.

The RLA imposes an implied duty on the union to fairly represent its members. *See Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010). To establish that the union breached its duty of fair representation, the plaintiff must prove that the union acted arbitrarily, discriminatorily, or in bad faith. *See id.* A union acts arbitrarily if its conduct was "so far outside a wide range of reasonableness" that it was "wholly irrational." *Id.* (quoting *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)). To show that the union acted discriminatorily, the plaintiff must "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Id.* (quoting *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 301 (1971)). A union acts in bad faith when "it acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Id.* (quoting *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998)). Our review of the union's performance is highly deferential. *See Blesedell v. Chillicothe Tel. Co.*, 811 F.3d 211, 223 (6th Cir. 2016).

The IPA's decision to proceed with Greene's potentially dispositive termination grievance first and hold

his other grievances in abeyance was an efficient and therefore sensible manner in which to handle his case. Similarly, the IPA's restrictions on Greene's ability to communicate with union staff and its decision to hire outside counsel to represent him were rational in light of his hostility toward the union's leadership and legal staff. The IPA's decision not to give Greene access to allegedly exculpatory documents from its Professional Standards Committee, which is a mechanism to resolve disputes between union members, was also rational in view of the IPA's need to preserve confidentiality and to promote safety and efficient dispute resolution. The record shows that the IPA did what it could under the circumstances to mitigate the negative information in Greene's EHR report concerning the scissors incident. Consequently, Greene has not shown that the IPA acted arbitrarily. Greene's appellate brief consists mainly of ad hominem attacks on other UPS employees and unsupported claims that the IPA colluded with UPS to terminate him, but he has not pointed to any evidence that shows that the IPS acted discriminatorily or in bad faith in representing him.

Greene also claimed that the IPA retaliated against him for criticizing the union and opposing the incumbent president in violation of the LMRDA. As the district court correctly found, however, the IPA was entitled to summary judgment because Greene failed to produce evidence showing that he was punished through an established union disciplinary process. *See United Food & Commercial Workers Int'l Union Local*

911 v. United Food & Commercial Workers Int'l Union, 301 F.3d 468, 474 (6th Cir. 2002).

Accordingly, we affirm the district court's judgment in this case.

B. Case No. 16-6772

Greene moved to vacate the arbitrator's award upholding his termination. The district court concluded that Greene failed to present evidence that supported vacating the arbitrator's award on any of the grounds permissible under the RLA and granted summary judgment to the IPA and UPS.

Federal courts' review of labor-arbitration decisions is very limited. As long as the arbitrator is even arguably acting within the scope of his authority, a court may not overturn his decision because it believes he committed serious error. *See Mich. Family Res., Inc. v. SEIU Local 517M*, 475 F.3d 746, 752 (6th Cir. 2007) (en banc). We may overturn the decision of an RLA-created adjustment board for three reasons only: (1) failure of the board to comply with the requirements of the RLA; (2) failure of the board to confine itself to matters within the scope of its jurisdiction; and (3) fraud or corruption. *See Airline Prof'l Ass'n of Int'l Bhd. of Teamsters, Local Union No. 1224 v. ABX Air, Inc.*, 274 F.3d 1023, 1030 (6th Cir. 2001); *see also* 45 U.S.C. § 153(q). Review under the first ground is generally limited to determining whether the arbitrator complied with the procedural obligations of the RLA. *See United Transp. Union v. Nat'l R.R. Passenger Corp.*,

588 F.3d 805, 811 (2d Cir. 2009) (collecting cases). An arbitrator acts outside the scope of his jurisdiction only if the award fails to draw its essence from the terms of the CBA. *See Airline Prof'l Ass'n*, 274 F.3d at 1030. The arbitrator's award is a product of fraud or corruption if he exhibited complete unwillingness to respond to any evidence or argument in support of one of the parties' positions. *See Green v. Grand Trunk W. R.R., Inc.*, 155 F. App'x 173, 176 (6th Cir. 2005).

Greene's brief does not point to any procedural requirements of the RLA that the arbitrator allegedly violated in issuing his award. Greene's argument that the award was the product of fraud and corruption is based largely, if not entirely, on claims of collusion between the arbitrator, the IPA, and UPS that lack any factual support in the record or, alternatively, reflect nothing more than his disagreement with the arbitrator's evidentiary and procedural rulings and factual findings. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 40 (1987) (stating that courts do not hear claims of factual, legal, or procedural error by the arbitrator). Accordingly, Greene failed to make any showing that the arbitrator failed to comply with the RLA or that the award was the result of fraud and corruption.

An arbitrator's award fails to draw its essence from the CBA only if the award: (1) conflicts with the express terms of the agreement; (2) imposes additional requirements that are not expressly provided in the agreement; (3) is without rational support or cannot be rationally derived from the terms of the agreement; or

(4) is based on general considerations of fairness and equity rather than the precise terms of the agreement. *See Airline Prof'l Ass'n*, 274 F.3d at 1030. We must uphold the arbitrator's award as long as he was arguably construing the agreement, even if we are convinced that he made a serious error. *See United Paperworkers*, 484 U.S. at 38.

The CBA in this case authorized UPS to order a pilot to undergo a non-routine medical evaluation if there was "objective evidence indicating that a crewmember has a medical problem which could interfere with his ability to safely function as a crewmember." The arbitrator construed this provision as authorizing UPS to order a non-routine medical evaluation if it had a good faith basis for believing that a pilot had a medical problem that impaired his performance. The arbitrator then made factual findings that UPS had sufficient objective evidence, based on Greene's back injury and unusual behavior, to invoke this provision. Finally, the arbitrator made the legal conclusion that Greene's insubordination in refusing to submit to a medical evaluation provided just cause under the CBA to terminate him. The arbitrator's decision shows that he was engaged in construing the CBA and thus that his award drew its essence from the CBA.

Greene has not shown that the award conflicts with any express terms of the CBA, imposes any additional requirements not expressly provided by the CBA, is without rational support or is not rationally derived from the terms of the CBA, or is based on considerations of fairness and equity rather than the

terms of the agreement. Greene argues that the arbitrator's award conflicts with the CBA's provision that states that the purpose of a medical examination is to "aid and assist [crewmembers] in maintaining their physical health and prolonging their career." Greene overlooks, however, that the goals of this provision might have been furthered had he complied with the order to undergo an examination. The arbitrator's award does not conflict with this provision. Greene also claims that the arbitrator's award conflicts with certain notice and discovery provisions of the CBA. The arbitrator, however, resolved all pre-hearing disputes, including discovery, and, as stated, those procedural rulings are not reviewable by the court. Finally, Greene claims that the arbitrator's award conflicts with CBA provisions that allegedly mandate progressive discipline over termination. The CBA specifically states, however, that upon the conclusion of the company's investigation, a crewmember may "be exonerated, disciplined, suspended or discharged." The arbitrator's award upholding Greene's termination does not conflict with the CBA.

Accordingly, we affirm the district court's judgment granting summary judgment to the defendants on Greene's complaint to vacate the arbitrator's award.

C. Case No. 16-6761

Greene filed legal-malpractice claims against FBT and attorneys Coleman and Sommer, claiming that their conflict of interest caused him to be terminated

by UPS and prolonged the resolution of his state tax case.

In order to prevail on a legal malpractice claim in Kentucky, where Greene's tax investigation and arbitration hearing occurred, the plaintiff must prove that: (1) there was an employment relationship with the attorney; (2) the attorney neglected to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) the attorney's negligence was the proximate cause of damage to the client. *See Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003). To demonstrate causation, the plaintiff must show that he would have fared better on the underlying claim but for the attorney's negligence. *See id.* The district court concluded that Greene failed to show that FBT's conflict of interest caused any harm and granted summary judgment to the defendants.

Greene's appellate brief discusses at length his theory that FBT, and in particular attorney Coleman, were the impetus for the State of Kentucky's tax investigation and that the Kentucky Department of Revenue, the IPA, UPS, FBT, Coleman, and the arbitrator conspired to drum up false insubordination charges against him in order to rid UPS of an allegedly troublesome employee. Greene's theory is not supported by any reasonable reading of the record. Greene makes little or no effort to show that the district court erred in finding that he failed to demonstrate a triable issue of fact on the issue of causation. In any event, FBT's unrebutted evidence shows that UPS was aware of Greene's tax problems in 2011, well before proceedings

were instituted to terminate him for failing to submit to a medical evaluation. Moreover, the arbitrator's award makes clear that UPS terminated Greene because he failed to submit to a medical evaluation and that, except as evidence pertaining to Greene's state of mind, the tax investigation played no part in UPS's termination decision or the arbitrator's award. There is no evidence to suggest that the two-month period in which FBT was in a conflict position with Greene prolonged the conclusion of the state tax matter. Accordingly, we affirm the district court's grant of summary judgment to the defendants on Greene's legal malpractice claim.

Conclusion

We **AFFIRM** the district court's judgment in each case. Greene also filed a complaint and an amended complaint in Case No. 16-6772, alleging new claims against UPS and UPS pilot Peyton Horace Cook III for perjury, conspiracy to defraud the United States, and misprision of felony, and the defendants in that case have filed motions to dismiss or strike Green's complaints. Greene's complaints are not properly before us. *See Harrison v. Ash*, 539 F.3d 510, 521 (6th Cir. 2008) (stating that federal courts of appeal have jurisdiction to hear only "final judgments" rendered by district courts) (citing 28 U.S.C. § 1291)); *In re Cannon*, 277 F.3d 838, 848 (6th Cir. 2002) (noting that a reviewing court will not consider issues raised for the first time on appeal). Accordingly, we **GRANT** the motions to

strike Greene's complaints and **DENY** all other pending motions.

ENTERED BY ORDER OF
THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:14-CV-00619-TBR

DOUGLAS W. GREENE PLAINTIFF

v.

FROST BROWN TODD, LLC., *et al.* DEFENDANT.

Memorandum Opinion

(Filed Nov. 21, 2016)

This case and its companion cases, *Greene v. IPA/UPS System Board of Adjustment, et al.*, No. 3:15-CV-00234, and *Greene v. Independent Pilots Association, et al.*, No. 3:14-CV-00628, arise from Plaintiff Douglas W. Greene's termination from his employment as a pilot for United Parcel Service Co. In this case, Greene seeks to recover from Frost Brown Todd, LLC (FBT) and two of its attorneys, Tony Coleman and Mark Sommer, for their conflict of interest in representing both UPS and Greene at the same time. Currently before the Court is Defendants' motion for summary judgment. [DN 15.] Greene has responded, [DN 35], and Defendants have replied, [DN 46]. This matter is now ripe for adjudication. As explained more fully below, Defendants' motion for summary judgment [DN 15] is GRANTED.

Greene advances two theories of legal malpractice in this case. First, he alleges that Defendants' conflict

of interest made UPS aware of the Kentucky Department of Revenue investigation, causing UPS to terminate his employment. While FBT and its attorneys did indeed have a conflict of interest in representing both Greene and UPS, Greene cannot establish that the Defendants' conflict of interest caused his termination from UPS. In *Greene v. IPA/UPS System Board of Adjustment, et al.*, No. 3:15-CV-00234, this Court upheld the System Board's determination that UPS had just cause to terminate Greene for his failure to submit to a required medical examination. Because the System Board's Award is entitled to preclusive effect in this case, Greene cannot establish that UPS terminated his employment because of the tax investigation, which he must do to prevail against these Defendants. Additionally, the unchallenged evidence of record demonstrates that UPS was aware of the tax investigation well before Defendants' conflict of interest ever arose. Second, Greene alleges that but for Defendants' conflict of interest, his tax dispute would have been resolved more expeditiously. With respect to this theory, Greene brings forth no expert testimony showing that Defendants' failure, if any, to diligently pursue his tax matters caused him to suffer damages. Because such testimony is required to prove a legal malpractice claim under Kentucky law, Greene's second theory of causation must also fail.

I. Facts and Procedural History

Plaintiff Douglas Greene is a commercial airline pilot, formerly employed by UPS. He was terminated

from that employment in 2013 after he refused to submit to a medical examination. Greene's 2013 termination proceedings gave rise to three lawsuits. In the first, *Greene v. Independent Pilots Association, et al.*, No. 3:14-CV-00628, Greene alleges that IPA, the union that represents UPS's pilots, failed to fulfill its duty of fair and adequate representation. In *Greene v. IPA / UPS System Board of Adjustment, et al.*, No. 3:15-CV-00234, Greene seeks to overturn the arbitration that concluded UPS had just cause to terminate him under the terms of the UPS-IPA Collective Bargaining Agreement (CBA). Finally, in this case, Greene claims that Defendants had a conflict of interest that ultimately caused his 2013 termination.

On or about March 25, 2010, UPS received a subpoena from a Jefferson County grand jury. [DN 15-2.] That subpoena required UPS to provide "a certified copy of all United Parcel Service records that specifically address and establish the Louisville assigned domicile at which crew members are based." [*Id.* at 1.] A second subpoena arrived on or about June 22, 2010, requesting "a certified copy of employee records for all years available for Douglas Greene." [DN 15-3 at 1.] UPS received a third subpoena also pertaining specifically to Greene in September 2010. [DN 15-6.] Defendant Tony Coleman, an attorney practicing at Frost Brown Todd, admits that he represented UPS during this time frame, *see* [DN 15-4 at 1], and responded to the Greene subpoenas on UPS's behalf, [DN 15-5; DN 15-7]. The subpoenas related to an ongoing Kentucky Department of Revenue investigation into the tax

filings of UPS pilots. UPS's worldwide air cargo operations are based in Louisville, Kentucky. [DN 15-8 at 8.] Kentucky authorities believed that some UPS pilots, including Greene, were domiciled in the Commonwealth, but were not paying the correct amount of state income taxes. *See* [DN 15-4 at 2; DN 15-9 at 1.] Greene, an Alaska resident at the time, disputed Kentucky's tax assessment against him. Ultimately, Greene and the other UPS pilots were successful in fending off the Kentucky Department of Revenue. [DN 15-8 at 13.]

While the tax investigation continued, UPS began termination proceedings against Greene in March 2011, following Greene's verbal confrontation with a supervisor. [DN 36-6.] Coleman and FBT represented UPS during Greene's 2011 termination. [DN 15-4 at 2.] Importantly, Coleman claims that "[d]uring the 2011 termination proceedings, it was disclosed and all parties were aware of Greene's issues with the Kentucky Department of Revenue and Commonwealth Attorney related to the nonpayment of taxes." [*Id.*] Additionally, in conversations with UPS officials leading up to Greene's 2013 termination, discussed below, Greene admitted that the tax investigation was brought up during his 2011 termination. [DN 15-8 at 27.] Ultimately, the 2011 termination was settled, and Greene remained employed at UPS.

In late 2012, the Kentucky tax investigation was still ongoing. In an effort to resolve the dispute, Greene hired Defendant Mark Sommer to represent him on or about December 13, 2012. *See* [DN 15-9; DN 15-10.] At that time, Sommer was an attorney at Bingham

Greenebaum Doll LLP. *See* [*id.*] In February 2013, however, Sommer left that firm and joined FBT, as he indicated to Greene by letter. [DN 15-11.] Sommer continued to represent Greene after his transition, as evidenced by Sommer's correspondence with various Kentucky Department of Revenue and Jefferson County Commonwealth's Attorney officials. *See* [DN 15-13.] Apparently, Defendants did not realize at this time that FBT's 2011 representation of UPS had been adverse to Greene. Sommer's representation of Greene continued until October 17, 2013, when Greene terminated Sommer and FBT by letter. [DN 15-9 at 2; DN 1-5 at 2.]

In 2013, UPS began a second round of termination proceedings against Greene. The facts giving rise to Greene's 2013 termination are more fully detailed in the System Board of Adjustment's Opinion and Award, [DN 15-8], and in this Court's Memorandum Opinion in *Greene v. IPA/UPS System Board of Adjustment, et al.*, No. 3:15-CV-00234. In short, on March 19, 2013, Greene was riding along in the jump seat of a Federal Express flight from Memphis, Tennessee to his home in Anchorage, Alaska. [DN 15-8 at 14.] At the conclusion of that flight, a FedEx security officer "confiscated a pair of small scissors with pointy ends" from Greene's personal belongings. [*Id.* at 14-15.] The scissors were not prohibited by Transportation Safety Administration guidelines, but FedEx's internal security protocols barred their possession. [*Id.* at 15.] Eventually, Greene's supervisors, including UPS System Chief Pilot Roger Quinn, decided that a notation of the incident should

be placed in Greene's UPS employee history, known as the Exception History Report (EHR). [*Id.* at 16-19.]

Believing that the EHR notation was unwarranted, Greene spent the summer attempting to have the notation removed, but Chief Pilot Quinn eventually decided that it would remain. [*Id.* at 18-19.] Greene's reaction to the scissor incident and the EHR notation caused his UPS supervisors to become concerned about his behavior, and an internal investigation followed. During its investigation, UPS discovered that Greene had been secretly recording his conversations with company officials. [*Id.* 22-23.] The nature and contents of those taped statements, as well as Greene's allusion to using painkilling drugs to manage a lingering back injury, caused Chief Pilot Quinn to place Greene on paid administrative leave. [*Id.* at 32.] Under the terms of the Collective Bargaining Agreement, UPS ordered Greene to undergo a special medical exam to determine whether he was fit to fly. [*Id.* at 35.] Greene thrice refused to submit himself to the medical exam, believing UPS did not have the contractual right under the CBA to order him to take the exam. [*Id.* at 36-38.] Following these refusals, Chief Pilot Quinn terminated Greene for insubordination on November 22, 2013, and termination proceedings ensued.

During UPS's second termination of Greene, Coleman and FBT once again represented UPS, beginning on or about August 22, 2013. [DN 15-4 at 2.] As noted above, Sommer's representation of Greene in the tax matter did not cease until October 17, 2013, when Greene terminated the representation because of the

conflict of interest. [DN 15-9 at 2; DN 1-5 at 2.] Thus, for nearly two months, Coleman, a FBT attorney, represented UPS in its termination of Greene, a FBT client.

Under the UPS-IPA Collective Bargaining Agreement and the Railway Labor Act, employment grievances such as Greene's must be submitted to binding arbitration before a System Board of Adjustment. In termination cases, the System Board consists of two UPS members, two IPA members, and a neutral third-party arbitrator. Greene's labor arbitration was originally scheduled to begin in January 2014. However, before the arbitration began, counsel for IPA, Irwin Cutler, objected to Coleman's representation of UPS because of FBT's conflict of interest. Coleman withdrew from representing UPS on January 13, 2014, *see* [DN 15-14], and UPS retained other counsel. Eventually, the System Board of Adjustment held Greene's arbitration on September 15-17, 2014, in Louisville, Kentucky. [DN 15-8 at 2.]

In a decision authored by Arbitrator Barry Winograd, the System Board determined that UPS had just cause to terminate Greene for insubordination. Particularly, Winograd found that UPS conducted a "sufficiently fair and thorough" investigation, [*id.* at 46], and pointed to several facts constituting "objective evidence" of Greene's medical issues: his acknowledgment of a longstanding back injury, his use of pain-killing drugs to treat that injury, his "unrelenting and wildly speculative" statements during discussions with UPS's managers, and his fixation on the scissor

incident and EHR notation. [*Id.* at 49-51.] Because UPS had objective evidence indicating Greene was experiencing medical problems that could impair his ability to fly, its directive that Greene submit to an additional medical exam was justified under the CBA. [*Id.* at 49.]

Shortly before the arbitration hearing, Greene filed the instant action. [DN 1.] In his complaint, Greene alleges, "But for the negligence of Defendants, [his] personal matters would not have been known to UPS and used against him in his termination matter, and [he] would have been more likely successful in mediating his conflict with UPS and avoiding termination." [*Id.* at 5-6.] Additionally, Greene claims that "[b]ut for the conflict of interest, [his] dispute with the Kentucky Department of Revenue would have been more vigorously pursued by Mr. Sommer and more expeditiously resolved." [*Id.* at 6.] Greene named as defendants Frost Brown Todd, LLC, Mark Sommer, and Tony Coleman. [*Id.* at 1.] Defendants answered, [DN 9], and then moved for summary judgment, [DN 15]. Greene responded, [DN 35], and Defendants replied, [DN 46]. Fully briefed, this matter is now ripe for adjudication.

II. Standard of Review

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals "that there is no genuine dispute as to any material fact and the movant is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court "may not make credibility determinations nor weigh the evidence when determining whether an issue of fact remains for trial." *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014) (citing *Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir. 2001); *Ahlers v. Schebil*, 188 F.3d 365, 369 (6th Cir. 1999)). "The ultimate question is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Back v. Nestlé USA, Inc.*, 694 F.3d 571, 575 (6th Cir. 2012) (quoting *Anderson*, 477 U.S. at 251-52).

As the parties moving for summary judgment, Defendants must shoulder the burden of showing the absence of a genuine dispute of material fact as to at least one essential element of Greene's claim. Fed. R. Civ. P. 56(c); see *Laster*, 746 F.3d at 726 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Assuming Defendants satisfy their burden of production, Greene "must—by deposition, answers to interrogatories, affidavits, and admissions on file—show specific facts that reveal a genuine issue for trial." *Laster*, 746 F.3d at 726 (citing *Celotex Corp.*, 477 U.S. at 324).

III. Discussion

By representing Douglas Greene in his tax investigation and UPS in Greene's termination proceedings at the same time, Defendants had a conflict of interest. However, to recover from Defendants for legal malpractice, Greene must prove not only that Defendants had a conflict of interest, but also that Defendants' conflict was the proximate cause of his harm. Greene first contends that UPS terminated his employment because of Kentucky's investigation into his personal tax matters, and that Defendants' conflict of interest caused UPS to become aware of that investigation. But in upholding Greene's termination, the System Board of Adjustment determined that Greene was dismissed for insubordination. That finding is entitled to preclusive effect in this case, and prevents Greene from establishing that Defendants' conflict caused his harm. Greene also argues that his tax dispute would have been resolved more quickly in the absence of Defendants' conflict of interest. On this theory, he brings forth no expert evidence, as is necessary to prove this kind of professional negligence under Kentucky law. Therefore, Defendants are entitled to summary judgment on Greene's sole claim.

The elements of a legal malpractice claim in Kentucky mirror those of a traditional negligence case. The plaintiff must prove "(1) that there was an employment relationship with the defendant/attorney; (2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that

the attorney's negligence was the proximate cause of damage to the client." *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003) (internal quotation marks and citation omitted). "A legal malpractice case is essentially a 'suit within a suit.'" *Pivnick v. White, Getgey, & Meyer Co., LPA*, 552 F.3d 479, 486 (6th Cir. 2009) (quoting *Marrs*, 95 S.W.3d at 860). To prevail, "the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have been more likely successful." *Marrs*, 95 S.W.3d at 860.

A. Duty and Breach

With respect to the first element, duty, an attorney/client relationship existed between Sommer and Greene from December 12, 2013, to October 17, 2013. [DN 15-10; DN 1-5.] This relationship began when Sommer was employed at Bingham Greenebaum Doll, and continued when Sommer began practicing at FBT in February 2013. Thus, from February 15, 2013, to October 17, 2013, Greene was a Frost Brown Todd client. When an attorney-client relationship exists, Kentucky law imposes a high standard of care:

> The relationship is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal.

> Since the relationship of attorney-client is one fiduciary in nature, the attorney has the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest.

Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978). That standard is breached when "the attorney's act, or failure to act . . . depart[s] from the quality of professional conduct customarily provided by members of the legal profession. *Id.* (citation omitted).

One way an attorney may breach this standard of care is by representing a client when a conflict of interest exists. *See Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980) (overturning district court's judgment n.o.v. in favor of defendant attorney in conflict of interest legal malpractice case). The Kentucky Rules of Professional Conduct define the circumstances under which a conflict of interest arises. Pertinent to this case, lawyers may not represent two clients when "the representation of one client will be directly adverse to another client." Ky. S. Ct. R. 3.130(1.7)(a)(1). This type of conflict is imputed to lawyers practicing in the same firm. *Id.* § 3.130(1.10)(a).

By themselves, the Rules of Professional Conduct do not "give rise to a cause of action against a lawyer [in a civil case] nor [do they] create any presumption in such a case that a legal duty has been breached." *Id.* § 3.130(XXI). However, by their terms, "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct" in a civil case. *Id.* This includes violation of the rules regarding conflicts of

interest. *See CenTra, Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008). Therefore, while Defendants' alleged violations of the Kentucky Rules of Professional Conduct cannot constitute the sole basis of Greene's cause of action, if such violations occurred, they may be considered as evidence that Defendants breached the standard of care imposed upon them by Kentucky law.

In this case, Defendants do not explicitly contest the fact that a conflict of interest existed during the period of time when FBT attorneys simultaneously represented Greene and UPS. By representing Greene in his tax matter while also representing the employer who was seeking to terminate Greene, Defendants had a concurrent conflict of interest, prohibited by Supreme Court Rule. 3.130(1.7)(a)(1). Because FBT lawyers represented the adverse parties in unrelated matters, this conflict was waivable with informed consent, *see* Ky. S. Ct. R. 3.130(1.7)(b), but no waiver was ever sought from either client. By simultaneously representing Greene and UPS, Defendants violated Kentucky's Rules of Professional Conduct.

Whether Defendants' violation of the Rules constitutes breach of their duty in this legal malpractice case, however, is a different question. On this point, Defendants argue that Greene must offer expert testimony establishing how Defendants' conflict of interest breached the applicable standard of care. Under Kentucky law, legal malpractice claims require expert testimony except "where the negligence is so apparent that a layperson with general knowledge would have no difficulty recognizing it." *Stephens v. Denison*, 150

S.W.3d 80, 82 (Ky. Ct. App. 2004). Kentucky courts have required expert testimony in cases concerning trial preparation, trial strategy, and motions to vacate, *Gleason v. Nighswander*, 480 S.W.3d 926, 929 (Ky. Ct. App. 2016), qualified domestic relations orders, *Burton v. Helmers*, No. 2008-CA-001470-MR, 2009 WL 4021148, at *2 (Ky. Ct. App. Nov. 20, 2009), and an "attorney's professional assessment of the law," *Thomas v. Yost Legal Group*, No. 2004-CA-001723-MR, 2005 WL 2174430, at *4 (Ky. Ct. App. Sept. 9, 2005). In contrast, courts interpreting Kentucky law suggest that expert testimony will not be needed in cases where a statute of limitations was missed or a plea offer was not conveyed. *See Adkins v. Palermo*, No. 13-CV-136-HRW, 2014 WL 4542490, at *3 (E.D. Ky. Sept. 11, 2014). Whether an expert witness is required to prove a Kentucky legal malpractice claim is within the discretion of the trial court. *Gleason*, 480 S.W.3d at 929 (citation omitted).

Here, Greene alleges that by having a conflict of interest, Defendants breached the standard of care expected of attorneys. Expert testimony is not required to establish that Defendants violated the Rules of Professional Conflict in this case. Again, Defendants simultaneously represented Greene in his tax matter and UPS in its termination proceeding against Greene from August 22, 2013, to October 17, 2013. This constituted a concurrent conflict of interest prohibited by Ky. S. Ct. R. 3.130(1.7)(a)(1), and Defendants did not seek a waiver. Mere violation of the aforementioned rule is not conclusive of breach, but "a layperson with general

knowledge" could conclude that a reasonably prudent lawyer and law firm would have recognized this type of conflict. *Stephens*, 150 S.W.3d at 82. Expert testimony is not required to prove this type of breach.

B. Causation

Next, Plaintiff must present a genuine issue of material fact on causation; that is, he must be able to show that Defendants' breach caused him to suffer damages. Greene advances two theories of causation and damages in this case. First, Greene asserts that "[b]ut for the negligence of Defendants, Mr. Greene's personal matters would not have been known to UPS and used against him in his termination matter, and Mr. Greene would have been more likely successful in mediating his conflict with UPS and avoiding termination." [DN 1 at 5-6.] Second, he claims that "[b]ut for the conflict of interest, Mr. Greene's dispute with the Kentucky Department of Revenue would have been more vigorously pursued by Mr. Sommer and more expeditiously resolved." [*Id.* at 6.] The Court will discuss these theories in turn.

(1) *Greene's UPS Termination*

As mentioned earlier, a legal malpractice claim is a "suit within a suit"; to establish causation, the plaintiff must prove that he would have been more likely successful on the underlying claim. *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003). With respect to Greene's first theory of causation, he must prove that, but for

Defendants' conflict of interest, he would have been more likely to keep his job with UPS. For two reasons, he cannot do so. First, the System Board of Adjustment determined that Greene was terminated in 2013 for failing to submit to a required medical examination. This finding precludes Greene from establishing that he was terminated from UPS because of the tax investigation, which he must do to prevail on this theory. Second, even if UPS had terminated Greene because of the tax investigation, the unchallenged evidence of record in this case demonstrates that UPS was aware of the investigation well before Defendants' conflict of interest arose. Therefore, Defendants' conflict could not have caused Greene's termination.

Defendants first argue that the System Board's Award, which determined that Greene was terminated from UPS for failing to submit to a required medical examination, precludes Greene from re-litigating the cause of his UPS termination in this case. The Sixth Circuit has set forth four elements that must be satisfied for collateral estoppel, also known as issue preclusion, to apply:

> 1) [T]he issue precluded must be the same one involved in the prior proceeding; 2) the issue must actually have been litigated in the prior proceeding; 3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; and 4) the prior forum must have provided the

> party against whom estoppel is asserted a full and fair opportunity to litigate the issue.

Cent. Transp., Inc. v. Four Phase Sys., Inc., 936 F.2d 256, 259 (6th Cir. 1991).[1]

Whether a labor arbitration may preclude the litigation of issues in subsequent common-law claims against third parties is not a question easily answered. The Supreme Court has held that arbitration under a collective bargaining agreement does not preclude suits to enforce federal statutory rights. *See, e.g.*, *McDonald v. West Branch*, 466 U.S. 284 (1984) (arbitration does not preclude suit under 42 U.S.C. § 1983);

---

[1] The Court recognizes that, alternatively, Kentucky collateral estoppel law could govern this particular issue. Kentucky law governs Plaintiff's substantive legal malpractice claim in this diversity jurisdiction case, but the System Board's Award arose out of the Railway Labor Act and is governed by federal law. *Intl. Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 684-86 (1963). If the application of collateral estoppel in this case is viewed as a matter of substance, Kentucky law governs; if the issue is viewed as procedural, federal law governs. Ultimately, however, this distinction is immaterial. Although the elements of collateral estoppel under Kentucky law are stated slightly differently, they are essentially the same as those found in federal jurisprudence. *See Swinford Trucking Co. v. Paducah Bank & Trust Co.*, 314 S.W.3d 310, 311 (Ky. Ct. App. 2010) ("The essential elements of collateral estoppel are: (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant."). The only additional element that Kentucky law imposes is the requirement of a final decision or judgment on the merits. Here, the System Board's Award was final and binding, and adjudicated the merits of Greene's dispute with UPS regarding his 2013 termination. The remainder of the issue preclusion analysis is the same under either system.

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) (arbitration does not preclude suit under Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitration does not preclude suit under Title VII). But those cases are distinguishable from the case at bar, which involves a tort suit arising under Kentucky law. The weight of authority holds that "an arbitrator's decision has preclusive effect in federal court," *Schreiber v. Phillips Display Components Co.*, 580 F.3d 355 (6th Cir. 2009), and that preclusive effect extends to common-law claims, *see Cent. Transp., Inc.* 936 F.2d at 261-62 (after arbitration decided breach of contract claim in defendants' favor, collateral estoppel barred plaintiffs' tortious interference claims). Thus, if the elements of collateral estoppel are satisfied, the System Board's Award will preclude Greene from contesting issues actually litigated and decided in the arbitration.

In support of their collateral estoppel argument, Defendants rely primarily upon the district court's opinion in *King v. Burlington Northern and Santa Fe Railway Co.*, 455 F. Supp. 2d 964 (N.D. Ill. 2006). In that case, Plaintiff Geraldine King, a railroad ticket agent, was accused by her employer, BNSF, of stealing a number of passenger tickets and selling them for her own benefit. *Id.* at 966. The company filed criminal charges against King and also initiated termination proceedings. *Id.* Following two hearings, BNSF terminated King, and she appealed to the System Board of Adjustment. *Id.* at 967-69. The System Board upheld her termination, determining that BNSF had cause to

believe that King had stolen the tickets. *Id.* at 969-70. Subsequently, BNSF declined to pursue the criminal case against King, and the criminal complaint against her was dismissed. *Id.* at 970. King then sued BNSF for malicious prosecution under Illinois law, which required her to prove that the prior criminal proceedings were instituted by BNSF without probable cause and with malice. *Id.* The court held that the System Board's "determination that Defendant had sufficiently convincing evidence to establish that Plaintiff had, indeed, stolen the tickets, precludes a determination in her favor on the issue of probable cause," and accordingly granted BNSF summary judgment. *Id.* at 976.

The Seventh Circuit upheld the district court's grant of summary judgment, but on different grounds. *King v. Burlington N. & Santa Fe Ry. Co.*, 538 F.3d 814 (7th Cir. 2008). The court "assume[d] for the sake of argument that the [System] Board is the type of tribunal whose findings may receive preclusive effect." *Id.* at 818. However, the court held that issue preclusion did not apply because, in its view, the issues were not the same. During the arbitration, the System Board determined only that BNSF "had established a convincing case" that King had stolen the tickets, which differed from the probable cause standard required in King's malicious prosecution case. *Id.* Because the standard of proof with respect to King's culpability differed in each proceeding, the court held that the issue was not actually settled by the System Board's award.

King is distinguishable from the present suit because it involved the application of defensive mutual

collateral estoppel. The parties in the first case (the arbitration) and the second case (the malicious prosecution suit) were identical. Here, Defendants seek to assert defensive non-mutual collateral estoppel, as they were not parties to the arbitration between Greene and UPS. "Mutuality between the parties is not required in defensive collateral estoppel cases so long as 'the plaintiff has had a full and fair opportunity to litigate the contested issue previously." *Ga.-Pac. Consumer Prod. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1098-99 (6th Cir. 2012) (quoting *McAdoo v. Dallas Corp.*, 932 F.2d 522, 523 (6th Cir. 1991)). Thus, the fact that Defendants, non-parties to the System Board arbitration, seek to assert collateral estoppel against Greene is of no real consequence, as long as the four elements of issue preclusion are satisfied. *Cent. Trans., Inc.*, 936 F.2d at 259.

First, "the issue precluded must be the same one involved in the prior proceeding." *Id.* During the arbitration, "[t]he parties agreed upon the following statement of the issues for resolution: Was the grievant dismissed with just cause; if not, what is the appropriate remedy?" [DN 15-8 at 3.] Under the terms of the Collective Bargaining Agreement, UPS could only discharge Greene with just cause. Thus, to decide this ultimate issue, Arbitrator Winograd had to determine why Greene was terminated, and whether that reason constituted just cause under the CBA. Here, to recover from Defendants, Greene must establish, among other things, that their negligence proximately caused him to suffer harm. *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky.

2003). Greene's first theory of causation is that "[b]ut for the negligence of Defendants, Mr. Greene's personal matters would not have been known to UPS and used against him in his termination matter, and Mr. Greene would have been more likely successful in mediating his conflict with UPS and avoiding termination." [DN 1 at 5-6.] In other words, to succeed on this theory, Greene must show that Defendants' conflict of interest caused UPS to become aware of his tax investigation, and that UPS terminated him because of that investigation.

However, the System Board's Award already decided the cause of Greene's termination. Arbitrator Winograd found that UPS "had objective evidence" indicating that Greene's ability to fly might be impaired, [DN 15-8 at 49], and could therefore order him to take an additional medical examination under the CBA. Greene's refusal to do so was insubordinate, and "there is no dispute that gross insubordination after a clear order and warning of discipline is grounds for dismissal." [*Id.* at 44.] Thus, in upholding Greene's dismissal in its entirety, the System Board determined that Greene was terminated for refusing to submit to a required medical exam, and not for some other reason. To prevail on his first theory, Greene must prove that his tax investigation, at the very least, contributed to his dismissal by UPS. But the cause of Greene's termination was already considered and decided by the System Board during Greene's labor arbitration.

Next, the cause of Greene's termination must have been "actually litigated" and a "critical and necessary

part" of the System Board's Award. *Cent. Transp. Inc.*, 936 F.2d at 259. In this case, the parties presented extensive evidence and argument on the issue of just cause termination, and Arbitrator Winograd explicitly considered and rejected alternative reasons for Greene's dismissal by UPS, [DN 15-8 at 53]. And, as explained above, determining the cause of Greene's termination was necessary to determine whether his termination was supported by just cause. The second and third elements of collateral estoppel are satisfied in this case.

Finally, "the prior forum must have provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue." *Cent. Transp. Inc.*, 936 F.2d at 259. Here, the System Board of Adjustment held an arbitration lasting three days, heard testimony from several witnesses, and received numerous exhibits into evidence. *See generally* [DN 15-8.] All parties, including Greene, were allowed to call witnesses and to cross-examine witnesses called by the other side. [*Id.* at 3.] During the hearing, Greene was represented by counsel, and IPA also advocated on Greene's behalf. After extensive post-hearing briefing, Arbitrator Winograd issued a fifty-six page decision detailing the reasons why Greene's termination should be upheld. While the procedural safeguards afforded to Greene during the arbitration were not the same as those available to him in the more traditional setting of a trial, the law does not require such extensive protections. Rather, for collateral estoppel to apply, Greene need only have had "a full and fair opportunity to

litigate the issue," *Cent. Transp. Inc.*, 936 F.2d at 259, and before the System Board, he had just that. The Sixth Circuit has repeatedly held that arbitrations afford litigants an adequate forum in which to seek vindication of their legal rights. *See, e.g.*, *id.* at 261; *Ivery v. United States*, 686 F.2d 410, 413-14 (6th Cir. 1982). This case presents the Court with no reason to depart from this precedent.

Greene's case is similar to *M.J. Woods, Inc. v. Conopco, Inc.*, 271 F. Supp. 2d 576 (S.D.N.Y. 2003). There, MJW approached Conopco to see if Conopco would be interested in licensing certain cosmetics inventions patented by MJW's founders. *Id.* at 579. Those negotiations eventually fell through, but afterwards, Conopco's Vice President of Research and Development obtained a patent on a similar invention. *Id.* at 580. In its suit, MJW alleged that Conopco violated the Lanham Act, that Conopco's outside counsel, Pennie & Edmonds LLP, committed legal malpractice, and that both defendants engaged in state-law unfair competition and misappropriation of trade secrets. *Id.* at 578. The district court sent all claims except MJW's malpractice claim against P & E to arbitration. *Id.* The arbitrator determined that the defendants "had not breached or misused any confidential information nor had they misappropriated trade secrets." *Id.* P & E then moved for summary judgment on MJW's malpractice claim, arguing that the arbitrator decided in P & E's favor certain issues that MJW had to establish to prevail. *Id.* at 578-79.

The district court agreed. Although the arbitrator had not ruled upon the merits of MJW's malpractice claim, the court wrote that "certain issues that compromise the pertinent elements of the Malpractice Claim necessarily had to be decided by the Arbitrator in order to render judgment in regard to MJW's other claims that were properly before him." *Id.* at 582. Particularly, to succeed on its malpractice claim, MJW had to establish that an attorney-client relationship existed between it and P & E and that P & E's malpractice caused MJW to suffer harm. *Id.* at 583. But the arbitrator had already determined that P & E's state-law misappropriation claims were meritless because MJW was not P & E's client, *id.* at 584, and because P & E's actions caused MJW to suffer no harm, *id.* at 585-86. Therefore, because those issues were already decided by the arbitrator, collateral estoppel prevented MJW from establishing the necessary elements to succeed on its malpractice claim.

The same is true here. To determine whether UPS had just cause to terminate Greene, the System Board necessarily had to determine the cause of Greene's termination. Greene had ample opportunity to litigate this issue and took advantage of that opportunity, but Arbitrator Winograd rejected his arguments. Greene cannot now re-litigate the cause of his termination, when that issue was already decided during his arbitration. Nor is this the proper case to argue that the System Board's Award is invalid, as Greene does in the bulk of his 118-page response. *See generally* [DN 35.] In *Greene v. IPA/UPS System Board of Adjustment, et*

al., No. 3:15-CV-00234, this Court upheld the System Board's Award as valid under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, further strengthening the Court's conclusion in this case that collateral estoppel applies.

Even if the System Board's decision regarding the cause of Greene's termination were not binding upon this Court, the result would still be the same for one simple reason: the uncontested evidence of record demonstrates that UPS knew about Greene's tax investigation before FBT's conflict arose. UPS demonstrated affirmative knowledge that Greene was being investigated on September 7, 2010, when it responded to a subpoena requesting UPS records pertaining specifically to Greene. This was more than two years prior to Greene's hiring of Sommer, in December 2012, and Sommer's move to FBT, in February 2013. Even assuming, *arguendo*, that Greene is correct, and UPS used Greene's failure to submit to the medical exam as a pretext to fire him for his tax investigation, these Defendants could not have been the cause of his termination. FBT and its attorneys had a conflict of interest in this case, but that conflict could not have caused UPS to become aware of something it already knew.

In sum, Greene presents no genuine issue of material fact with respect to his first theory of causation. Because UPS was already aware of the Kentucky Department of Revenue's investigation into his personal tax matters well before his 2013 termination and before Defendants' conflict of interest, Defendants cannot have caused Greene's termination. Even if

Greene's theory was logically possible, the System Board of Arbitration necessarily determined that Greene was terminated for insubordination, and collateral estoppel precludes Greene from attacking that finding in this proceeding.

(2) *Greene's Tax Investigation*

Greene also advances a second theory of causation. According to Greene, "[b]ut for the conflict of interest, Mr. Greene's dispute with the Kentucky Department of Revenue would have been more vigorously pursued by Mr. Sommer and more expeditiously resolved." [DN 1 at 6.] As previously stated, Greene and his fellow UPS pilots were ultimately successful in fighting off the Kentucky tax assessments. [DN 15-8 at 13.] To prevail under this theory, Greene must prove that, despite his ultimate victory, he is still worse off than he would have been absent Defendants' conflict. Here, Greene claims that Defendants' conflict caused him to "incur[] additional costs of hiring new counsel to represent him in his tax matter, requiring substantial time and effort to review documents and get up to speed and creating an additional delay in resolving the matter." [DN 1 at 6.]

Under Kentucky law, a plaintiff in a professional malpractice case is typically required "to put forth expert testimony to inform the jury of the applicable . . . standard of care, any breach of that standard[,] and the resulting injury." *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). Because Defendants' conflict of interest

is the type of breach that could be recognized by a layperson, the Court does not believe that Greene must bring forth expert evidence to establish the element of breach in this case. *Stephens v. Denison*, 150 S.W.3d 80, 82 (Ky. Ct. App. 2004). However, to recover under his second theory, Greene must prove that, because of the conflict, his tax attorneys either refused or were unable to take all appropriate steps towards the resolution of his tax dispute. Such a claim necessarily implicates an "attorney's professional assessment of the law." *Thomas v. Yost Legal Group*, No. 2004-CA-001723-MR, 2005 WL 2174430, at *4 (Ky. Ct. App. Sept. 9, 2005). Here, Greene does require expert testimony to show that Defendants' conflict of interest caused his tax matter to be resolved later than it should have, and at a higher expense. *See Rogers v. Clay*, No. 2006-CA-000397-MR, 2006 WL 3691214 (Ky. Ct. App. Dec. 15, 2006) (upholding trial court's grant of summary judgment in legal malpractice case when plaintiff did not put forth expert evidence on causation element). Defendants have submitted eight items of correspondence purporting to show that from December 2012 through October 2013, Sommer was negotiating with various officials regarding Greene's tax assessment. [DN 15-13.] Faced with this evidence, a layperson would require expert testimony to conclude that, because of Defendants' conflict of interest, Sommer did not act as a reasonably prudent attorney in seeking to resolve Greene's tax dispute.

This case was filed on September 9, 2014. [DN 1.] The deadline for expert disclosure passed on April 20,

2015, and the deadline for discovery passed on June 30, 2015. [DN 12.] Defendants filed the instant motion on July 29, 2015. [DN 15.] Thus, for more than a year, Greene has been on notice that expert testimony might be required to prove his attorney malpractice claim. Despite this lengthy notice and the multiple extensions of time granted by this Court, Greene has failed to present any expert testimony or to state that he intends to obtain the same. Because Greene's second theory of causation requires expert testimony, and because Greene has failed to bring forth any, no genuine dispute of material fact exists and summary judgment is appropriate.

IV. Conclusion

The practice of law is a self-regulating profession. To ensure the public's confidence in our judicial system, attorneys are expected to diligently follow the Rules of Professional Conduct. In this case, the rules against concurrent client conflicts of interest prohibited Defendants from simultaneously representing UPS and Douglas Greene. The record does not clearly explain why Defendants did not recognize this conflict, but in any event, they did not. However, to recover from Defendants in this legal malpractice case, Greene must do more than show the mere existence of a conflict. He must show that Defendants' conflict caused him to suffer harm. Although Greene claims Defendant's conflict caused his termination from UPS, the System Board of Adjustment found otherwise. That finding is entitled to preclusive effect in this case. Even if it were not,

Defendants have shown, and Greene has not rebutted, that their conflict of interest could not have made UPS aware of Greene's tax investigation. UPS knew of the investigation well before Defendants' conflict arose. Furthermore, Greene has not shown via expert testimony, as Kentucky law requires, that Defendants' conflict caused his tax dispute to be resolved more slowly or more expensively than it should have been. No genuine issue of material fact exists with respect to Greene's sole claim of legal malpractice, and Defendants are therefore entitled to summary judgment.

An appropriate order will follow.

November 21, 2016

CC: Counsel of Record
Douglas Greene, *pro se*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:14-CV-00628-TBR

DOUGLAS W. GREENE — PLAINTIFF

v.

INDEPENDENT PILOTS ASSOCIATION, *et al.* — DEFENDANTS

Memorandum Opinion

(Filed Nov. 21, 2016)

This case and its companion cases, *Greene v. Frost Brown Todd, LLC, et al.*, No. 3:14-CV-00619-TBR, and *Greene v. IPA/UPS System Board of Adjustment*, No. 3:15-CV-00234-TBR, arise from Plaintiff Douglas W. Greene's dismissal from his employment as a pilot for United Parcel Service Co. In this case, Greene alleges that Independent Pilots Association, the union that represents UPS's pilots, failed to fairly represent him during his termination proceedings, and retaliated against him for his political activity within the union. *See* [DN 1.][1] Before the Court are several motions, most notably IPA's motion for summary judgment. [DN 50.] For the reasons explained below, that motion [DN 50] is GRANTED. Therefore, IPA's motion to dismiss pursuant to Rule 37(b) or to compel discovery, [DN 51], motion for temporary restraining order, [DN 55], and

[1] Greene brings identical claims against IPA and five of its officers in their official capacities. *See* [DN 1.] In this opinion, the Court uses "IPA" and "Defendants" synonymously.

motion for reconsideration, [DN 62], are DENIED AS MOOT. IPA's motion for leave to file excess pages [DN 74] is GRANTED. Finally, IPA's motion for sanctions [DN 54] is DENIED.

I. Facts and Procedural History

Douglas Greene is an experienced airline pilot with more than twenty years of experience flying large commercial aircraft, including the Boeing 747-400. His employment as a UPS pilot began in 1994 and ended with his termination on November 22, 2013. Greene's early years of employment with UPS appear to have been relatively uneventful. In March 2011, however, UPS subjected Greene to termination proceedings for the first time. [DN 50-3 at 6.] The facts and merits of Greene's 2011 termination are unrelated to the case at bar, except that during that termination, Independent Pilots Association filed a grievance on Greene's behalf. [*Id.*] IPA was successful in pursuing Greene's grievance, and negotiated a settlement that allowed Greene to keep his job. [*Id.*]

At the same time, Greene was under investigation by the Kentucky Department of Revenue. [DN 50-47 at 14.] UPS's flight operations are based in Louisville, Kentucky, and Kentucky authorities apparently believed that some pilots, including Greene, were domiciled in the Commonwealth but were not paying the correct amount of state income taxes. Greene and his fellow UPS pilots were ultimately successful in fending off the tax assessments. [*Id.*] During his tax dispute,

Greene sought to have an anonymous letter published in IPA's bi-weekly newsletter, *Flight Times*. *See* [DN 50-3 at 3.] IPA's policy did not allow the publication of anonymous letters to the editor, so IPA declined Greene's request. [DN 50-58 at 2.] IPA President Robert Travis claims that in his attempts to have his letter published, Greene made "inappropriate, verbally abusive and potentially threatening and slanderous statements" to others concerning IPA and its officials. [DN 50-3 at 3-4.] Because of Greene's conduct, IPA's Executive Board decided to designate Edwin S. Hopson, outside counsel at Wyatt, Tarrant & Combs, as Greene's sole point of contact with IPA for any issues related to his tax dispute. [*Id.* at 4.]

Greene's second dismissal proceedings occurred in 2013. On March 19 of that year, Greene was "jumpseating," or flying for free, on a Federal Express flight from Memphis, Tennessee to his home in Anchorage, Alaska. [DN 50-47 at 15.] At the conclusion of that flight, FedEx security screened Greene's belongings and found a pair of small toiletry scissors. [*Id.* at 16.] Although Transportation Safety Administration guidelines did not ban the scissors from the flight, FedEx's internal security protocols barred their possession. [*Id.*] Greene was unaware that the scissors were a prohibited item. [*Id.*]

Following the March 19 incident, FedEx security notified UPS that Greene had possessed a prohibited item and returned the scissors to Assistant Chief Pilot Jim Psiones, a supervisor at Greene's Anchorage duty station. [*Id.* at 16-17.] Psiones returned the scissors to

Greene while Greene "was in a crew room with other pilots." [*Id.* at 17.] Greene later claimed to UPS System Chief Pilot Roger Quinn that Psiones was confrontational during that encounter, and told Greene that a report had been filed with the TSA regarding the scissor incident. *See* [DN 50-54 at 3-4.] Greene later discovered, as the parties now agree, that no TSA report was ever filed. [*Id.* at 4.]

Additionally, Anchorage Chief Pilot Ed Faith made a notation of the scissor incident on Greene's Exception History Report, or EHR. The EHR is a non-disciplinary part of each UPS crewmember's employment record that makes note of various occurrences during a pilot's employment. A look at Greene's own EHR reveals that most entries are relatively benign, pertaining to work absences, scheduling changes, and the like. *See* [DN 50-55.] Indeed, some EHR entries are positive in nature. *See, e.g.*, [*id.* at 1 ("[D]oug was extremely helpful to us by taking this trip out this afternoon").] The EHR notation regarding the scissor incident, however, was not positive. Faith described the incident as follows [sic throughout]:

> ups was notified by one fedex operator that during the screening process for mr. greene's requested jumpseat, a pair of scissors was discovered. this is a prohibited item! when asked about the scissors, mr. greene stated that "no one else seems to have a problem with them." the scissors were surrendered and later recovered by anc acp jim psiones. this is unacceptable behavior on the part of mr. greene and

> could jeopardize future jumpseat travel for ups pilots on fedex.

[*Id.* at 3.] In a separate section, Faith's EHR notation stated:

> both jim psiones and ups security rep ken murray have spoken with mr. greene. he has been advised that his actions and confrontational behavior are unacceptable and not to have it happen again. entered by anc cp ed faith. . . . in a conversation subsequently with capt. greene, he did not seem to take the issue seriously and had negative opinions on the performance of the security staff at fedex and stated he has been through there (fedex) with those scissors several times with no problems. in short, capt. greene marginalized the event and always had a response justifying his actions. capt. greene took exception to my bringing the issue forward in the crew room. it was not my intent to address the issue openly. I was left with no options once capt. greene began talking and never stopped to listen. j psiones

[*Id.*]

While Greene did not deny that he possessed the toiletry scissors on the FedEx flight, he felt that Faith's EHR notation did not accurately reflect the incident. Thus, Greene spent the summer of 2013 lobbying various UPS and IPA officials in an attempt to have the notation removed from his EHR. Particularly, Greene contacted Billy Cason, IPA Treasurer, and Christopher Harper, Chairman of the IPA Jump Seat Committee,

seeing their help in removing the notation. *See* [DN 50-56 at 2; DN 50-62 at 2.] Under the UPS-IPA Collective Bargaining Agreement, EHR notations are not disciplinary, and therefore may not be the subject of an employment grievance. *See* [DN 50-9 at 43 ("Verbal warnings, warning letters and letters of concern which do not include loss of pay, loss of a benefit, suspension or termination shall not be considered discipline for purposes of the grievance procedure.").] Therefore, IPA did not file a grievance concerning the EHR notation on Greene's behalf, but Cason and Harper did negotiate with UPS officials concerning the notation. *See* [DN 50-56 at 2; DN 50-62 at 2.] While Cason and Harper were not successful in having the entire EHR notation removed, they did convince Chief Pilot Quinn to add the following statement [sic throughout]:

> **update 8/1/2013**ups received a letter from fedex cp jeff kilmer on june 14, 2013 acknowledging the event and that capt. greene was courtesy to his security team when the event occurred. archive of that email is preserved. this matter is considered closed unless further information is provided. roger quinn system chief pilot

[DN 50-55 at 3.] Both Cason and Harper consider their efforts successful under the circumstances. *See* [DN 50-56 at 2; DN 50-62 at 2-3.] Greene, however, was still unsatisfied, writing a six page letter to that effect to Chief Pilot Quinn. *See* [DN 50-54.]

To address Greene's continued concerns with the EHR notation, Anchorage Chief Pilot Faith met with

Greene and Wayne Jackson, an IPA representative, on August 22, 2013. In a subsequent EHR notation, Faith detailed what transpired at that meeting [sic throughout]:

> on 22 august 2013, capts: doug greene, wayne jackson and i met to discuss captain greene concerns with his recent exception entry. i gave captain greene an opportunity to explain his side of the fedex story and let him know where i had received my information for the initial exception entry. during the conversation it was discovered that captain greene was recording our conversation without my knowledge or approval. when I questioned captain greene regarding his recording of our conversation, he stated that he recorded all his conversations between himself and the ipa and ups. he stated that he recorded his conversation with anc security supervisor ken murray regarding the fedex issue without his knowledge. captain greene stated that the ipa and ups were trying to get him and he would use the tapes to ensure his side of the story when he came after ups. i told captain greene that i had received concerns from a number of crewmembers that he was attempting to gather information on acp jim psiones. i told captain greene that the crewmembers indicated they were feeling harassed and intimidated and felt uncomfortable flying with him or speaking to him. i asked if he was familiar with ups' workplace violence and harassment policies and he stated that he was and that he began all his conversations with a disclaimer

> to allow the crewmember to decide whether they wanted to speak to him or not. i said regardless of his disclaimer, some of the crewmembers felt intimidated and threatened and i stated that i needed a commitment that he not make additional inquiries and if we received additional concerns from crewmembers we would have to move forward with formal harassment/workplace violence actions. he stated he understood.

[DN 50-55 at 3-4.] During a later disciplinary hearing, Greene's recording of the August 22 meeting was played and transcribed. That transcript runs some eighty-six pages and reveals that the bulk of that meeting consisted of Greene explaining the circumstances of the scissor incident and how, in his view, the EHR notation was inaccurate and unwarranted. *See* [DN 50-21 at 5-91.] Additionally, Greene references the Kentucky tax investigation and his belief that UPS and IPA officials had conspired against him and other UPS pilots. Greene also mentions a back injury that he suffered in 1994 and re-aggravated in 2012, suggesting that he had sought medical treatment to deal with the pain. *See* [*id.* at 52-56.]

Greene's behavior following the scissor incident, and particularly his statements to other pilots and during the August 22 meeting, caused UPS to become concerned with Greene's ability to safely function as a pilot. UPS removed Greene from flight status on or around August 22 and notified IPA that it was investigating Greene's conduct. [DN 50-3 at 5.] Under Article 7.B.2, when UPS removes a pilot from flight duty, the

pilot is entitled to a disciplinary hearing, at which he may be represented by IPA. [DN 50-9 at 43.] In the days leading up to Greene's hearing, scheduled for September 11, 2013, IPA's Executive Board decided to hire outside counsel to handle Greene's case on IPA's behalf. [DN 50-3 at 5.] Typically, IPA members are represented by IPA staff attorneys during disciplinary proceedings, but because of Greene's acrimonious history with IPA leadership, the Board hired attorney Irwin Cutler to advocate for Greene. [*Id.* at 6.] While Cutler had not previously represented clients in the air cargo industry, he had extensive experience in labor and employment law, and was recognized by his peers as an outstanding attorney in his field. [DN 50-18 at 1-2.] The Executive Board informed Greene of its decision to hire Cutler by letter on August 30, 2013, and copied Greene's personal attorney, Arnold Feldman. *See* [DN 50-7.] Cutler, Feldman, and Greene met in person on September 10, 2013, to prepare for the disciplinary hearing the next day. [DN 50-18 at 3.]

During the September 11 hearing, Greene stated that in addition to his recording of the August 22, 2013 meeting, he also possessed two additional recordings of conversations with UPS management. [*Id.*] Greene provided all three audio files to Feldman, who forwarded them to Cutler. [*Id.* at 3-4.] During a second disciplinary hearing on October 16, 2013, Greene claimed that those were the only recordings he possessed. [*Id.* at 4.] However, Greene later admitted that his statement during the October 16 hearing was

untruthful, and that he actually recorded four conversations. [DN 50-47 at 22-23.]

In addition to the two disciplinary hearings, UPS also received statements from other employees that raised concerns about Greene's behavior and his ability to fly safely. Michael Starnes, one of Greene's fellow pilots, emailed Jennifer Robbins, a UPS investigator, on September 7, 2013, to follow up on a previous telephone call. [DN 50-51 at 1.] In his email, Starnes states that, in his opinion, Greene's behavior towards Psiones was not justified, and characterizes Greene's statements as "personal attacks." [*Id.*] Starnes also says that "Doug's paranoia has extend[ed] to him carrying a recording device onto UPS property and keeping files of paper with him in order to document anything that Jim [Psiones] says or does. This to me sounds like someone who is more interested in revenge than coming to work to fly airplanes." [*Id.*] Similarly, Captain Peyton Cook emailed Psiones on September 23, stating that "Captain Greene's hostile and volatile personality towards fellow crew members and UPS management jeopardizes the conduct of safe flight operations." [DN 50-52 at 1.]

Pilot Marc McDermont also provided a statement to Robbins, on October 19, 2013. *See* [DN 50-53.] McDermont states that during a layover in Hong Kong in early July, he and other UPS crewmembers met Greene in the lobby of a hotel. [*Id.* at 1.] This was the first time McDermont and Greene had ever met. [*Id.*] McDermont, Greene, and the other UPS crewmembers went out to dinner, during which "Captain Greene

spoke quite vociferously and at great length about his interactions with the Company and the Kentucky Department of Revenue. He stated that there was a conspiracy between UPS and the Kentucky Department of Revenue to harm him financially and to impeach his character." [*Id.*] McDermont also tells Robbins that, during their dinner, Greene "said that UPS had hired several hit men who were associated with UPS' attorney. . . . Captain Greene then stated that he had developed so much evidence of their plot to kill him that it had made it impossible for UPS to carry through with the assassination." [*Id.*]

Following its internal investigation and the two disciplinary hearings, UPS decided to require Greene to submit to an additional medical examination, as was its right under the CBA. In an October 25, 2013 letter, Chief Pilot Quinn informed Greene:

> This investigation has uncovered various acts of misconduct that has provided a legitimate basis for discipline. However, the investigation has also uncovered "objective evidence indicating that you may have a medical problem which could interfere with your ability to safely function as a crewmember."

[DN 50-23 at 2.] Quinn was quoting Article 5.D.1.a of the CBA, which provides, in pertinent part, "If there is objective evidence indicating that a crewmember has a medical problem which could interfere with his ability to safely function as a crewmember, the Company may require the crewmember to have a medical examination other than a routine FAA required physical

examination." [DN 50-9 at 25.] In response to Quinn's directive, Cutler requested that UPS provide the "objective evidence" that had caused UPS to become concerned with Greene's ability to fly. [DN 50-18 at 4.] The next day, UPS provided Cutler with 407 pages of evidence, "consist[ing] mainly of transcripts of Greene's recorded conversations and statements that a UPS investigator had received from pilots regarding Greene's unusual behavior." [*Id.* at 4-5.]

UPS first directed Greene to see Dr. Petra Illig, an Aviation Medical Examiner based in Anchorage, on November 2, 2013. Prior to that appointment, Cutler "warned Greene and Feldman about the Company's claimed objective evidence to justify the order for an exam," telling them that an arbitrator might very well find that UPS's evidence justified an additional medical exam under the CBA. [*Id.* at 5.] Greene failed to appear for the November 2 exam. UPS scheduled another appointment for Greene with Dr. Illig on November 7, 2013, and informed Greene via email that "[f]ailure to appear will result in the immediate termination of your employment with United Parcel Service." [DN 50-24 at 2.] Before the November 7 appointment, Cutler and Feldman exchanged several emails. *See* [DN 50-25; DN 50-26.] Those messages show that in the days leading up to the November 7 appointment, Greene and Feldman were still concerned with the propriety, purpose, and scope of the medical examination. *See* [*id.*] While Cutler stopped short of advising Greene to attend the appointment, he maintained his position that Greene would "run significant risks by refusing to

take the exam." [DN 50-25 at 4.] Cutler also stated that "the Union will certainly defend Doug with regard to any decision he makes." [*Id.*] Finally, Cutler corresponded with Tony Coleman, UPS's outside counsel at the time, seeking answers to some of the questions Feldman had raised regarding the examination. [DN 50-26 at 4.] Following this colloquy, Greene did attend his appointment with Dr. Illig on November 7. [DN 50-18 at 6.] However, Greene had Feldman on speakerphone during the appointment, and eventually left without being examined. [*Id.*]

Despite UPS's earlier warning to Greene, it allowed him one more opportunity to submit to an examination. Cutler states that Greene requested, through Feldman, that he be given the weekend of November 16-17 to meet with his family to decide whether to undergo the exam. [*Id.*] Cutler relayed that request to UPS, and UPS agreed. [DN 50-27 at 2.] UPS also stated that "the only information we will seek from the examining doctor is a conclusion as to whether Doug is legally safe to return to work for UPS as a Captain. We do not need any medical details." [*Id.*] Nevertheless, Greene declined a third opportunity to be examined, and Chief Pilot Quinn terminated his employment on November 22, 2013 for insubordination. [DN 50-28 at 2.]

Following Greene's termination, IPA filed a grievance on Greene's behalf. [DN 50-18 at 6.] In cases involving discharge, CBA Article 7.C.1 allows the grievance to proceed directly to the IPA/UPS System Board of Adjustment, comprised of two UPS-appointed

members, two IPA-appointed members, and one neutral arbitrator selected from an alphabetical list. [DN 50-9 at 44; *id.* at 49.] Initially, Arbitrator James Scearce was selected as the neutral member of the System Board, and he set the arbitration hearing for January 21, 2014. [DN 50-18 at 7.] On December 12, 2013, Scearce also informed UPS and IPA via email that he was suffering from macular degeneration and was "somewhat impaired at close reading." [DN 50-29 at 2.] Cutler admits that this email was never forwarded to Feldman or Greene. [DN 50-18 at 7.]

During December 2013 and January 2014, Cutler claims that he and Houston Parrish, a fellow attorney at Cutler's firm, "worked with Feldman in interviewing potential witnesses, engaging in telephonic strategy sessions, viewing documents, and otherwise doing what lawyers normally do to prepare for an evidentiary hearing." [*Id.*] Pursuant to the CBA's discovery provisions, Cutler also requested numerous documents from UPS. [*Id.*] Additionally, Cutler wrote to Tony Coleman, outside counsel for UPS, on January 8, 2014, asking Coleman to recuse himself from Greene's case because of a conflict of interest.[2] *See* [DN 50-30.] Cutler

[2] That conflict forms the basis of Greene's claims in *Greene v. Frost Brown Todd, LLC, et al.*, No. 3:14-CV-00619. Greene had previously hired attorney Mark Sommer to represent him in his Kentucky tax dispute. When Greene originally hired Sommer, he was employed at Bingham Greenebaum Doll, but during the pendency of Greene's case, Sommer began working at Frost Brown Todd. Sommer still represented Greene when Coleman and Frost Brown Todd were hired to represent UPS in Greene's termination proceedings.

states that he was not informed of the conflict until December 12, 2013, and Greene did not request that Coleman be recused until January 6, 2014. [DN 50-18 at 7-8.] Coleman recused himself and his firm on January 13, 2014. [DN 50-31.]

The next day, January 14, Cutler received a call from John Klages, a Quarles & Brady attorney based in Chicago, who stated that UPS had hired him to replace Coleman. [DN 50-18 at 8.] Klages asked Cutler to agree to postpone the arbitration hearing, scheduled to begin a week later. [*Id.*] Cutler claims that he and Feldman had already discussed the possibility of postponing the hearing, and Feldman was willing to agree. [*Id.*] Because of his previous conversation with Feldman, and his belief that Arbitrator Scearce would grant a postponement over any objection because of the short time frame, Cutler agreed to the postponement. [*Id.*] Later on January 14, however, Cutler received an email from Feldman, asking that IPA oppose UPS's forthcoming motion to postpone. [DN 50-32 at 2.] Cutler declined to oppose a postponement, instead sending a letter to Klages and Scearce requesting that the arbitration be rescheduled as soon as feasible. [DN 50- 33.] Scearce offered dates for the hearing in February, but according to Cutler, both Greene and UPS rejected those dates. [DN 50-34.] Cutler says that Feldman and Greene wanted to delay the hearing while they researched Arbitrator Scearce and the method by which UPS and IPA chose the neutral arbitrators. [DN 50-18 at 9.] Eventually, the parties settled on September 15, 2014 as the hearing date. [*Id.*]

While Greene's termination grievance was pending, Feldman requested that Cutler provide him with several types of information. First, Feldman asked for information or documents pertaining to the IPA Professional Standards Committee. Robert Travis, IPA President, describes the Committee in his declaration:

> The IPA Professional Standards Committee is a group of IPA member pilots who routinely function independently of IPA's officers. Their role is to consider issues which pilots bring to them regarding other pilots and to attempt to resolve those issues before the matter is escalated or is called to UPS management's attention which may result in discipline. Professional standards committees are common in the airline industry and perform peer-to-peer dispute resolution. . . . Their role is to consider the issues which pilots bring to them regarding other pilots and to attempt to resolve those issues before the matter is escalated to the Company's attention and possible discipline. . . . As Professional Standards is a mechanism for pilots to address issues with other pilots internally and confidentially, its value depends on the fact that it is confidential. The committee members keep all communications completely confidential and share them within the IPA organization strictly on a "need to know" basis.

[DN 50-3 at 6-7.] In two letters to Feldman, Cutler explains why IPA declined to furnish the Professional Standards Committee information: "To introduce evidence of what has transpired (or perhaps more

accurately, what has not transpired) with Professional Standards we think unwisely opens up an area of discovery and subpoena that functions best when its confidential nature is protected." [DN 50-35 at 2; *see also* DN 50-36 at 3 ("Weighing the probative value of [the Professional Standards] evidence against the risk of opening the door for UPS to dredge up Doug's prior termination, and considering the deleterious effect it may have on the Professional Standards program, I am not willing to introduce that evidence at the arbitration hearing.").]

Feldman also requested that Cutler provide information regarding the arbitrator selection process, and specifically how Scearce had been selected for inclusion on the list of arbitrators. [DN 50-37.] Feldman and Greene were apparently concerned with Arbitrator Scearce because of his age, and because he had previously been censured by the National Academy of Arbitrators. Cutler responded with a list of the twenty arbitrators that were currently on the UPS-IPA panel, and explained that whenever an arbitrator is needed, UPS and IPA simply select the next person on the list. [DN 50-38 at 1.] Cutler did, however, decline to provide documents relating to the formation of the arbitrator list in 2006, when the current iteration of the CBA went into effect. [DN 50-18 at 11.] Cutler told Feldman that IPA did not believe Scearce's past censure warranted disqualification, and did not respond to Feldman's concerns regarding Scearce's age. [DN 50-39 at 2-3.]

On April 3, 2014, Feldman sent a letter to Scearce, asking Scearce to recuse himself because he had issued subpoenas for UPS witnesses without notifying Feldman or Greene, and because of his past censure. [DN 50-40 at 1-2.] IPA joined Feldman's request for Scearce to withdraw on April 4. [DN 50-41 at 1.] Citing medical limitations, Scearce withdrew, [DN 50-42 at 2], and the parties selected Jack Tillem, the next arbitrator on the list, as his replacement. On July 21, 2014, Feldman filed a motion asking Tillem to withdraw, *see* [DN 50-44], alleging that he was unqualified to hear Greene's case, [DN 50-43 at 1]. Tillem originally denied Greene's motion, [DN 50-45 at 1], but then voluntarily withdrew, stating that "the denial of [Greene's] motion cannot help but create an appearance[,] if not the reality[,] of lack of impartiality, a shroud hanging over the entire proceeding," [DN 50-46 at 1]. The next arbitrator on the list was Barry Winograd. Cutler states that Feldman "did not have a problem with Winograd because his opinions [were] better than Tillem's, not because of his experience in the airline industry." [DN 50-18 at 12.] Winograd ultimately presided over the arbitration hearing held on September 15-17, 2014.

In the weeks leading up to the hearing, Cutler states that he and Feldman "had many conversations . . . to discuss strategy and to prepare for the hearing." [*Id.* at 12.] IPA arranged for Greene's witnesses to be present for the hearing at IPA's expense. [*Id.* at 12-13.] Ten days before the hearing, on September 5, 2014, Feldman requested that IPA completely withdraw from active participation in Greene's case. *See* [DN

50-48.] Specifically, Feldman asked that "IPA discontinue contacting union and company witnesses, opposing counsel and . . . the arbitrator." [*Id.* at 1.] However, Feldman did request that Cutler "continue to promptly coordinate administrative and logistical matters," "relay messages as required," and "pay the costs it is obligated to pay." [*Id.*] Additionally, Feldman asked that Greene, rather than IPA, be allowed to appoint the two union representatives to sit on the System Board. [*Id.* at 2.]

On September 8, 2014, Cutler replied to Feldman's letter. *See* [DN 50-49.] Cutler agreed to allow Feldman to "represent Captain Greene at the hearing, to make an opening statement and closing statement or brief, present witnesses, cross-examine witnesses, make objections and motions and otherwise fully participate in the hearing." [*Id.* at 1.] However, Cutler reserved IPA's right to "participate fully in the hearing and the proceedings leading up to the hearing," stating that turning complete control of the arbitration over to Greene "would be an abdication of [IPA's] obligation to the membership as a whole." [*Id.*] Pursuant to the CBA, IPA declined to allow Greene to appoint the two union representatives to the System Board. *See* [*id.* at 2-3.] Apparently unsatisfied with IPA's concessions, Greene moved on September 10 to exclude IPA from the arbitration, and to be allowed to appoint the union representatives. Arbitrator Winograd denied both of those motions. [DN 50-50 at 2.]

On the morning of September 12, 2014, UPS delivered to Cutler's office "two boxes containing

approximately 4,000 pages of documents." [DN 75-1 at 1.] Cutler notified Feldman that the documents had been delivered, [*id.* at 4], and made copies for Feldman of all the documents, [*id.* at 2]. Cutler and his staff "reviewed the documents and made extra copies of those which [they] felt were of importance or of interest." [*Id.*] According to Cutler, one item of interest that his office copied was the document Greene now refers to as the "Jennifer Robbins Determinate E-Mail." [DN 63 at 23 (emphasis removed).] In that email, Robbins tells Rob Guinn, another UPS security manager, "Just so you know, Roger [Quinn] and I are on the same page that we should bring Greene back in to ask a few more questions and then determinate [sic] him due to[:] creating a hostile work environment, dishonesty and retaliation." [Case No. 3:15-CV-00234, DN 56-2 at 1.][3]

Also on September 12, 2014, the same day that UPS delivered 4,000 pages of documents to Cutler, Greene filed the instant suit. [DN 1.] Greene's specific allegations are detailed below, but generally speaking, Greene claims that in handling his termination grievance, IPA violated both its duty of fair representation and certain provisions of the Labor-Management Reporting and Disclosure Act. *See generally* [*id.*] The record is unclear as to when the suit came to IPA's attention, but in any event, Cutler and Parrish attended the arbitration hearing on September 15-17. [DN 50-18 at 15.] UPS called five witnesses and

[3] Greene refers to the Robbins email in his response to IPA's motion for summary judgment, but the email was not filed as an exhibit to his response in this case.

introduced thirty-five exhibits during the hearing. [*Id.*] Feldman, on Greene's behalf, called eleven witnesses, including Greene, and introduced twenty-one exhibits. [*Id.*] IPA also introduced several additional exhibits that it felt supported Greene's case, but were not introduced by Feldman. [*Id.*] Following the arbitration, the parties filed post-hearing briefs and responses. [*Id.*] Cutler claims that after both the arbitration and the post-hearing briefing, Feldman thanked Cutler for his assistance and complimented Cutler on the quality of his work. [*Id.*] Cutler also states that Feldman and Greene rejected Cutler's suggestion that they offer to Arbitrator Winograd an intermediate remedy, rather than all-or-nothing termination or reinstatement. [*Id.*]

Arbitrator Winograd issued the System Board of Adjustment's Opinion and Award on March 20, 2015. *See* [DN 50-47.] Both UPS-appointed System Board members voted in favor of termination, [*id.* at 58-59], and both IPA-appointed members voted in favor of reinstatement, [*id.* at 60-61]. Arbitrator Winograd broke the tie and upheld Greene's dismissal in its entirety. He found that UPS's investigation was "sufficiently fair and thorough," [*id.* at 47], and that UPS had sufficient "objective evidence" to direct Greene to submit to an additional medical examination under the CBA, [*id.* at 50]. "Standing alone," Winograd wrote, "Captain Greene's acknowledgement of a serious back injury . . . provided objective evidence of a need for further medical examination." [*Id.*] Winograd characterized Greene's statements following the scissor incident as "unrelenting and wildly speculative in the range and

nature of accusations that he lodged against ACP Psiones, the Company, the Union, and Kentucky's revenue authority, including allegations that the Company and the Union were engaged in allied action against him." [*Id.* at 51.] Greene's "fixation" on the EHR notation "raised a legitimate medical issue about his judgment and focus." [*Id.*] Winograd described Greene's conduct as "occupational self-destruction beyond the remedial authority of [the System Board]." [*Id.* at 55.] Finally, Winograd found "no evidence of collusion between the Company and the Union," [*id.* at 56], recognizing that there was

> ample evidence of the Union's firm and clear opposition to the Company's action, reflecting a Union interest to protect not only Greene, but the bargaining unit as a whole from unjustified medical examinations under Article 5.D. The Union's activities with respect to this case show conscientious, skilled, and independent representation of Captain Greene throughout the investigatory process, the hearing, and after, continuing to offer evidence and objections despite hostility expressed by Captain Greene.

[*Id.*]

As previously mentioned, Greene filed this action on September 12, 2014, three days before the arbitration hearing began. Greene alleges that IPA and five of its officers violated §§ 101(a)(2) and (5) of the Labor-Management Reporting and Disclosure Act of 1959, as well as their duty of fair representation. [DN 1 at 1-2.]

He lists three events that he claims "resulted in a marked change in Captain Greene's relationship with the IPA":

> a. The first event involved the shuffling of IPA Executive Board leadership assignments in a manner Captain Greene believed was contrary to the union's Constitution and By-laws.
>
> b. The second event was Captain Greene's public support and nomination of a candidate to oppose then IPA President Robert Travis, who subsequently won reelection.
>
> c. The third event was the IPA's decision to limit who Captain Greene could speak with and restrict what he could publish, with regard to an investigation of UPS pilots undertaken by the Kentucky Department of Revenue.

[*Id.* at 3.] Greene claims that in retaliation for his "vocal and unabashed . . . criticism of the IPA, its leadership and its General Counsel," IPA breached its duty of fair representation and violated the LMRDA in several ways. [*Id.* at 4.] As these allegations form the gravamen of Greene's claims against IPA, they are reproduced below:

> 42. In retaliation for his outspoken criticism of the IPA and his nomination of an opposing candidate, the union has refused to provide Captain Greene with the documents and information needed to properly prosecute his grievance against UPS and to defend himself

in the matter of his discharge from employment by UPS and has thus violated Section [411(a)(2)] of the LMRDA.

43. Section [411(a)(5)] of the LMRDA safeguards union members against improper discipline. In retaliation for his outspoken criticism of the IPA and his nomination of an opposing candidate, the union has constructively disciplined him by refusing to provide Captain Greene with the documents and information needed to properly prosecute his grievance against UPS and to defend himself in the matter of his discharge from employment by UPS.

. . .

45. Refusal to permit Captain Greene to communicate with his elected representatives and appropriate union staff in preparation for his defense is a breach of the IPA's duty of fair representation and because it is in retaliation for his political speech is a violation of the LMRDA.

46. Refusal to disclose professional standards documents, or the absence of documents bearing directly on his case is a breach of the IPA's duty of fair representation and because it is in retaliation for his political speech is a violation of the LMRDA.

47. Refusal to disclose documents related to the arbitrator selection process is a breach of the IPA's duty of fair representation and

because it is in retaliation for his political speech is a violation of the LMRDA.

48. Refusal to prosecute eleven pending grievances is a breach of the IPA's duty of fair representation and because it is in retaliation for his political speech is a violation of the LMRDA.

49. Refusal to assist Captain Greene in correcting his employment record is a breach of the IPA's duty of fair representation and because it is in retaliation for his political speech is a violation of the LMRDA.

50. Refusal to inform Captain Greene, either directly or through union counsel that the company intended to discharge Captain Greene hindered his and outside counsel's ability to defend Captain Greene during the investigation and was a breach of the IPA's duty of fair representation and because it is in retaliation for his political speech is a violation of the LMRDA.

51. Assisting Mr. McDermont, a member of the bargaining unit, to file false, misleading and defamatory statements against Captain Greene was a breach of the IPA's duty of fair representation and because it is in retaliation for his political speech is a violation of the LMRDA.

52. Withholding disqualifying information regarding the arbitrator's health from Captain Greene was a breach of the IPA's duty of fair representation and because it is in

> retaliation for his political speech is a violation of the LMRDA.

[*Id.* at 7-9.]

When Greene filed his complaint, he was represented by Feldman as well as local counsel. Feldman moved to withdraw on November 19, 2015, [DN 25], and the Court granted that motion on December 9, 2015, [DN 29]. Since that time, Greene has proceeded *pro se*. Currently ripe for adjudication before the Court are: Defendants' motion for summary judgment, [DN 50]; Defendants' motion to dismiss pursuant to Rule 37(b), or in the alternative, to compel discovery responses, [DN 51]; Defendants' motion for sanctions, [DN 54]; Defendants' motion for temporary restraining order, [DN 55]; Defendants' motion for reconsideration, [DN 62]; and Defendants' motion for leave to file excess pages, [DN 74]. Both dispositive motions have been fully briefed, and the time for filing responses and replies for all other motions has passed. These matters are now ripe for adjudication.

II. Discussion

A. IPA's Motion for Summary Judgment

(1) *Standard of Review*

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine

dispute of material fact exists where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court "may not make credibility determinations nor weigh the evidence when determining whether an issue of fact remains for trial." *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014) (citing *Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir. 2001); *Ahlers v. Schebil*, 188 F.3d 365, 369 (6th Cir. 1999)). "The ultimate question is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Back v. Nestlé USA, Inc.*, 694 F.3d 571, 575 (6th Cir. 2012) (quoting *Anderson*, 477 U.S. at 251–52).

As the party moving for summary judgment, IPA must shoulder the burden of showing the absence of a genuine dispute of material fact as to at least one essential element of Greene's claims. Fed. R. Civ. P. 56(c); see *Laster*, 746 F.3d at 726 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Assuming IPA satisfies its burden of production, Greene "must—by deposition, answers to interrogatories, affidavits, and admissions on file—show specific facts that reveal a genuine issue for trial." *Laster*, 746 F.3d at 726 (citing *Celotex Corp.*, 477 U.S. at 324).

(2) *Greene's Duty of Fair Representation Claim*

Greene first alleges that Independent Pilots Association breached its duty of fair representation in its

handling of Greene's employment grievances against UPS. *See generally* [DN 1.] In order to prevail on this claim, Greene must show that in handling his termination proceedings, IPA acted arbitrarily, discriminatorily, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Additionally, Greene must prove that if IPA had not acted in such a manner, the outcome of his arbitration would likely have been different. *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994). In handling member grievances, the law affords unions a great deal of discretion, and IPA exercised that discretion in a reasonable manner throughout the course of Greene's termination. Greene presents no evidence demonstrating that IPA acted arbitrarily, discriminatorily, or in bad faith, or that he could have ever been successful pursuing his termination grievance. Therefore, Defendants are entitled to summary judgment on Greene's first claim.

In *Greene v. IPA/UPS System Board of Adjustment*, No. 3:15-CV-00234, this Court upheld the System Board's Award as valid under the Railway Labor Act. Normally, binding arbitration under the RLA is just that – binding. The RLA provides only a narrow scope of review, and permits a reviewing court to overturn an arbitration in only limited circumstances. *See* 45 U.S.C. § 153 First (q). "Subject to [that] very limited judicial review, [the employee] will be bound by the result according to the finality provisions of the [collective bargaining] agreement." *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983) (citations omitted). However, a union's violation of its duty to fairly

represent an employee during disciplinary proceedings seems to provide an exception to this rule. In *DelCostello*, the Supreme Court stated that "when the union . . . acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation . . . an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." *Id.* (citations omitted). In other words, "[t]he union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Thus, the final, binding RLA arbitration that adjudicated Greene's termination grievance, upheld by this Court, does not bar Greene's duty of fair representation suit against IPA.

A union's duty to fairly represent its members was first announced by the Supreme Court in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). In that case, which also arose under the Railway Labor Act, the Brotherhood of Locomotive Firemen and Enginemen and the railroad amended their collective bargaining agreement to exclude African-American railroad firemen from employment. *Id.* at 194-96. The Supreme Court held that, in passing the Railway Labor Act, Congress intended "to impose on the bargaining representative . . . the duty to exercise fairly the

power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them." *Id.* at 202-03.

Steele imposed the duty of fair representation upon the union in the context of a contract negotiation, but the Court later extended that duty to apply in employee discipline cases. *Vaca*, 386 U.S. at 186 (1967). In *Vaca v. Sipes*, the Court held that a union did not breach its duty of fair representation when it declined to pursue an employee's discharge grievance to arbitration, after the union concluded the employer had sufficient medical evidence to justify its decision. *Id.* at 194-95. The *Vaca* Court set out the circumstances under which a union violates its duty of fair representation. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190.

Most commonly, questions regarding a union's violation of its duty arise in the context of a hybrid claim under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Under that statute, an aggrieved employee may sue at the same time both his employer, for violating the collective bargaining agreement, and his union, for failing to fairly represent him. To prevail on a LMRA § 301 hybrid claim, the employee must prove not only that the union breached its duty, but also that the employer breached the collective bargaining agreement. *DelCostello*, 462 U.S. at 165 (1983). These two claims are "'inextricably interdependent,' and the employee must prove both in order to recover from either

defendant." *Lyon v. Yellow Transp., Inc.*, 379 F. App'x 452, 454 (6th Cir. 2010) (quoting *DelCostello*, 462 U.S. at 165) (internal citation omitted). In this case, Greene has not brought a true hybrid § 301 claim, because he has chosen to sue only his union, Independent Pilots Association. To recover against IPA, Greene need not also sue UPS. *See id.* ("[A]n employee may choose to sue one defendant and not the other."). However, Greene's choice to sue only IPA does not absolve him of his burden to prove both that IPA "handled his grievance 'in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation,'" and that UPS breached the CBA. *Id.* at 455 (quoting *DelCostello*, 462 U.S. at 164). Because Greene cannot show that IPA breached its duty of fair representation, the Court need only analyze the first aspect of Greene's fair representation claim.

To prevail against IPA, Greene must first prove that IPA acted arbitrarily, discriminatorily, or in bad faith. *Vaca*, 386 U.S. 171, 190 (1967). However, the Supreme Court has concluded that Congress did not intend for a federal court to replace the union's decisions with its own. Thus, "[a]ny substantive examination of a union's performance . . . must be highly deferential." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991); *see also Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 526 (6th Cir. 1993). While a gross mistake or inaction without a reasonable explanation may demonstrate a breach of the union's duty, *Poole v. Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1983), mere negligence or errors in judgment are not enough, *Walk v. P*I*E*

Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992). "An unwise or even an unconsidered decision by the union is not necessarily an irrational decision." *Id.* Mere "[c]onclusory allegations of discrimination are insufficient" to maintain an action against a union for breach of its duty of fair representation; rather, "an affirmative showing that the Union's action or inaction was motivated by bad faith is required." *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975).

Additionally, if indeed the union did breach its duty of fair representation, the plaintiff must prove that the breach mattered in some appreciable way. The Sixth Circuit has concluded that a breach of duty is only actionable if there is a "direct nexus" between the breach and the resulting injury. *Wood v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 406*, 807 F.2d 493, 502 (6th Cir. 1986). In other words, "the plaintiff must meet the onerous burden of proving that the grievance process was 'seriously flawed by the union's breach of its duty to represent employees honestly and in good faith.'" *Black*, 15 F.3d at 585 (quoting *Hines*, 424 U.S. at 570) (emphasis removed). "Thus, if a union fails to present favorable evidence during the grievance process, this failure may constitute a breach of its duty only if that evidence probably would have brought about a different decision." *Id.* (citing *Taylor v. Ford Motor Co.*, 866 F.2d 895, 898-99 (6th Cir. 1989)). To ultimately prevail against IPA, then, Greene must prove not only that IPA breached its duty of fair representation, but also

that his employment grievance would have been successful had that breach not occurred. With an eye toward the deference due to the union's decision-making, the Court must now evaluate the propriety of IPA's conduct during Greene's disciplinary proceedings.

First, Greene may show that IPA breached its duty of fair representation by acting arbitrarily. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)) (citation omitted). Mere negligence on the part of the union will not suffice, nor will ordinary mistakes, errors, or flaws in judgment. *Garrison v. Cassens Transp. Co.*, 334 F.3d 528, 538 (6th Cir. 2003) (citations omitted). "[A]n unwise or even an unconsidered decision by the union is not necessarily an irrational decision." *Id.* (quoting *Walk v. P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992)). Instead, the plaintiff must show that the union's actions were "wholly irrational." *O'Neill*, 499 U.S. at 78. And while a union's duty includes undertaking a "reasonable investigation," *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994), that duty "does not require a union to exhaust every theoretically available procedure simply on the demand of a union member," *St. Clair v. Local Union No. 515 of the Int'l Bhd. of Teamsters*, 422 F.2d 128, 130 (6th Cir. 1969) (citing *Vaca*, 386 U.S. at 192).

The Sixth Circuit addressed a close case of arbitrariness in *Walk v. P*I*E Nationwide, Inc.* Walk, a dockworker and truck driver, was discharged from his employment after he tested positive for marijuana. 958 F.2d at 1325. After unsuccessfully pursuing grievance procedures under the collective bargaining agreement, Walk brought suit against his employer and the International Brotherhood of Teamsters. *Id.* Walk alleged, among other things, that the union failed to fairly represent him because it neglected to raise a chain of custody issue that existed with respect to his urine sample. *Id.* The Sixth Circuit acknowledged that, had Walk's union representative adequately investigated the case before the arbitration, he may have learned of the chain of custody issue. *Id.* at 1329. Furthermore, the court suggested that a defect in the chain of custody might have been grounds for setting aside Walk's discharge. *Id.* Nevertheless, the court concluded that although the union's failure to pursue the chain of custody issue presented "a very close question," the failure "was more of an omission or oversight [and] a negligent error of judgment that was not directed against plaintiff capriciously or in bad faith." *Id.*

In this case, Greene alleges that IPA acted arbitrarily when it "refused to enforce Federal Law in accordance with the Railway Labor Act (RLA) & the Labor Management Reporting and Disclosure Act (LMRDA) by enforcing the Plain Language of the Collective Bargaining Agreement by insisting a Duty of Fair Representation demanding that the Plaintiff's Grievances were heard." [DN 63 at 21 (capitalization

in original).] This conclusory statement is not especially helpful to the Court in determining which of IPA's specific actions Greene considers to be arbitrary. Looking at the allegations contained in Greene's complaint, however, IPA did make some decisions in its handling of Greene's termination that arguably affected Greene negatively. But none of those decisions fell "so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal quotation marks and citation omitted).

IPA hired outside counsel to handle Greene's termination proceedings rather than using in-house counsel. According to IPA President Robert Travis, "IPA's normal procedure was to provide a member who is under investigation with representation by an IPA staff attorney." [DN 50-3 at 5.] However, IPA's Executive Board "decided that that procedure was not appropriate because Greene had expressed no confidence in [IPA's] legal staff and because of the untrue, inappropriate, verbally abusive and potentially threatening statements Greene had made" during his previous conflicts with IPA. [*Id.*] IPA chose an experienced labor attorney with distinguished credentials in his field, Irwin Cutler, to handle its advocacy of Greene. Given Greene's contentious history with IPA, this decision was reasonable. Furthermore, throughout this case, Greene has alleged that IPA and its officers conspired with UPS to have him terminated. Greene cannot maintain those allegations and, at the same time, argue that the very persons who sought his discharge acted arbitrarily by handing off his case to outside

counsel. By hiring Cutler to handle Greene's termination, IPA sought to place Greene's case in the hands of a competent, neutral third-party attorney unburdened by the baggage of IPA's past relationship with Greene.

IPA also refused to disclose certain documents pertaining to the Professional Standards Committee and the original formation of the arbitrator selection process. As Travis explained, Professional Standards is a union body that mediates disputes between pilots. [DN 50-3 at 6-7.] IPA's policy is to keep all information shared with Professional Standards confidential. [*Id.* at 7.] Indeed, IPA believes that Professional Standards derives its value from its confidentiality; if pilots knew that the information they share with the committee might become public during a subsequent arbitration, they might be less inclined to make use of its dispute resolution processes. [*Id.*] As the labor representative of thousands of pilots, not just Captain Greene, IPA must sometimes favor the needs of the many over the needs of a few. *See O'Neill*, 499 U.S. at 81. IPA made a reasoned choice that disclosing the Professional Standards documents created a risk to the program that was greater than the value of the documents in Greene's hands. Similarly, IPA declined Greene's request for documents pertaining to the original formation of the arbitrator list that occurred years earlier. At the time Greene, through Feldman, made that request, he did not provide any explanation as to how those documents would prove relevant or helpful. IPA's decision to not disclose these documents was reasonable under

the circumstances, and therefore, this Court may not second-guess those decisions.

Perhaps Greene's most meritorious allegation is that IPA refused to process eleven of his pre-hearing grievances. Those grievances, and IPA's reasons for refusing to prosecute them, are detailed in Travis's declaration. *See* [DN 50-3 at 8-9.] The grievances pertain to Greene's removal from flight status, the EHR notation, statements UPS made in its communications with Greene, UPS's directive requiring Greene to submit to the additional medical exam, and pre-hearing discovery and procedural matters. *See* [*id.*] Travis states that "IPA did not withdraw any of these grievances but, with UPS's concurrence, held them in abeyance so that, after the arbitration award on his termination grievance, if any of those grievances had merit and were not remedied by an arbitrator's award, IPA could still pursue them." [*Id.* at 9.] IPA further argues that it had "good reasons to hold each of these grievances in abeyance and instead to focus its energy on the big issues – defending [Greene] in the Company's investigation of his behavior and later attempting to show that the Company did not have 'objective evidence' to justify its order for a medical exam." [DN 50-1 at 34.] The Court agrees. Whether or not Greene's preliminary grievances had merit, they would ultimately have been subsumed by the System Board's adjudication of Greene's termination grievance. In other words, even if IPA had pursued Greene's eleven preliminary grievances, his termination grievance would still have proceeded to arbitration. IPA fully

prosecuted Greene's termination grievance, the one that mattered. Its decision to hold Greene's other grievances in abeyance was not "wholly irrational," *O'Neill,* 499 U.S. at 78, and was therefore not arbitrary.

Similarly, Greene's remaining allegations of arbitrary conduct are unsupported by any substantive evidence. His complaint alleges that IPA refused to assist him in correcting his employment record. [DN 1 at 8.] But that is simply not the case. Both Billy Cason and Christopher Harper negotiated with UPS officials on Greene's behalf to have the EHR notation changed or removed. *See* [DN 50-56 at 2; DN 50-62 at 2.] Their efforts are reflected in the EHR notation itself, which contains an addendum added by Chief Pilot Quinn. [DN 50-55 at 3.] Greene claims that the IPA refused to inform him that UPS intended to discharge him, and that this refusal hindered his ability to defend himself during the investigation. [DN 1 at 9.] This claim relates to Greene's allegation that Thomas Kalfas, IPA secretary and a defendant in this suit, "stated [to Peyton Cook] that Captain Greene would be losing his job" more than two months prior to Greene's termination. [*Id.* at 5-6.] Kalfas admits that he and Cook had a telephone conversation regarding the statement Cook planned to give UPS regarding Greene's behavior, but denies telling Cook that Greene was going to be terminated. [DN 50- 58 at 2-3.] Greene has provided no evidence that Kalfas ever made this statement, nor has he explained how his knowledge of the statement would have mattered in his, Feldman's, or Cutler's handling of his case.

Greene states that IPA assisted Marc McDermont in filing a false, misleading, and defamatory statement against him. [DN 1 at 9.] Apparently, before McDermont provided his statement to UPS, he contacted IPA staff attorney Carrie James. [DN 50-63 at 1.] James states that she "advised [McDermont] about his obligations to cooperate with a Company investigation [and] advised him that any statement he made should be factual and completely accurate." [*Id.*] Again, Greene brings forth no affirmative evidence showing that James or any other IPA official counseled or assisted McDermont in making a false statement. Finally, Greene alleges that IPA withheld disqualifying information about Arbitrator Scearce's health. [DN 1 at 9.] Cutler admits that he never forwarded the email that mentioned Scearce's eyesight issues to Feldman or Greene, attributing his failure to "inadvertence." [DN 50-18 at 7.] Greene has provided no proof that Cutler intentionally withheld Scearce's email. At most, Cutler's failure to pass along his knowledge of Scearce's minor health issue was negligent, and mere negligence cannot be the basis for arbitrary conduct in the duty of fair representation context. *Walk*, 958 F.2d at 1329.

Even if Greene's allegations were supported by evidence and amounted to arbitrary conduct, Greene must also show a "direct nexus" between IPA's actions or inactions and his ultimate termination. *Wood v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 406*, 807 F.2d 493, 502 (6th Cir. 1986). This is a bridge too far. For example, Greene

does not explain how his case would have been decided differently had IPA's in-house counsel, rather than Cutler, handled the case. Furthermore, even if IPA had chosen to prosecute Greene's numerous pre-hearing grievances, Arbitrator Winograd would have eventually been called upon to decide whether Greene's termination was justified under the CBA. Greene brings forth no evidence demonstrating that, had those grievances been pursued, Winograd would have reached a different decision. Similarly, even if McDermont's statement to UPS was completely false, it would not have made a difference in the outcome. Arbitrator Winograd wrote that "[s]tanding alone, Captain Greene's acknowledgement of a serious back injury . . . provided objective evidence of a need for further medical examination." [DN 50-47 at 50.] This statement also forecloses the possibility that the Professional Standards Committee documents could have made an outcome-determinative difference. Greene's objective in seeking the Professional Standards documents was to show that his fellow pilots had not complained about his behavior, presumably to rebut the statements that UPS received from Starnes, Cook, and McDermont. But as Arbitrator Winograd's above-quoted passage reveals, Greene's own statements, rather than the allegations of other pilots, were ultimately responsible for his discharge. Finally, any complaints Greene may have had concerning Arbitrator Scearce's health or the arbitrator selection process are immaterial. After successfully removing two arbitrators, Greene, through his attorney, agreed that Winograd was a satisfactory choice.

During the course of its advocacy for Greene, IPA necessarily had to make decisions regarding the proper course of action. Those decisions are entitled to substantial deference, and may constitute a breach of IPA's duty of fair representation only if they were arbitrary. As explained above, they were not. Because Greene hired outside counsel to represent him during his termination proceedings, as was his right, IPA took on a supporting role, assisting Feldman and Greene and acting as a conduit between them and UPS. None of the decisions IPA made while fulfilling this role can be fairly characterized as "wholly irrational," *O'Neill*, 499 U.S. at 78, and thus IPA did not act arbitrarily.

Greene might also show that IPA breached its duty by acting in a discriminatory manner. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). To show discriminatory conduct sufficient to establish a breach of the union's duty, a plaintiff must come forward with "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 301 (1971). Standing alone, mere differential treatment of two employee groups does not constitute discrimination in this context. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 81 (1991).

Most commonly, allegations of discrimination in the fair representation context arise when a union favors one group of employees over another for purposes of seniority after a strike or merger. *See, e.g., id.* (citing *NLRB v. Erie Resistor Corp.*, 37 U.S. 221 (1963); *Trans*

World Airlines, Inc. v. Flight Attendants, 489 U.S. 426 (1989)). Presumably, a union could also violate its duty by discriminating against individual members on the basis of a protected characteristic, such as race. *See Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). At the very least, a successful plaintiff would have to show that his union had no legitimate basis for treating him differently than a comparable employee.

Here, Greene presents no facts suggesting IPA discriminated against him in any appreciable way. Greene does not allege that he is a member of a protected class, or that IPA treated him differently because of his membership in that class. Nor has Greene shown that IPA represented him less vigorously than any other similarly-situated union member. In his response, Greene does make some vague allegations of discrimination by IPA. For instance, he states, "UPS has knowingly discriminated against me by singling me out with Unreasonable and Arbitrary actions they have not done to other crewmembers (i.e. Bob Allen & others over Exception History entries, security and UPS manufactured disciplinary actions)." [DN 63 at 11 (emphasis removed); *see also id.* at 21; *id.* at 29; *id.* at 70.] But Greene brings forth no evidence demonstrating who Bob Allen (later referred to as Bill Allen, [*id.* at 21]) is, what Allen was accused of, and how IPA treated him differently than Greene. Because he has failed to make even a minimal showing of discrimination, Greene presents no genuine issue of material fact with respect to this prong of his duty of fair representation claim.

Finally, Greene can prove breach by showing that IPA acted in bad faith in its handling of his disciplinary proceedings. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). The Sixth Circuit has characterized "bad faith" as actions lacking "complete good faith and honesty of purpose in the exercise of its discretion." *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1355 (6th Cir. 1989) (quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976)). To demonstrate bad faith, a plaintiff must come forward with "evidence of fraud, deceitful action, or dishonest conduct." *Summers v. Keebler Co.*, 133 F. App'x 249, 253 (6th Cir. 2005) (citing *Humphrey v. Moore*, 375 U.S. 335, 348 (1964)).

This is where the heart of Greene's duty of fair representation claim now lies. Indeed, in his response to IPA's motion for summary judgment, the word "fraud" or one of its derivations appears 131 times in Greene's 92-page filing. *See* [DN 63.] However, conclusory allegations of fraud are insufficient to demonstrate that IPA acted in bad faith. Rather, Greene must back up his accusations of fraud with substance, bringing forth affirmative evidence that IPA engaged in misconduct. *See Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975).

In his response, Greene lists eight specific ways in which IPA acted in bad faith. *See* [DN 63 at 22-25.] Generally speaking, Greene alleges that IPA either violated or allowed UPS to violate certain provisions of the CBA. *See* [*id.*] But the evidence of record demonstrates that, rather than allowing UPS to freely violate the CBA, IPA assisted Greene's personal counsel in

pursuing his termination grievance to arbitration, as the CBA required it to do. IPA and Greene may have had disagreements during UPS's investigation and subsequent discharge of Greene. But IPA has shown, and Greene has not rebutted, that IPA's decisions were motivated by a desire to assist Greene to the fullest possible extent, while still protecting the interests of the union membership as a whole.

Undoubtedly, some degree of animosity exists between the parties to this case. But mere ill will is not enough to prove that IPA acted in bad faith. As the Sixth Circuit has stated:

> Not all members of the same union are necessarily personal friends. They may even be personal rivals – bearing ordinary human jealousies and conflicting goals. Such personal differences may be evidence that a union officer was hostile to a particular union member. This personal hostility may even be the first step in an employer's discipline against a bargaining unit employee. Personal hostility is not enough, however, to establish a *prima facie* case of unfair representation in a union member's discharge if the union's representation during the disciplinary steps is adequate and there is no evidence that the personal hostility tainted the arbitrators' decision.

VanDerVeer v. United Parcel Serv., Inc., 25 F.3d 403, 405 (6th Cir. 1994) (citation omitted). Given Greene's inflammatory rhetoric both prior to and during this case, it would not be altogether unsurprising if certain IPA members harbor animosity towards Greene. But

to establish that IPA acted in bad faith, thereby breaching its duty of fair representation, Greene must do more than make bare allegations of fraud and personal hostility. Faced with IPA's motion for summary judgment, supported by record evidence, Greene must demonstrate that IPA's, not UPS's, actions towards him were motivated by that hostility, and that the arbitrator's decision was tainted as a result. He has not done so. After receiving testimony and evidence over the course of a three-day hearing, Arbitrator Winograd concluded that IPA engaged in "firm and clear opposition to the Company's action. . . . The Union's activities with respect to this case show conscientious, skilled, and independent representation of Captain Greene throughout the investigatory process, the hearing, and after." [DN 50-47 at 56.] The Court agrees.

In sum, Greene presents no genuine issue of material fact with respect to his duty of fair representation claim against IPA and its officers. IPA has demonstrated that, at every step of its advocacy on Greene's behalf, it acted reasonably and in good faith. Granted, IPA did not agree with Greene and his personal counsel on every decision. But the law does not require IPA to unquestionably follow Greene's commands. Rather, IPA must be afforded substantial deference in its decision-making, and will be liable for breaching its duty of fair representation only when it acts arbitrarily, discriminatorily, or in bad faith. *Vaca*, 386 U.S. at 190. Greene brings forth no evidence demonstrating that IPA acted in such a way, nor does he show that the outcome of his arbitration would

likely have changed had IPA acted differently. Therefore, Defendants are entitled to summary judgment on Greene's duty of fair representation claim.

(3) *Greene's LMRDA Claims*

Greene's second set of claims arises under the Labor-Management Reporting and Disclosure Act, 73 Stat. 519, *as amended*, 29 U.S.C. § 401 *et seq*. That Act, among other things, prevents labor unions from retaliating against union members who exercise their free speech right to speak out against the union. However, in a civil suit against a union under the LMRDA, the employee must show that he was subjected to the union's formal disciplinary procedures, rather than ad hoc retaliation by individual union members. Here, Greene was never disciplined by IPA in the manner contemplated by the LMRDA, so his claims under the Act must fail.

Passed in 1959, Title I of the LMRDA, 29 U.S.C. §§ 411-415, is entitled "Bill of Rights of Members of Labor Organizations." The LMRDA "was the product of congressional concern with widespread abuses of power by union leadership." *Finnegan v. Leu*, 456 U.S. 431, 435 (1982). When it was enacted, Title I "placed emphasis on the rights of union members to freedom of expression without fear of sanctions by the union. . . . Such protection was necessary to . . . ensur[e] that unions would be democratically governed and responsive to the will of their memberships." *Id.* at

435-36. Here, Greene relies upon §§ 101(a)(2) and (5) of the Act, 29 U.S.C. §§ 411(a)(2) and (5), which provide:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2).

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Id. § 411(a)(5). Furthermore, LMRDA § 609, 29 U.S.C. § 529, states that "[i]t shall be unlawful for any labor organization . . . to fine, suspend, expel, or otherwise

discipline any of its members for exercising any right to which he is entitled under the provisions of [Title I]."

To establish liability under either LMRDA § 101(a)(2) (through § 609) or § 101(a)(5), an aggrieved employee must prove that he was "fine[d], suspend[ed], expel[led], or otherwise discipline[d]." While the first three types of punishment are self-explanatory, the fourth is not. Helpfully, both the Supreme Court and the Sixth Circuit have addressed the meaning of "otherwise discipline" in the context of the LMRDA. In *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, the Court considered the case of a worker who alleged that his union, which operated a hiring hall and referral list, refused to recommend his services to prospective employers in retaliation for his political activities within the union. 493 U.S. 67, 71-73 (1989). The plaintiff claimed that the union's failure to recommend him to employers constituted discipline within the meaning of LMRDA §§ 101(a)(5) and 609. *Id.* at 72. The Court disagreed, holding that "by using the phrase 'otherwise discipline,' Congress did not intend to include all acts that deterred the exercise of rights protected under the LMRDA, but rather meant instead to denote only punishment authorized by the union as a collective entity to enforce its rules." *Id.* at 91. Applying the *ejusdem generis* canon of statutory construction, the Court recognized that "the specifically enumerated types of discipline—fine, expulsion, and suspension—imply some sort of established disciplinary process rather than ad

hoc retaliation by individual union officers." *Id.* at 91-92. Because the plaintiff "was not punished by any tribunal, nor was he the subject of any proceedings convened by [the union][,]" he could not maintain an action under LMRDA §§ 101(a)(5) and 609. *Id.* at 94.

The Sixth Circuit has twice addressed the *Breininger* Court's definition of "otherwise discipline," first in *United Food and Commercial Workers International Union Local 911 v. United Food and Commercial Workers International Union*, 301 F.3d 468 (6th Cir. 2002). There, a grocery workers' union had a collective bargaining agreement with a number of Meijer grocery stores. *Id.* at 471-72. After negotiations to renew the CBA fell through, the union's local chapter, Local 911, wanted to boycott Meijer, but the international union overruled its request for a boycott. *Id.* at 472. Subsequently, Local 911 requested that the workers of a newly-constructed Meijer store be assigned to its jurisdiction, but the international union assigned the workers to a different chapter. Local 911 sued the international union under LMRDA §§ 101(a)(2) and (5), but the Sixth Circuit upheld the district court's dismissal of these counts. With respect to Local 911's § 101(a)(5) claim, the court held that the international union's denial of jurisdiction "did not result from an established union disciplinary process," and therefore was "much closer to ad hoc retaliation than to 'punishment authorized by the union as a collective entity to enforce its rules.'" *Id.* at 747 (quoting *Breininger*, 493 U.S. at 91-92)).

Similarly, in *Webster v. United Auto Workers, Local 51*, the Sixth Circuit held that the union had not disciplined the plaintiff within the meaning of LMRDA § 101(a)(2). 394 F.3d 436, 441 (6th Cir. 2005). In that case, Webster, an elected union official, alleged that he was subjected to retaliation after publicly stating that "International Auto Workers had 'sold out' the membership." *Id.* at 439. The district court granted summary judgment in favor of the union, determining that Webster's allegations of "concerted activity to disparage [him] to the membership and to deny him the right to challenge this concerted activity within the context of a union hearing[]" were insufficient to constitute "discipline" under the LMRDA. *Id.* at 440-41. The Sixth Circuit agreed, observing that Webster "present[ed] no evidence to show that the alleged treatment of him was authorized by a collective entity to enforce its rules or that it resulted from an established union disciplinary process." *Id.* at 441. Rather, Webster "was the target of the kind of ad hoc retaliation by individual union officials that is not subject to the protections of the Act." *Id. See also Konen v. Int'l B'hood. of Teamsters, Local 200*, 255 F.3d 402, 410 (7th Cir. 2001) (plaintiff was "never subjected to official Union discipline . . . and there [was] no evidence that his membership rights or status [had] been diminished in any way").

Faced with this precedent, the record is devoid of any actions taken by IPA that would constitute prohibited conduct under the LMRDA. IPA never sought to fine, suspend, or expel Greene, so the only way Greene may prevail under the LMRDA §§ 101(a)(2) and (5) is

to show that he was "otherwise disciplined." He cannot. The actions taken by IPA that Greene details in his complaint all involve decisions IPA made during the course of its representation of Greene during his UPS termination proceedings. *See* [DN 1 at 7-9.] IPA's choices regarding the proper handling of Greene's dispute with UPS were procedural, not punitive, in nature. And while Greene was subjected to formal disciplinary proceedings that ultimately resulted in his discharge, those proceedings were instituted by UPS, not IPA. Regardless of their propriety, UPS's actions towards Greene cannot form the basis of IPA's liability to Greene under the LMRDA, when IPA as an entity took no disciplinary action towards him. Because Greene "was not punished by any tribunal, nor was he the subject of any proceedings convened by [the union]," he cannot maintain his claims against IPA under LMRDA §§ 101(a)(5) and 609. *Breininger*, 493 U.S. at 94.

B. IPA's Motion for Sanctions

As explained above, IPA is entitled to summary judgment on both counts of Greene's complaint. Therefore, IPA's motion to dismiss pursuant to Rule 37(b) or to compel discovery [DN 51] is moot. IPA also filed a motion for a temporary restraining order, seeking to prevent Greene from engaging in the hostile and abusive motion practice that has been Greene's hallmark throughout this litigation. [DN 55.] But because this suit may proceed no further, the Court sees no reason at this time why a temporary restraining order against

Greene's alleged abusive litigation conduct would be necessary. That motion [DN 55] is also moot, as is IPA's motion asking the Court to reconsider its order granting Greene an extension of time [DN 62].

However, one motion does remain ripe for the Court's adjudication – IPA's motion for sanctions. [DN 54.] IPA claims that on July 26, 2016, the day after it filed its motion for summary judgment, Greene sent Christopher Harper, one of IPA's witnesses, a "threatening and intimidating email." [DN 54-1 at 2.] IPA had previously submitted Harper's declaration in support of its motion for summary judgment. *See* [DN 50-62.] In his declaration, Harper describes the efforts he took to have Greene's EHR notation corrected or removed, and states that IPA did not attempt to hinder his assistance of Greene. *See* [*id.*] Greene's July 26 email states [sic throughout]:

> Dear Chris,
>
> Here's some great questions that have been already crafted for you to answer in a Federal Court of law under a lie detector. Thought it might be helpful to give you a head start on how to formulate your answers:
>
> The one question I have is who wrote Harper's declaration? It wasn't him. Looks like the IPA had their hand in this. Most people do not know how to write a declaration much less the format used.
>
> . . .

What a terrible shame to think you were coerced to aid and abet in a Federal Crime. It's very clear you do not realize the magnitude of what you are implicating yourself in, with UPS & IPA efforts trying to thrown you under the bus to give them an alibi with your false and fraudulent "declaration," which is not even an affidavit. You have blatantly committed perjury in your falsely alleged true & correct words.

We will be quite anxious to get you under lie detector, as like you "*I believe*" you will be going to jail before this is all over. Your only hope to save yourself is with your truthful testimony as to who we both know put you up to this act of obstructing justice by knowingly aiding and abetting in a Federal Crime. *(This is certainly no way to run an Airline.)*

You should think long and hard about your conduct because it is already defeated with overwhelming evidence. The whole thing wreaks with the stench of vile filth and pathetic shame. Here's some helpful good reading to remind you what it means to be an Airline Pilot and the Code of Ethics we are supposed to live by. I am very disappointed in you Chris Harper and so will others when the truth is revealed in it's entirety sooner than you realize. My family and I will forgive you and hold you harmless for your complicity in this criminal attack against us as long as you come forward with your truthful testimony while you still can.

God Bless . . . . Doug Greene & Family

[DN 54-3 at 2 (emphasis in original).] Greene then attached a four-page document entitled "The Airline Pilot Code of Ethics". [*Id.* at 5-8.]

Greene's email to Harper is consistent with what the Court has come to expect from Greene throughout the course of this litigation. During this case, Greene has engaged in unwarranted, egregious name-calling. For instance, in just one brief, Greene refers to various persons involved in this case as: "incompetent," [DN 63 at 69]; "paranoid," [*id.* at 44]; "senile," [*id.* at 54]; "[a] senile old man," [*id.* at 74]; "intoxicated," [*id.* at 55]; "literally insane," [*id.* at 76]; "very devious and sick people," [*id.* at 84]; "one sick individual hell bent on sustaining Fraud Upon the Court," [*id.* at 68]; "[a] very sick man [] who has obviously lost his mental faculties and ability to reason," [*id.* at 75]; "uneducated thugs," [*id.* at 85]; "obviously incapable of reading on an 8th grade level," [*id.* at 57]; "a sadistic liar," [*id.* at 59]; "[a] pathological liar," [*id.* at 62 (emphasis removed)]; "a pathological liar in dire need of help," [*id.* at 54]; "one of the most egregious liars of all," [*id.* at 58]; "malefactors," [*id.* at 37]; "one of the biggest malefactors of all contributing to fraud in this entire masquerade," [*id.* at 69]; "guilty of perjury," [*id.* at 71]; "guilty of aiding & abetting in this crime," [*id.* at 52]; "guilty of committing Fraud Upon the Court purposely lying by omission!" [*id.* at 53]; "complicit in aiding and abetting in RICO Act fraud," [*id.* at 79]; "a bunch of clowns that are guilty of crimes worthy of criminal prosecution," [*id.* at 71 (emphasis removed)]; "a cabal of tyrants who think

they are above the law," [DN 63 at 33]; "UPS' errand boys, moles, bitches, whatever word you want to use in describing a traitor . . . Benedict Arnold," [*id.* at 44]; and "Barney Fife," [*id.* at 42].

IPA argues that "Greene's threat and attempt to intimidate an adverse witness call for this Court to exercise its inherent authority to sanction Greene." [DN 54-1 at 3.] Defendants request that, as a sanction, this Court should dismiss Greene's case with prejudice, or in the alternative, award IPA its attorney's fees in bringing the motion and enjoin Greene from intimidating or harassing its witnesses. [*Id.* at 6.] This Court does indeed possess "the inherent power to sanction a party" upon a showing of bad faith "or conduct 'tantamount to bad faith.'" *Dell, Inc. v. Elles*, No. 07-2082, 2008 WL 4613978 at *3 (6th Cir. June 10, 2008) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980)). Inherent power sanctions allow the court "to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). However, the Supreme Court has cautioned that "inherent powers must be exercised with restraint and discretion." *Id.* at 44.

Greene's conduct during this case and its companion cases is, quite simply, unacceptable. *Pro se* litigants are held to a less stringent standard than lawyers, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), and rightfully so. They are operating in a setting that is likely unfamiliar, and they do not have the same formal training and experience as members of the bar. Nevertheless, this Court expects all persons appearing

before it to maintain a baseline level of decorum and respect towards the Court, opposing parties, and witnesses. Greene has repeatedly and flagrantly violated that expectation. Greene's July 26 email to Harper may not contain any outright threats of criminal prosecution or violence, but his accusations of criminal behavior, unsupported by substantive evidence, are inappropriate.

However, because Defendants are entitled to summary judgment on both of Greene's claims, the potential sanction of dismissal is moot. Similarly, because this case has reached its end, the Court sees no need at this time to issue the injunction Defendants request. The Court also declines to award Defendants their attorney's fees in bringing this motion. Thus, IPA's motion for sanctions [DN 54] is denied. The Court cautions Greene that by denying IPA's motion, the Court is not condoning his behavior. Although Greene may feel strongly about his cases, he is warned that in any future litigation, the Court will not hesitate to impose appropriate sanctions.

An appropriate order will follow.

[SEAL]

/s/ **Thomas B. Russell**
Thomas B. Russell, Senior Judge
United States District Court

November 21 2016

CC: Counsel of Record
Douglas Greene, *pro se*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:15-CV-00234-TBR

DOUGLAS W. GREENE	PLAINTIFF
v.	
IPA/UPS SYSTEM BOARD OF ADJUSTMENT	DEFENDANT
and	
UNITED PARCEL SERVICE CO. and INDEPENDENT PILOTS ASSOCIATION	INTERVENOR DEFENDANTS

Memorandum Opinion

(Filed Nov. 21, 2016)

This case and its companion cases, *Greene v. Frost Brown Todd, LLC, et al.,* No. 3:14-CV-00619, and *Greene v. Independent Pilots Association, et al.,* No. 3:14-CV-00628, arise from Plaintiff Douglas W. Greene's dismissal from his employment as a pilot for UPS. In this case, Greene seeks to overturn the IPA/UPS System Board of Adjustment's determination that he was properly terminated for cause. Currently before the Court are Intervenor Defendants United Parcel Service Co.'s and Independent Pilots Association's motions for summary judgment. [DN 12; DN 22.] Greene has responded, [DN 50], and both UPS and IPA have replied [DN 72; DN 70.] Greene also submitted two additional documents raising new arguments not contained in his initial response, which effectively

functioned as sur-replies filed without leave of the Court. [DN 75; DN 79.] The Court allowed IPA and UPS to respond to those additional filings, and they have. [DN 86; DN 87; DN 91; DN 93.] Fully briefed, this matter is ripe for adjudication.

For the following reasons, UPS's and IPA's motions for summary judgment are GRANTED. [DN 12; DN 22.] After Greene was terminated from UPS, the Railway Labor Act and the UPS-IPA Collective Bargaining Agreement (CBA) required him to submit his termination grievance to the System Board of Adjustment for binding arbitration. The System Board determined that Greene was rightfully terminated for insubordination after he refused to undergo an additional medical examination, which UPS ordered pursuant to the CBA. This Court may overturn the System Board's Award upon only three grounds: "(1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption." *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 93 (1978) (citing 45 U.S.C. § 153 First (q)). UPS and IPA have shown, and Greene has failed to rebut, that no genuine dispute of material fact exists with respect to any of these three grounds of review. In deciding that Greene was properly terminated for cause, the System Board complied with the Railway Labor Act, acted within its jurisdiction, and did not engage in fraud or corruption. Therefore, UPS and IPA are entitled to summary judgment.

I. Facts and Procedural History[1]

United Parcel Service is a worldwide cargo company, shipping thousands of packages around the globe each day. As part of this operation, headquartered in Louisville, Kentucky, UPS employs over 2,500 pilots. [DN 19-15 at 9.] In 2013, Plaintiff Douglas W. Greene was one of these pilots, as he had been for nearly twenty years prior. [*Id.* at 8.] By all accounts, Captain Greene was an exemplary pilot, routinely flying large jets along international routes. [*Id.* at 13-14.] Even UPS System Chief Pilot Roger Quinn, the company official who ultimately terminated Greene's employment, "describe[d] Captain Greene . . . as doing his job well and [as] a pleasure to work with." [*Id.* at 14.] Greene was also politically active within the company, opposing the leadership of the Independent Pilots Association, the union that represents UPS's pilots. [*Id.*] Several years earlier, a group of pilots led by Greene were successful in fending off tax assessments by the Kentucky Department of Revenue. [*Id.*] Greene believes that UPS and IPA were allied against the pilots, and against Greene personally, with regard to the Kentucky tax investigation. [*Id.*]

---

[1] "[R]eviewing courts are bound by the facts as found by the arbitrator. . . . " *NetJets Aviation, Inc. v. Int'l Bhd. of Teamsters, Airline Div.,* 486 F.3d 935, 937 (6th Cir. 2007). In the context of the Railway Labor Act, discussed at length below, "the findings and order of the division of the Adjustment Board shall be conclusive on the parties." 45 U.S.C. §§ 153 First (p)-(q). As such, "the following summary is largely based on the fact statement in the decision of the Board." *NetJets Aviation,* 486 F.3d at 937.

The circumstances giving rise to Greene's termination, the subject matter of this case, began on March 19, 2013.[2] [*Id.* at 15.] On that date, Greene was exercising jump seat privileges on a Federal Express flight from Memphis, Tennessee to his home in Anchorage, Alaska.[3] [*Id.*] At the conclusion of the flight, a FedEx security officer "confiscated a pair of small scissors with pointy ends" from Greene's personal belongings. [*Id.* at 15-16.] Although these scissors were not prohibited by Transportation Safety Administration guidelines, FedEx's internal security protocols barred their possession. [*Id.* at 16.] Having previously carried the scissors on jump seat flights before, Greene was unaware that the scissors were not allowed. [*Id.*] By all indications, Greene behaved appropriately and respectfully towards FedEx officials during this incident. [*Id.*]

Shortly thereafter, FedEx security sent a report to UPS describing the incident, and returned the scissors to Assistant Chief Pilot Jim Psiones, the head of Greene's Anchorage duty station. [*Id.* at 16-17.]

---

[2] Prior to his 2013 termination, Greene was subjected to termination proceedings in 2011 that did not result in his dismissal. [*Id.* at 9.] UPS sought to introduce evidence pertaining to the 2011 termination during the arbitration hearing in this case, but Arbitrator Winograd excluded that evidence on the basis of relevance. [*Id.*] However, in post-hearing briefs, Greene and IPA argued that the 2011 termination "contribut[ed] to [Greene's] subsequent state of mind in fearing that a fitness exam would have been a prelude to dismissal." [*Id.*]

[3] As a matter of professional courtesy, air carriers routinely allow pilots employed by other carriers to ride along in the jump seat, a spare fold-down seat in the aircraft's cabin.

Psiones gave the scissors back to Greene while Greene "was in a crew room with other pilots," mentioning to Greene "some type of security report." [*Id.* at 17.] Greene took issue with Psiones bringing up the occurrence in the presence of his coworkers, telling him that such matters should be addressed in private. [*Id.*] Eventually, Chief Pilot Quinn was made aware of the scissor incident, and asked that a notation be made on Greene's Exception History Report, or EHR. The EHR is a non-disciplinary part of each UPS crewmember's employment record that makes note of various occurrences, such as work absences. *See, e.g.,* [DN 13-6.] A notation regarding the scissor incident was made on Greene's EHR on May 21, 2013, by Anchorage Chief Pilot Ed Faith. [*Id.* at 3-4.] The EHR notation stated, as quoted by Arbitrator Winograd [sic throughout]:

> ups was notified by one fedex operator that during the screening process for mr. greene's requested jumpseat, a pair of scissors was discovered this is a prohibited item! when asked about the scissors, mr. greene stated that "no one else seems to have a problem with them." the scissors were surrendered and later recovered by anc acp jim psiones. this is unacceptable behavior on the part of mr. greene and could jeopardize future jumpseat travel for ups pilots on fedex.

[*Id.*] In a separate section, the EHR notation stated:

> both jim psiones and ups security rep ken murray have spoken with mr. greene. he has been advised that his actions and confrontational behavior are unacceptable and not to

> have it happen again. entered by anc cp ed faith. . . . in a conversation subsequently with capt. greene, he did not seem to take the issue seriously and had negative opinions on the performance of the security staff at fedex and stated he has been through there (fedex) with those scissors several times with no problems. in short, capt. greene marginalized the event and always had a response justifying his actions. capt. greene took exception to my bringing the issue forward in the crew room. it was not my intent to address the issue openly. I was left with no options once capt. greene began talking and never stopped to listen. j psiones

[*Id.*]

Greene took exception to the EHR notation, feeling that it did not accurately recount the scissor incident and the conversations that followed. [DN 19-15 at 19.] Over the summer, Greene attempted to have the notation removed from his EHR, contacting UPS managers, IPA representatives, Chief Pilot Quinn, and the chief pilot of FedEx. [*Id.*] Greene also filed a complaint with the Transportation Safety Administration "alleging that ACP Psiones falsely told him the incident was reported to the TSA, although Captain Greene had been told by another manager that a TSA report had not been made." [*Id.* at 21-22.] While Chief Pilot Quinn ultimately decided that the notation would remain, he added an amendment stating that Greene had behaved courteously towards FedEx security during the scissor incident. [*Id.* at 19-20.]

Apparently, Greene's reaction to the scissor incident and the EHR notation caused his UPS supervisors to become concerned about his behavior. "In one exchange, Chief Pilot Quinn said that Captain Greene should be kept 'in our sites' [sic] after being informed of Captain Greene's continuing disagreement with the EHR." [*Id.* at 21.] Psiones also took issue with Greene's challenge to the EHR notation, as well as Greene's aforementioned complaint against Psiones to the TSA. [*Id.*] To address these internal concerns, UPS management held a meeting on August 22, 2013, which Anchorage Chief Pilot Ed Faith, IPA representative Wayne Jackson, and Greene attended. [*Id.* at 22.] During that meeting, the other parties "realized that Captain Greene was tape-recording what was said." [*Id.*] Greene then admitted he had previously recorded conversations with UPS security officer Ken Murray on June 18 and with a local UPS manager on August 13. [*Id.*] During his direct examination at the arbitration hearing, Greene stated that these were the only recordings he made of conversations with UPS officials. [*Id.*] "However, on cross-examination, Captain Greene acknowledged that he had withheld a tape he made of a June 13 conversation with a Company manager," ostensibly to catch UPS officials in a lie. [*Id.* at 22-23.]

Arbitrator Winograd quoted Greene's taped statements at length in his written decision, as UPS cited the statements as support for its belief that Greene's behavior warranted an additional medical examination. [*Id.* at 23.] In the June 18 conversation with Murray, Greene discusses at length his belief that UPS,

IPA, and the Kentucky Department of Revenue are conspiring against UPS pilots in general, and Greene in particular, regarding the tax assessments. For example, Greene says:

> I think this is really about another issue, and I'm not going to go into detail about it. It's more about an attack on our pilot group by the state of Kentucky and Doug Greene trying to help our pilots to know how to defend themselves against rights violations. I didn't serve 22 years in the military to have a corrupt government try to deny us our rights. . . . But, you know, I don't understand what's going on here. I mean, I guess the company doesn't think pilots should defend themselves against corrupt government that fraudulently try to extort money out of you, but we have no choice. We didn't ask for this fight, Ken. Our own union started this mess because they turned in one of our own executive board members because they spoke the truth about the last contract and they gave information about him to the Kentucky Department of Revenue.

[*Id.* at 24-25.] In the aforementioned August 22 meeting, Greene again brought up the Kentucky tax investigation, saying that he believed it was the reason UPS sought to terminate him in 2011. Here, Greene begins by speaking as if he is standing in the shoes of UPS:

> So, subsequently, this guy is crazy. We know he's crazy and he knows he's crazy. He's violated our pilots' rights. They've targeted us just like they did the IRS targeted the Tea

> Party groups. They know we know it now. We don't want bad press for the company. We don't want it. The company probably should have challenged the jurisdiction of the subpoena. They didn't do it, but – you know, but they didn't give up any money except IPA pilots even though it says pilot employees of UPS. . . . We can't have people put under duress flying airplanes because of corrupt governments abusing their powers, so I fought back. And I was terminated because of this.
>
> This came out in the arbitration hearing when I was terminated, okay, with Tony Coleman [counsel for UPS] when he talked to Bill Trent [counsel for IPA]. It came out that's why I was fired because of this. You know why? Because when UPS started getting subpoenas coming across their desk, not just this one, but specific subpoenas with Doug Greene's name on it, it tarnished my perfect 19-year career with this company, and it is perfect.

Id. at 27. On two occasions, Anchorage Chief Pilot Faith attempts to interject, claiming that he "know[s] nothing about any of that." [*Id.* at 29.]

The parties also discussed Greene's recurring back injury during the August 22 meeting. In the words of Arbitrator Winograd, Greene's statements "strongly suggest[ed] Captain Greene's readiness to take painkilling drugs and injections so that he could carry out work-related duties without, if possible, taking time off." [*Id.* at 30.] Particularly, Greene mentioned a back injury he suffered in 1994 that "never

went away," saying that he "managed it for 20 years" before reinjuring himself in 2012. [*Id.*] Greene stated that he had received epidurals and a steroid pack in order to lessen his pain. [*Id.* at 31.]

Following the meeting, Chief Pilot Quinn "decided to remove Captain Greene from service, placing him on paid administrative leave while further action was considered." [*Id.* at 33.] UPS conducted two follow-up predisciplinary hearings on September 11 and October 16. [*Id.*] Internally, UPS officials were communicating about Greene's situation, their emails "support[ing] an inference that at least some managers saw the continuous efforts of Captain Greene in challenging the EHR report as an opportunity to retaliate against him." [*Id.* at 34.] However, during these discussions, Chief Pilot Quinn "spoke favorably of Captain Greene's experience and character." [*Id.*] As part of its internal investigation, UPS security also received three emails from other UPS pilots. They recounted several instances in which Greene had spoken out vociferously and sometimes irrationally against UPS, IPA, Jim Psiones, and the Kentucky Department of Revenue. [*Id.* at 35.] On one occasion, Greene said to another pilot that he believed UPS had hired someone to kill him. [*Id.*]

UPS's meetings with Greene, the company's internal investigation, and Greene's own recorded statements prompted Chief Pilot Quinn in October 2013 to require Greene to undergo a special medical examination, as provided for in Article 5.D of the Collective Bargaining Agreement. "Captain Greene's obsessive focus on the scissor incident . . . and his association of the

EHR report with actions by the Company, the Union, and Kentucky revenue officials, raised concerns on [Quinn's] part regarding Captain Greene's connection to reality and his ability to safely function as a pilot." [*Id.* at 36.] Additionally, Quinn "also had questions about Captain Greene's longstanding back injury and how it had been handled." [*Id.* at 37.]

UPS arranged for an experienced aviation medical examiner (AME) in Anchorage to carry out the exam. [*Id.*] This AME had previously completed Greene's routine FAA medical exams. [*Id.*] According to Greene, the AME "intended to conduct a full physical examination, draw a blood sample, carry out a urine analysis for drug screening, ask simple cognitive questions, and take a family history." [*Id.*] However, IPA filed a grievance on Greene's behalf, arguing that UPS had insufficient evidence to warrant an additional exam under the terms of the CBA. [*Id.* at 37-38.] As such, Greene twice refused to submit himself to the medical exam, once on November 2, and again on November 7. [*Id.* at 37.] UPS afforded Greene a third opportunity to submit to the exam in mid-November, giving Greene a weekend to think the matter over, but he again refused. [*Id.* at 39.] Before the third opportunity, UPS offered to hold another pre-disciplinary hearing, but Greene waived that hearing through IPA counsel. [*Id.* at 41.] Before each of the final two opportunities for an examination, UPS expressly warned Greene that further refusal would result in his termination. [*Id.* at 38-39.]

Greene offered several justifications for his refusals. As previously mentioned, both he and IPA believed that UPS had insufficient evidence to order the medical exam under the terms of the CBA. Additionally, "Captain Greene expressed concern that the AME would find something wrong and recommend a second evaluation, and that the multi-level review process under [the CBA] was insufficient protection because the Union would not be serving his interests." [*Id.* at 38.] Finally, during the arbitration hearing, Greene admitted that he declined the final opportunity to be examined because he "was going through an interview in Korea and [he] wanted to get another job before [UPS] terminated [him]." [*Id.* at 40.] Accordingly, and pursuant to UPS's previous warnings, Greene was terminated for insubordination by Chief Pilot Quinn on November 22, 2013. *See* [DN 15-8.]

IPA filed a grievance on Greene's behalf, contending that his termination violated the CBA. Typically, the CBA requires labor grievances to be resolved by the System Board of Adjustment, a panel consisting of two IPA representatives and two UPS representatives. [DN 13-1 at 94.] If that panel is deadlocked, a third-party neutral arbitrator is added to break the tie. [DN 13-2 at 2.] However, in cases involving an employee's discharge, the employee may, at his election, proceed directly to the five-member System Board. [DN 13-1 at 89.] Here, IPA requested in its grievance that Greene's case proceed directly to arbitration, and Greene's counsel did not object. [DN 22-2 at 8-9.]

After negotiation between the parties, including the replacement of the first two neutral arbitrators chosen to serve, the parties eventually settled upon Barry Winograd to serve as the third-party neutral. The hearing was held September 15-17, 2014, in Louisville, Kentucky. [DN 19-15 at 3.] The parties agreed that the arbitration would decide the following questions: "Was the grievant dismissed with just cause; if not, what is the appropriate remedy?" [*Id.* at 4.] Just cause is required to dismiss an employee under CBA Article 8.F.2. [*Id.*] At the hearing, Greene was represented his own counsel, Arnold Feldman, and IPA. [*Id.*]

Greene made several motions prior to the hearing. Greene moved "that a videographer be used, that a second reporter transcribe the hearing, that the Union be disqualified as the grievant's representative, and that the grievant, not the Union, should designate one or more members of the System Board." [*Id.* at 3-4.] Arbitrator Winograd denied all these motions, and also resolved outstanding scheduling and discovery disputes. [*Id.*]

After hearing the testimony presented by the parties, reviewing the submitted evidence, and receiving post-hearing briefs, the System Board issued its Opinion and Award on March 20, 2015. Both UPS Board members concurred in the decision, and both IPA members dissented. Ultimately, in a decision authored by Arbitrator Winograd, the Board determined that UPS had just cause to terminate Greene for insubordination. Winograd found that UPS conducted a "sufficiently fair and thorough" investigation, [*id.* at 47], and

pointed towards several facts constituting "objective evidence" of Greene's medical issues: his acknowledgment of a long-standing back injury, his use of painkilling drugs to treat that injury, his "unrelenting and wildly speculative" statements during discussions with UPS's managers, and his fixation on the scissor incident and subsequent EHR notation. [*Id.* at 50-52.] Because UPS had cause to believe Greene was experiencing medical problems that could impair his ability to fly, its directive that Greene submit to an additional medical exam was justified under the CBA. [*Id.* at 50.] In turn, Greene's refusal on three occasions to undergo the medical exam constituted insubordination, for which Chief Pilot Quinn rightfully terminated Greene. In Winograd's words, Greene's failure to submit to the third opportunity for an exam "resolve[d] any doubt that he was engaged in occupational self-destruction beyond the remedial authority" of the System Board. [*Id.* at 55.] The Board found no evidence that UPS terminated Greene because of bias and hostility towards him or because of his political views, nor did it find evidence of collusion between IPA and UPS. [*Id.* at 54-56.]

Greene filed the instant action on March 30, 2015, seeking to overturn the System Board of Adjustment Award. [DN 1.] He named as defendant the "IPA/UPS System Board of Adjustment." [*Id.*] UPS and IPA moved to intervene, arguing that under the doctrine of *functus officio*,[4] "the Arbitration Board ceased to exist

[4] "[W]ithout further authority or legal competence because the duties and functions of the original commission have been

once it issued its final and binding decision on March 20, 2015." [DN 6 at 4; DN 10]. The Court granted both motions, [DN 11], and the Intervenor Defendants moved for summary judgment, [DN 12; DN 22].

Greene responded to UPS's and IPA's motions for summary judgment, [DN 50], and UPS and IPA replied, [DN 70; DN 72]. He then filed two documents entitled "Plaintiff's Notice of Filing Addressing Intervenor Fraud Upon the Court in Their Replies to Plaintiff's Response to Defendant's Motion for Summary Judgment," and "Plaintiff's Notice of Filing Addendum of Perjury for Plaintiff Response to Defendant's Motion for Summary Judgment," respectively. [DN 75; DN 79.] These documents raised new arguments not contained in Greene's initial response, and essentially functioned as sur-replies filed without leave of the Court. The Court permitted IPA and UPS to respond to these filings, and they did. [DN 86; DN 87; DN 91; DN 93.] Fully briefed, this matter is now ripe for adjudication.

II. Standard of Review

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists where "there is sufficient evidence favoring the nonmoving party for a jury

---

fully accomplished." *Functus Officio*, Black's Law Dictionary (10th ed. 2014).

to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). The Court "may not make credibility determinations nor weigh the evidence when determining whether an issue of fact remains for trial." *Laster v. City of Kalamazoo,* 746 F.3d 714, 726 (6th Cir. 2014) (citing *Logan v. Denny's, Inc.,* 259 F.3d 558, 566 (6th Cir. 2001); *Ahlers v. Schebil,* 188 F.3d 365, 369 (6th Cir. 1999)). "The ultimate question is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Back v. Nestlé USA, Inc.,* 694 F.3d 571, 575 (6th Cir. 2012) (quoting *Anderson,* 477 U.S. at 251-52). As the parties moving for summary judgment, UPS and IPA must shoulder the burden of showing the absence of a genuine dispute of material fact as to at least one essential element of Greene's claim. Fed. R. Civ. P. 56(c); see *Laster,* 746 F.3d at 726 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986)). Assuming UPS and IPA satisfy their burden of production, Greene "must—by deposition, answers to interrogatories, affidavits, and admissions on file—show specific facts that reveal a genuine issue for trial." *Laster,* 746 F.3d at 726 (citing *Celotex Corp.,* 477 U.S. at 324).

III. Discussion

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). When Congress grants the federal courts jurisdiction to hear a particular cause of action, it may limit the extent to which courts can review the

plaintiff's claim. Such is the case here. This case arises under the Railway Labor Act, a federal law that, among other things, requires certain labor disputes in the railroad and airline industries to be submitted to mandatory, binding arbitration. 44 Stat. 577, as amended, 45 U.S.C. § 151 *et seq.* As part of this scheme, parties who are dissatisfied with the outcome of an RLA arbitration may petition a United States district court to vacate the decision. *Id.* §§ 153 First (p)-(q). At the same time, however, Congress limits the available grounds of review. Federal courts may only set aside an RLA arbitration for "(1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption." *Union Pac. R. Co. v. Sheehan,* 439 U.S. 89, 93 (1978). Otherwise, the court must uphold the arbitration award, even if the court believes the decision was factually erroneous.

In this case, Greene seeks to vacate the System Board of Adjustment Award that upheld his termination by UPS. Because Greene presents no genuine issue of material fact with respect to any of the three aforementioned grounds for review, this Court must grant summary judgment in favor of UPS and IPA. The evidence of record demonstrates that the System Board complied with the RLA, confined itself to its jurisdiction under the parties' Collective Bargaining Agreement, and did not engage in fraud or corruption. Therefore, this Court must uphold the System Board's

Award, and may not inquire into Greene's factual disagreements with the System Board.

A. Railway Labor Act

The Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151 *et seq.*, provides a "comprehensive framework for the resolution of labor disputes in the railroad industry." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 562 (1987). It was enacted by Congress in 1926 "to promote peaceful and efficient resolution" of such disputes. *Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region,* 558 U.S. 67, 72 (2009) (citation omitted). The RLA "instructs labor and industry 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise.'" *Id.* (quoting 45 U.S.C. § 151 First). The Supreme Court has described the obligation of labor and industry to pursue agreement as the "heart of the Railway Labor Act." *Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 377-378 (1969).

Initially, the RLA applied only to rail carriers, but Congress soon amended the statute to include air carriers as well. 74 Pub. L. No. 487 (1936), 49 Stat. 1189; 45 U.S.C. § 181. As amended, there are some noteworthy differences between the dispute resolution schemes for rail carriers and air carriers. Section 153 of the RLA established the National Railroad

Adjustment Board ("NRAB") to ultimately adjudicate railroad labor disputes. However, when Congress extended the RLA's application to air carriers, it specifically precluded the NRAB from reviewing airline labor disputes, the theory being that those disputes should be heard by "boards of adjustment particularly suited to their industry." *Edwards v. United Parcel Serv., Inc.*, 16 F. App'x 333, 338 (6th Cir. 2001); *see* 45 U.S.C § 181. Instead, air carrier labor disputes are adjudicated under § 184. That RLA section puts the onus upon "every carrier and . . . its employees . . . to establish a board of adjustment" to adjudicate labor disputes. *Id.* § 184. Adding a further wrinkle, § 184 provides that these individually-established adjustment boards shall have "jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title." *Id.* So in the end, the jurisdiction of the air carrier adjustment boards is defined by § 153, the very section that § 181 says does not apply to air carriers.

The bottom line is this: railway labor disputes are adjudicated by the NRAB, and airline labor disputes are adjudicated by adjustment boards established by agreement between air carriers and their employee representatives. In either case, the jurisdiction of the particular adjustment board is defined by § 153. As such, "the same standards that govern review of an NRAB award apply when a court reviews an award issued by a 'special adjustment board[,]'" in this case, the IPA/UPS System Board of Adjustment. *Bhd. of*

Locomotive Eng'rs & Trainmen v. United Transp. Union, 700 F.3d 891, 899 (6th Cir. 2012) (quoting *Cole v. Erie Lackawanna Ry. Co.,* 541 F.2d 528, 531-32 (6th Cir. 1976)).

At its core, dispute resolution under the RLA is a matter of agreement between the carrier and its employees. That agreement, the collective bargaining agreement, "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 578 (1960) (citation omitted). "A CBA's objective is 'to erect a system of industrial self-government' that permits the relationship between the parties to be 'governed by an agreed-upon rule of law.'" *United Transp. Union,* 700 F.3d at 899-900 (quoting *United Steelworkers,* 363 U.S. at 580). "[The] effectuation [of the CBA] demands the development of a common law of the shop which implements and furnishes the context of the agreement." *Id.* at 900 (internal quotations omitted).

Labor disputes under the RLA are classified as either major or minor disputes. A "minor dispute" is one that "involves the application or interpretation of an existing collective-bargaining agreement." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters,* 480 U.S. 1301, 1302 (1987). Although the case before the Court has significant ramifications for the parties involved, the RLA classifies Greene's termination as a minor dispute. *See Kaschak v. Consol. Rail Corp.,* 707 F.2d 902, 905 (6th Cir. 1983) (appellant's claim of wrongful discharge under terms of a collective bargaining agreement was a

minor dispute). In minor disputes, the RLA requires employees and carriers "to exhaust the grievance procedures specified in the collective-bargaining agreement" before resorting to arbitration. *Union Pac. R. Co.,* 558 U.S. at 73. If the parties to a collective bargaining agreement are unable to resolve a minor dispute, the final step under the RLA is mandatory, binding arbitration. "Congress included a mandatory arbitral mechanism in the statute to efficiently resolve labor disputes, promote stability in the relationship between rail companies and their employees, and keep such disputes out of the courts." *United Transp. Union,* 700 F.3d at 899 (citing *Sheehan,* 439 U.S. at 94). This mechanism "is unique to the RLA and is not found in the other major federal labor relations statute that covers private sector employees." *Id.* RLA arbitration awards are "final and binding upon both parties to the dispute." 45 U.S.C. § 153 First (m).

B. Judicial Review Under the RLA

Judicial review of RLA arbitrations is extremely limited. Indeed, courts have characterized the scope of this review as "among the narrowest known to the law." *Jones v. Seaboard Sys. R.R.,* 783 F.2d 639, 642 (6th Cir. 1986) (citation omitted). The RLA provides, in pertinent part:

> "On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply

> with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

45 U.S.C. § 153 First (q).

The Sixth Circuit has held that this scope of review "is narrower even than the highly deferential abuse of discretion standard." *Seaboard Sys.,* 783 F.2d at 642 (citation and internal quotation marks omitted). "In order to set aside the Board's decision, [the court must] determine that the decision was 'wholly baseless and without foundation and reason.'" *Schneider v. S. Ry.,* 822 F.2d 22, 24 (6th Cir. 1987) (quoting *Gunther v. San Diego & Arizona E. Ry.,* 382 U.S. 257, 264 (1965)). "[S]uch limited review respects the intent of the parties who specifically bargained for [the arbitrator's] judgment and all that it connotes. . . . In the final analysis, [the arbitrator's] judgment must not be disturbed so long as it draws its essence from the [CBA]." *Bhd. of Locomotive Eng'rs & Trainmen v. United Transp. Union,* 700 F.3d 891, 900 (6th Cir. 2012) (internal quotation marks and citations omitted).

The seminal case regarding the scope of review of RLA arbitrations is *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89 (1978). There, the Tenth Circuit had vacated an Adjustment Board decision because it believed the Board had denied the plaintiff due process in reviewing his termination. *Id.* at 91. A unanimous Supreme Court reversed the Tenth Circuit, stating that "[the RLA's] statutory language means just what

it says." *Id.* at 93 (citations omitted). The Court held that Adjustment Board orders may only be reviewed for "(1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption." *Id.* (citing 45 U.S.C. § 153 First (q)).

Because this Court's power to review the System Board's Award is circumscribed in Greene's case, as in every similar case, the Court can quickly dispense with Greene's second claimed ground for overturning the System Board. In his Petition, Greene claims that the System Board violated his Fifth Amendment due process rights by improperly making and supporting credibility findings, by failing to cite supporting law or precedent, and by impermissibly relying upon hearsay statements. [DN 3-1 at 2.] But under *Sheehan,* this Court is not permitted to review the System Board's Award to see if the Board afforded Greene proper due process. This implicit holding from *Sheehan* has been explicitly stated by several circuit courts, including our own.[5] *See, e.g., Jones v. St. Louis-San Francisco Ry. Co.,* 728 F.2d 257, 261 (6th Cir. 1984) ("[A] due process violation . . . cannot serve as a basis for judicial review in this context."). Therefore, this Court must limit its

[5] The Court recognizes that other circuits allow due process review of RLA arbitrations. *See, e.g., Shafii v. PLC British Airways,* 22 F.3d 59, 64 (2d Cir. 1994) (review available); *Edelman v. Western Airlines, Inc.,* 892 F.2d 839, 847 (9th Cir. 1989) (same). But the Sixth Circuit does not, and the Court is bound by that interpretation of 45 U.S.C. § 153 First (q) and *Sheehan.*

review of the System Board's Award to the three grounds stated in 45 U.S.C. § 153 First (q). "If [Greene] cannot satisfy any of these three grounds, review cannot be granted." *Seaboard Sys.,* 783 F.2d at 642 (citing *Andrews v. Louisville & Nashville R.R. Co.,* 406 U.S. 320, 325 (1972)).

In his Petition, Greene claims only that the System Board exceeded its jurisdiction, the second ground for review listed in 45 U.S.C. § 153 First (q). However, at various points in his voluminous filings on these motions, Greene does allege that the System Board violated the Railway Labor Act and that the Board's decision was a product of fraud and corruption. In the interest of thoroughness, the Court will address all three grounds.

(1) *Violations of the RLA*

First, Greene may prevail in this case by showing that the System Board "fail[ed] . . . to comply with the requirements of the Railway Labor Act." *Union Pac. R. Co. v. Sheehan,* 439 U.S. 89, 93 (1978). A survey of the jurisprudence in this area reveals that courts rarely vacate RLA arbitrations on this ground. When they do, it is typically because the adjustment board in question failed to decide the merits of a case when the RLA required it to do so. For instance, in *System Federation, No. 30, Railway Employees' Department, AFL-CIO v. Braidwood,* a district court considered a case where the National Railroad Adjustment Board issued an Award refusing to decide the merits of a railroad

employee's grievance. 284 F. Supp. 611 (N.D. Ill. 1968). The NRAB declined to rule on the merits because of an unresolved circuit split, making the correct outcome unclear. *Id.* at 614. Following a Supreme Court decision that resolved the split, the NRAB again refused to rule on the merits. *Id.* The union argued, and the district court agreed, that by failing to rule on the merits of the employee's grievance, the NRAB failed "to fulfill its duties under the Act, which include the effective and final decision of grievances presented to it." *Id.* at 616. *See also Bhd. of R. R. Signalmen v. Chicago, M., St. P. & P. R. Co.,* 284 F. Supp. 401 (N.D. Ill. 1968) (Board's failure to issue a final money award violated RLA).

Here, Greene does not point out which specific provisions of the RLA the System Board violated. Regardless, the System Board did not violate the RLA in this case. Unlike the cases cited above, the System Board issued a final decision on the merits of Greene's employment grievance. The sole issue the Board was convened to decide was whether UPS had just cause to terminate Greene, and the Board answered that question affirmatively. When Greene states that the System Board and Arbitrator Winograd violated the RLA, Greene is essentially saying the Board and Winograd issued a decision with which he disagrees. Greene raises no RLA violations that justify this Court's vacation of the System Board's Award.

(2) *Lack of Jurisdiction*

The second way Greene may prevail in this case is by showing that the System Board "fail[ed] . . . to conform, or confine, itself to matters within the scope of its jurisdiction." *Union Pac. R. Co. v. Sheehan,* 439 U.S. 89, 93 (1978). The System Board's jurisdiction is limited to that which is conferred upon it by the CBA. *Jones v. St. Louis-San Francisco Ry. Co.,* 728 F.2d 257, 265 (6th Cir. 1984). To determine whether the System Board had jurisdiction to decide a particular matter, this Court must look to see whether "the award drew its essence from the collective bargaining agreement." *Zeviar v. Local No. 2747, Airline, Aerospace & Allied Emp., IBT,* 733 F.2d 556, 559 (8th Cir. 1984) (citing *W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers,* 461 U.S. 757 (1983)). Stated otherwise, if "the court is satisfied that the arbitrators were interpreting the contract rather than doing something else," the jurisdictional inquiry ceases. *Fine v. CSX Transp., Inc.,* 229 F.3d 1151, No. 99-1645, 2000 WL 1206526, at * 2 (6th Cir. Aug. 18, 2000) (unpublished table decision) (quoting *Hill v. Norfolk and W. Ry. Co.,* 814 F.2d 1192, 1197 (7th Cir. 1987)). The Sixth Circuit has set out four ways in which an arbitrator might exceed his jurisdiction:

> An arbitrator's award will be overturned for failure to draw its essence from the agreement only where 1) the award conflicts with the express terms of the agreement, 2) the award imposes additional requirements that are not expressly provided in the agreement, 3) the award is without rational support or cannot be rationally derived from the terms of

> the agreement, or 4) the award is based on general considerations of fairness and equity rather than the precise terms of the agreement.

Airline Prof'ls Ass'n of Int'l Bhd. of Teamsters, Local Union No. 1224, AFL-CIO v. ABX Air, Inc., 274 F.3d 1023, 1030 (6th Cir. 2001) (citation omitted).

If Greene's objections to the System Board's Award can be distilled to a single point, it is this: Greene contends that UPS was not permitted under the terms of the Collective Bargaining Agreement to require him to submit to an additional medical examination. The relevant CBA provision, Article 5.D.1.a., provides:

> If there is objective evidence indicating that a crewmember has a medical problem which could interfere with his ability to safely function as a crewmember, the Company may require the crewmember to have a medical examination other than a routine FAA required physical examination. A crewmember may be removed from duty with pay until the medical examination is completed. Such removal from duty must be approved by the Chief Pilot.

[DN 13-1 at 52.] The CBA further provides that the additional exam will be administered by a UPS-designated Aero Medical Examiner, and that UPS will pay the expenses of the examination. [*Id.* at 52-53.] If the UPS-designated AME determines that the crewmember is unfit to fly, Article 5.D.1.e allows the

crewmember to seek a second opinion from his or her own doctor. [*Id.* at 53.] If the two doctors disagree, Article 5.D.3 states that a third doctor whose opinion shall be final will be used to break the tie. [*Id.* at 54.]

In this case, Arbitrator Winograd unquestionably interpreted the CBA in deciding that Greene's termination was justified, and the Court cannot disturb his interpretation. Winograd begins his discussion by outlining the arguments presented by UPS, IPA, and Greene in some detail. [DN 19-15 at 42-44.] He then spends some seven pages evaluating the evidence presented by all parties through the lens of the CBA, in an effort to determine whether UPS had the necessary objective evidence to direct Greene to undergo an additional medical exam. [*Id.* at 48-55.] In doing so, Winograd necessarily had to interpret the CBA, as he does in the following passage from the Award:

> In analyzing Article 5.D, the scope of a medical examination authorized by that provision is other than a "routine" certification examination required by the FAA. The text of Article 5.D expressly distinguishes one from the other, thus indicating that a special focus may underlie the Company's referral. As Article 5.D also makes plain, the Company can exercise its prerogative based on an assessment by the chief pilot placing a pilot on leave from duty in conjunction with an examination directive. Given this, there is no requirement under the agreement for a preliminary report by a doctor or a medical official.

[*Id.* at 48-49.] Article 5.D.1.a, and particularly the phrase "a medical examination other than a routine FAA required physical examination," are indeed susceptible to multiple readings. One could interpret the phrase as requiring "a medical exam [different in type] than a routine FAA required physical examination." One could also read the phrase as meaning "a medical exam [in addition to] a routine FAA required physical examination." And as Greene repeatedly points out, the CBA also fails to define what constitutes "objective evidence." But the point of binding arbitration under the RLA is to save reviewing courts from deciding which interpretation of the CBA is the correct one. This Court's inquiry is limited to whether the "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509 (2001) (citations and internal quotations omitted). Here, that is precisely what Arbitrator Winograd did.

By arguing that UPS did not possess objective evidence warranting an additional medical examination, Greene asks this Court to evaluate the factual correctness of Arbitrator Winograd's decision. But the Court's scope of review regarding the substance of the System Board's Award is limited to whether "the award is without rational support or cannot be rationally derived from the terms of the agreement." *ABX Air,* 274 F.3d at 1030 (citation omitted). In other words, unless the arbitrator's logic "was 'wholly baseless and without foundation and reason,'" this Court may not disturb the Award. *Schneider v. S. Ry. Co.,* 822 F.2d 22, 24 (6th

Cir. 1987) (quoting *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257, 264 (1965)). Upon a thorough review of the System Board's Award, the Court is satisfied that, based upon the evidence presented to the Board, Arbitrator Winograd's decision was not wholly baseless and without foundation, reason, or rational support. *Id.* As noted by Arbitrator Winograd, Greene's own statements, especially those regarding his willingness to take pain medication in order to fly, constituted much of the "objective evidence" cited by UPS. Winograd reviewed those statements, as well as the other evidence, and reached the conclusion that UPS had the right under the CBA to require the exam. Because at least some evidence exists supporting that conclusion, this Court must defer to the System Board.

Similarly, there is no indication that Arbitrator Winograd "impose[d] additional requirements that [were] not expressly provided in the agreement," or based his decision upon "general considerations of fairness and equity rather than the precise terms of the agreement." *ABX Air,* 274 F.3d at 1030 (citation omitted). Rather, the record shows that Winograd heard testimony from multiple witnesses over the course of three days, received numerous exhibits, and considered argument from all involved parties. He rendered a decision that, in his view, was the correct one, based upon the evidence and his reasoned interpretation of the CBA. Even if this Court believed Winograd decided the case wrongly, it possesses no authority to overturn the Award.

Greene seeks to draw an analogy between his case and *Konop v. Hawaiian Airlines, Inc.,* No. 2:06-CV-04426 (C.D. Cal. Jan. 4. 2008), an order of a California federal district court vacating a System Board of Adjustment Award because that Board exceeded the scope of its jurisdiction. However, the district court's decision was reversed by the Ninth Circuit in *Konop v. Hawaiian Airlines, Inc.,* 336 F. App'x 705 (9th Cir. 2009), *cert. denied,* 558 U.S. 1149 (2010). In *Konop,* the parties' collective bargaining agreement "required notice of the precise charge or charges to the party," and Hawaiian Airlines did not provide the plaintiff with a statement of the facts or evidence against him. *Id.* at 706 (internal quotation marks omitted). The System Board found that the airline's statement of charges was sufficient under the CBA, but the district court vacated the Board's Award because the court believed Hawaiian Airlines' statement of charges was insufficient. *Id.* at 706-07. The Ninth Circuit reversed the district court because the district court had, in effect, substituted its own interpretation of the CBA for that of the System Board. *Id. Konop* lends further support to the notion that, "so long as the arbitrator is even *arguably* construing the contract, the reviewing court's view of the correctness of the arbitrator's decision—whether factually or legally flawed or even 'silly'—is irrelevant." *Id.* at 707 (citing *Garvey,* 532 U.S. at 509). Ultimately, *Konop* undercuts, rather than supports, Greene's arguments.

Greene raises other jurisdictional challenges to the System Board's Award. For two reasons, Greene

says that his arbitration was not properly before the System Board. First, a four-person Board did not meet and attempt to resolve Greene's termination before the third-party neutral was added. *See* [DN 3-1 at 2.] Normally, grievances must go before a four-person board, consisting of two UPS members and two IPA members, before a neutral arbitrator is added. However, in termination cases, both the RLA and CBA provide that the parties may skip the four-person board and go directly to binding arbitration, as they did in this case. Second, Greene previously filed a grievance stating that UPS did not have objective evidence to order an additional medical exam, and that grievance had not been resolved at the time of the arbitration. *See* [*id.*] But Arbitrator Winograd specifically considered and rejected this argument. *See* [DN 19-15 at 46-47.] In doing so, Winograd interpreted the CBA, stating:

> Nothing in Article 5.D provides for advance review in a grievance proceeding to test the validity of a Company directive for a medical examination. If an employee declines to comply, an opportunity remains under the contractual grievance and arbitration machinery for full consideration of the directive and an employee's objections to discipline, as in the present proceeding.

[*Id.*] The Court must defer to this interpretation, just as it defers to Winograd's interpretation of the CBA's medical exam provision.

Deference aside, Greene waived these jurisdictional arguments at the very outset of the arbitration.

Arbitrator Winograd asked the parties whether they were ready to proceed with the arbitration, and all those present assented. [DN 13 at 5.] Greene again waived this argument in his post-hearing brief, stating that "[t]his matter is properly before the Board." [DN 19-10 at 5.] Parties to arbitrations "ha[ve] an affirmative obligation to present to the arbitrator any arguments why the arbitration should not proceed. [They] cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator." *United Steelworkers of Am., AFL-CIO-CLC v. Smoke-Craft, Inc.,* 652 F.2d 1356, 1360 (9th Cir. 1981) (citing *Cook Indust., Inc. v. C. Itoh & Co. (Am.) Inc.,* 449 F.2d 106, 107-08 (2d Cir. 1971), *cert. denied,* 405 U.S. 921 (1972)). This is precisely what Greene attempts to do now, to no avail.

When federal courts vacate RLA arbitrations, it is typically because the System Board exceeded the boundaries provided by the collective bargaining agreement. In determining what those boundaries are, the arbitrator is afforded a great deal of deference. If the decision even arguably falls within the scope of the agreement, courts may not second-guess the arbitrator's determination. Here, Arbitrator Winograd interpreted the parties' CBA, and his interpretation was not "wholly baseless and without foundation and reason." *Schneider,* 822 F.2d at 24. Therefore, this Court may not overturn the System Board's Award based upon the second ground of review contained in 45 U.S.C. § 153 First (q).

(3) *Fraud or Corruption*

Finally, Greene may prevail by showing that the System Board's Award was a product of "fraud or corruption." *Union Pac. R. Co. v. Sheehan,* 439 U.S. 89, 93 (1978). Not just any fraud or corruption will do, however. The RLA states that "the order of the division may be set aside . . . for fraud or corruption *by a member of the division making the order.*" 45 U.S.C. § 153 First (q) (emphasis added). Stated otherwise, "Fraud in this context is understood to mean fraud by a member of the Board, not fraud by a party." *Green v. Grand Trunk W. R. Inc.,* 155 F. App'x 173, 176 (6th Cir. 2005) (citations omitted). The RLA does not define fraud, but "complete unwillingness by a Board member to respond to any evidence or argument in support of one of the parties' positions would constitute fraud." *Id.* (citing *Pac. & Arctic Ry. & Nav. Co. v. United Transp. Union,* 952 F.2d 1144, 1148 (9th Cir. 1991)).

Here, while Greene accuses most every person and entity involved in this case of fraud, corruption, and perjury,[6] the bulk of his accusations are levied at the parties and witnesses before the System Board and this Court, not the Board members themselves. Even if UPS and IPA did, as Greene believes, manufacture the evidence presented against Greene during the arbitration proceedings, this Court would still not have the power to overturn the System Board's decision

---

[6] In his response alone, Greene uses "fraud" and its derivations 140 times; "corrupt" and its derivations 28 times; and "perjury" 12 times. *See* [DN 50.]

based upon fraudulent conduct. At the very least, to survive summary judgment, Greene must show that not only did UPS and IPA present fraudulent evidence, but also that "the [System Board] knew or should have known that the case he was there to support was tainted by fraud." *Woodrum v. S. Ry. Co.,* 750 F.2d 876, 882 (11th Cir. 1985), *cert. denied,* 474 U.S. 821 (1985). Although Greene strenuously contests the grounds upon which the System Board decided his case, no evidence supports the proposition that the Board members knew or should have known that UPS and IPA were engaged in fraud or corruption.

When Greene does allege that Arbitrator Winograd engaged in fraud, he is essentially just stating his disagreement with the Board's findings. In his response, Greene lists thirteen "Arbitrator Acts of Misconduct." [DN 50 at 24-26.] But the acts that Greene lists are largely nothing more than adverse procedural and evidentiary rulings, which this Court does not have the power to second-guess. On another occasion, Greene quotes the portion of Arbitrator Winograd's decision referring to Greene's "readiness to take painkilling drugs and injections," [DN 19-15 at 31], arguing that "[n]othing in the record supports the inference that those medications remotely affected Greene's judgment or performance." [DN 50 at 46.] But the issue in the arbitration was not whether the medications actually affected Greene's ability to fly, but rather, whether UPS could require Greene to undergo a medical exam to see if he was able to fly. Furthermore, because Winograd characterized UPS's investigation as

"sufficiently fair and thorough," Greene claims that Winograd "is guilty of blatant complicity with UPS and the IPA to target the Plaintiff." [DN 50 at 48.] This is not fraud. Rather, Greene is simply trying to repackage his disagreement with the substance of the arbitrator's decision under the guise of fraud and corruption.

Greene does occasionally put forth arguments that, if true, would support a finding of fraud. For example, Greene states that "Arbitrator was guilty of fraud on multiple accounts purposely fabricating statements Plaintiff never made and manufacturing false claims out of thin air." [*Id.* at 26.] But Greene fails to cite to any evidence in the record demonstrating that the arbitrator "purposely fabricat[ed]" Greene's statements. [*Id.*] Greene's claims of fraud regarding Arbitrator Winograd are mere conclusory statements, unsupported by any material evidence giving rise to a genuine dispute of material fact. Because Greene "brings forth no evidence that any Board member refused to consider his claims," *Grand Trunk W. R. Inc.,* 155 F. App'x at 176, he may not overturn the System Board's Award under the third ground of review stated in 45 U.S.C. § 153 First (q).

IV. Conclusion

As the Supreme Court stated in *Sheehan,* "The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations." *Union Pac. R. Co. v. Sheehan,* 439 U.S. 89, 94 (1978). Mandatory, binding arbitration under the RLA is designed

to provide companies, employees, and unions with a reliable and efficient means of resolving labor disputes. To carry out this goal, reviewing courts may vacate an RLA arbitration only in the most extreme circumstances. The limited scope of review provided for in 45 U.S.C. § 153 (First) (q) prevents courts from being dragged into the quagmire of often messy factual scenarios. It also preserves the expectations of the parties who negotiated the terms of their respective collective bargaining agreements. This Court is called to decide only whether UPS, IPA, and Greene got what they bargained for, not whether the ultimate outcome was the factually correct one.

Here, the parties received precisely what they should have expected: a reasoned decision by a neutral arbitrator who weighed the evidence, interpreted the terms of the CBA, and rendered a decision that fairly reflected the provisions of that agreement. Thus, the Court's inquiry must cease. As his filings make clear, Captain Greene feels that he has been slighted by the other parties in these cases. But the exceedingly narrow review allowed in cases of this type prevents the Court from expressing an opinion regarding Greene's beliefs. Greene had the opportunity to raise his factual arguments before the System Board of Adjustment; he may not do so now. UPS and IPA have shown that no genuine dispute of material fact exists with respect to any of the three permissible grounds for review of the System Board's Award, and Greene has failed to rebut that showing. Therefore, UPS and IPA are entitled to summary judgment.

An appropriate order will follow.

November 21, 2016

CC: Counsel of Record
Douglas Greene, *pro se*

Nos. 16-6761/6763/6772

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS WALTER GREENE,

Plaintiff-Appellant,

v.

FROST BROWN TODD, LLC; MARK FRANCIS SOMMER; TONY C. COLEMAN (16-6761),

INDEPENDENT PILOTS ASSOCIATION, ET AL. (16-6763),

IPA/UPS SYSTEM BOARD OF ADJUSTMENT; UNITED PARCEL SERVICE CO.; INDEPENDENT PILOTS ASSOCIATION (16-6772),

Defendants-Appellees.

ORDER

(Filed Apr. 13, 2018)

BEFORE: GILMAN, ROGERS, and SUTTON, Circuit Judges.

The court received three petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

Case No. 16-6761/16-6763/16-6772

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed May 2, 2018)

DOUGLAS WALTER GREENE

Plaintiff - Appellant

v.

FROST BROWN TODD, LLC; MARK FRANCIS SOMMER; TONY C. COLEMAN, et al

Defendants - Appellees.

BEFORE: GILMAN, Circuit Judge; ROGERS, Circuit Judge; SUTTON, Circuit Judge.

Upon consideration of the appellant's motion to stay the mandate in the above-styled appeals,

It is **ORDERED** that the motion is hereby **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: May 02, 2018 /s/ Deb S. Hunt

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 16-6761/16-6763/16-6772

Filed: May 10, 2018

DOUGLAS WALTER GREENE

Plaintiff - Appellant

v.

FROST BROWN TODD, LLC; MARK FRANCIS SOMMER; TONY C. COLEMAN

Defendants - Appellees.

MANDATE

Pursuant to the court's disposition that was filed 12/04/2017 the mandate for this case hereby issues today.

COSTS: None

DOUGLAS WALTER GREENE

Circuit Court Case No: 16-6772
District Court Case No: 3:15-cv-00234

Plaintiff - Appellant

v.

IPA/UPS SYSTEM BOARD OF ADJUSTMENT; UNITED PARCEL SERVICE CO.; INDEPENDENT PILOTS ASSOCIATION

Defendants - Appellees

On Appeal from the United States District Court for the Western District of Kentucky Louisville Division
Thomas B. Russell, District Judge

MOTION TO STAY THE MANDATE PENDING FILING PETITION FOR WRIT OF CERTIORARI

FRAP RULE 41(d)(2)

(Filed Apr. 23, 2018)

DOUGLAS WALTER GREENE
304 S. Jones Blvd., Suite 2787
Las Vegas, NV 89107
Telephone: (907) 231-9076

Nos. 16-6761/6763/6772

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS WALTER GREENE

Circuit Court Case No: 16-6761
District Court Case No. 3:14-cv-00619

Plaintiff - Appellant

v.

FROST BROWN TODD, LLC; MARK FRANCIS SOMMER; TONY C. COLEMAN

Defendants - Appellees

DOUGLAS WALTER GREENE

Circuit Court Case No: 16-6763
District Court Case No. 3:14-cv-00628

Plaintiff - Appellant

v.

INDEPENDENT PILOTS ASSOCIATION; ROBERT TRAVIS, in his capacity as President of the Independent Pilots Association; ERICK GERDES, in his capacity as Vice President of the Independent Pilots Association; THOMAS KALFAS, in his capacity as Secretary of the Independent Pilots Association; BILL CASON, in his capacity as Treasurer of the Independent Pilots Association; HARRY TREFES, in his capacity as At Large Representative of the Independent Pilots Association

Defendants - Appellees

MOTION

Pursuant to the provisions of 28 U.S.C. § 2101(f), and Fed. R. App. P. Rule 41(d)(2)(B), the above-named Appellant respectfully moves the Court to enter an order staying issuance of the mandate in the above-entitled appeals. Appellant makes this motion with bona fide intention to make proper and timely application to the Supreme Court of the United States for a writ of certiorari.

This Court denies a motion for a stay of the mandate if it determines that the application for certiorari would be frivolous or is made merely for delay. 6 Cir. R. 41 Issuance of Mandate; Stay of Mandate states: "The mandate ordinarily will issue pursuant to Fed R. App. P. 41(b) unless there is a showing, or an independent determination by this court, that a petition for writ of certiorari would present a substantial question and that there is a good cause for a stay." The Court should grant this motion because being frivolous or made for delay does not apply here. The writ of certiorari indeed presents a substantial question of national importance that will identify points of law and fact overlooked and misapprehended by this court.

These overlooked and misapprehended points of law and fact demonstrates a circuit split and conflict with the stare decisis precedent Rules of Law established by the United States Supreme Court in which the Appellant's [Constitutional] Rights have been violated of which these concerns applies here.

First, **the application for certiorari would not be frivolous and it is reasonably likely to be reviewed by the Supreme Court** because of multiple grounds to be raised in the application which merit the attention of the Supreme Court as follows:

1. **Captain Douglas Greene has *NEVER* even been afforded an *appearance in front of a trial court* with or *without a* jury** so as in accordance with FRCP Rule 52(a)(6) to be given due regard to the trial court's opportunity to judge the witnesses' credibility.

2. **Greene asserted his Rule 38. Right to a Jury Trial Demand** to only be denied at all costs by UPS/IPA's undue monetary and political influences. This Constitutional right has been unlawfully denied despite filing a motion for a **Rule 38 Jury Trial Demand** which is a basic Right that has been determined in just one of many United States Supreme Court Decisions as in TEAMSTERS v. TERRY in which JUSTICE MARSHALL delivered the opinion of the Court stating:

   "This case presents the question whether an employee who seeks relief in the form of back-pay for a union's alleged breach of its duty of fair representation has a right to trial by jury. We hold that the Seventh Amendment entitles such a plaintiff to a jury trial."

   These proceedings have presented more than a mere *"scintilla"* of sufficient evidence favoring the nonmoving party for a jury verdict for that party showing countless disputes in Material Facts. The District & Appellate Courts violated **FRCP Rule**

56 Summary Judgment by Granting/Affirming Defendant's Motions for Summary Judgment given the record shows findings of fact in both oral & documentary evidence of material facts in dispute unlawfully set aside by the District/Appellate Courts:

"The right to a jury trial is fundamental in our judicial system, and that the right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which there is room for a reasonable difference of opinion among fair-minded men passed upon by the jury and not by the court." *(Michael Tomick v. United Parcel Service et al., Superior Court of Connecticut. CV064008944, Decided: October 28, 2010).*

3. **The panel decision conflicts with a decision of the United States Supreme Court** in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Wherein the U.S. Supreme Court held:

"The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 477 U. S. 247-257.

(a) Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and Page 477 U. S. 243 determine the truth of the matter, but to determine whether there is a genuine issue for trial.

There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. Pp. 477 U. S. 247-252.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the New York Times "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 477 U. S. 252-256."

In *Hines v. Anchor Motor Freight*, the U.S. Supreme Court held:

"The finality provision has sufficient force to surmount occasional instances of mistake. But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory, for in that event error and injustice of the grossest sort would multiply. The contractual system would then cease to qualify as an adequate mechanism to secure individual redress for damaging failure of the employer to abide by the contract. Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity. In our view, enforcement of the

finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings. Wrongfully discharged employees would be left without jobs and without a fair opportunity to secure an adequate remedy."

4. **Rule 52.(a)(5) & (6): Findings and Conclusion by the Court**

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, or moved for partial findings.

The District Court not only tampered with evidence they refused to answer Greene's demands for Evidentiary Support of false findings that were based on known fraud of which the record proves ***"Beyond Reasonable Doubt,"*** but set aside by the District & Appellate Courts.

(6) Setting Aside the Findings of fact and giving no trial court opportunity to judge the witnesses' credibility.

5. **Questions of national importance affecting federal rights to due process and a Duty of Fair Representation (DFR),** include but are not limited to. . . . the court not vacating an arbitration decision even though it possesses evidence that the arbitration decision was a product of fraud. The court not finding a **BREACH of Duty of Fair Representation** when a union allows more than 6,000 pages of documents to be dumped

in violation of the Collective Bargaining Agreement days before arbitration. This is important not only for UPS Pilots but for all union members nation wide. It is a very dangerous precedent that both the District & Appellate Courts have in their possession enough evidence to determine that UPS is forcing pilots with DUI and substance abuse problems to write false statements used to target unwanted pilots attempting to do their job in enforcing the Safety & Security of the airline industry by something as simple as calling in sick or fatigued. This coercion has extended to all operations of UPS to include the groundside eliciting provocation that caused tragic massacres of human beings in UPS gateway facilities in San Francisco, CA & Birmingham, AL.

(1) If allowed to stand, this case will encourage other unions to violate stare decisis precedent of the Supreme Court – Union owes ***"duty to exercise fairly the power conferred upon it on . . . without hostile discrimination"*** against bargaining unit members (Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944))

(2) These triad cases afford an opportunity to properly distinguish bad faith representation from arbitrary representation. The latter, by definition, requires a final product of bargaining to prove breach of DFR. DFR obligation **"applies to all union activity"** involving all duties as exclusive collective bargaining:

- contract negotiations/settlement.
- contract administration.

- processing/handling/settlement of grievances (not violating the CBA by unlawfully putting grievances at abeyance).
- all other activities involving IPA's representative role.

ALPA v. O'Neill, 499 U.S. 65, 78 (1991). The former does not. *Amalgamated Motor Coach Emp. v. Lockridge*, 403 U.S. 274, 301 (1974).

(3) This decision must be reversed or reconciled with a number of other circuit court splits & conflicted U.S. Supreme Court decisions to include even within the 6th Circuit itself:

BOBO v. UPS 6th Circuit 2012 Remand; RUSSELL v. UNITED PARCEL | 110 Ohio App.3d 95 (1996); ARNOLD v. Air Line Pilots Association, and John G. Schleder, Defendants-Appellees; BALOWSKI v. INTERNATIONAL | 372 F.2d 829 (1967); BIANCHI V. ROADWAY EXPRESS, INC.,; BOWEN v. UNITED STATES POSTAL SERVICE; See the 7th Circuit Hoffman Standard in *Hoffman v. Lonza, Inc.,; HAYDUK v. UNITED PARCEL SERVICE | 930 F.Supp. 584 (1996); Braxton v. United Parcel Service, Inc., 806 F. Supp. 537 (ED. Pa. 1992); Tull v. United States, (full text) // 481 U.S. 412 (1987); Arnold v. Air Midwest Inc Ar Paquette Air Line Pilots Association, 10th Circuit (1996); MARGETTA v. PAM PAM CORPO | 501 F.2d 179 (1974); United Parcel Service, Inc. v. Mitchell,* **the Supreme Court dealt with an employee's suit charging his employer with wrongful discharge and his union with breach of its fair**

> **representation duty**; MUNIZ v. UNITED PARCEL SERVICE INC.; Olsen v. United Parcel Service, 892 F. 2d 1290 – Court of Appeals, 7th Circuit; RUZICKA v. GENERAL MOTORS | 528 F.2d 912 (1975); Thomas v. United Parcel Service, Inc. And Local 710, International Brotherhood of, 890 F.2d 909;

The above case law list represents at least 16 circuit court split cases of which United Parcel Service is a litigant in 6 out of the 16 given an undisputable reputation of Workplace Violence against their employees ignored by the District & Appellate Courts against Greene.

Second, **this motion is not made to delay; it is made to protect the UPS pilots & other UPS employees from needless hardship**. A stay of the mandate provides the opportunity to help countless employees from being [] denied a **Duty of Fair Representation** by UPS' Company controlled Unions and to alleviate the fears of retaliation and workplace violence for something as simple as being able to call in sick for work. Evidence in the record taken in an National Transportation Board (NTSB) survey, after the preventable & tragic crash of UPS flight 1354, shows that 96% of all UPS pilots are terrified for fear of retribution, punitive action, or getting suspended who were fatigued or sick and therefore did not call in unfit for duty. This is the true hardship that compromises the Safety & Security of the airline industry yet apparently of no concern to the District or Appellate Courts. Hardship analysis should focus on the first 90 days of

a stay because, as a general rule, once a stay is in place, it continues after a petition is filed until the Supreme Court's final disposition. *See* Fed. R. App. P. Rule 41(d)(2)(B). Hardship [] will continue for pilots as it is still reported today with UPS' corporate culture of threats, intimidation and retribution against their employees if the mandate is not stayed so as to proffer the Appellant petition for a writ of certiorari for the United States Supreme Court to take judicial notice of national importance that affects the Safety & Security of the airline industry and the flying public.

UPS' corporate culture mandates an extremely high probability of another aircraft mishap in the near future and a tragic event such as this is impossible to undo. Therefore it's incumbent upon the Supreme Court to have the opportunity to hear these triad cases so as to reverse this Court's conflicted decision so that Greene can finally be heard. Surely, it would be much harder to protect UPS pilot's interests in another mishap situation than it would be to protect UPS' interests in concealing their gross misconduct if the mandate isn't stayed.

Third, **it is the Supreme Court's job to resolve questions of significant national importance and to make sure that the law is interpreted and applied consistently throughout the nation to include Standards of Review.** The Appellate Court Order denying petitions for rehearing stated:

> ***"The issues raised in the petitions were fully considered upon the original submission and***

> ***decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc. Therefore, the petitions are denied."***

This statement in and of itself brings into question the Code of Conduct for Judicial Employees specifically **Canon 1 & Canon 3**:

Canon 1: A Judicial Employee Should Uphold the Integrity and Independence of the Judiciary and of the Judicial Employee's Office.

Canon 3: A Judicial Employee Should Adhere to Appropriate Standards in Performing the Duties of the Office.

The evidence shows gross misconduct on multiple accounts of judicial employees fabricating facts that didn't exist, tampering with evidence & Appellant pleadings, underhanded behavior to purposely time out Appellant Responses showing egregious discrimination to a *Pro Se* litigant. Even worse is blatantly ignoring the Rule of Law in both Federal Rules of Civil/Appellant Procedures and not complying with a *De Novo Standard of Review* while giving complete deference to the District Court. These concerns were addressed for the first time in the Appellant Petitions for Rehearing En Banc and therefore would have been impossible to have been ***"fully considered upon the original submission and decision of the cases."*** Plain and simple honest adjudication has been denied at all costs to appease UPS and their undue political &

monetary influences. The Appellate Court's Decisions of overwhelming Appellant denial show it is quite apparent the hundreds of Appellant hours spent in drafting pleadings were not read nor were any of the countless finding of fact in both oral & documentary evidence submitted in the record by Greene ever even considered in favor of law clerks and administrative personnel violating **Canons 1 & 3**.

The Appellant's entire experience with the U.S. Federal Courts has been an indignant abomination of justice that should be the shame of this nation against all American Workers and a 22-Year Veteran that faithfully served to uphold the very rights I have been denied.

In the United States separation of powers is a constitutional principle introduced to ensure that the three major institutions of the state namely; the legislative, the executive and the judiciary are not concentrated in any single body whether in functions, personnel or powers. ***Legislative*** is a law-making body, ***Executive*** puts law into operation and ***Judiciary*** interprets law and settles disputes. ***Checks and Balances*** is a system that was built into the U.S. Constitution by the framers, **to keep each branch of government in check**. It is meant **to prevent any one branch from usurping too much power**. Each branch of government has a certain amount of control over the other branches, in addition to its individual powers.

Unfortunately since the passing of Citizens United it is quite apparent the framers intent of maintaining a system of **Checks and Balances** has been compromised.

As witnessed in these triad cases the undue political and monetary influences of United Parcel Service shows a blatant abuse of legislative powers to influence the judiciary denying American workers basic human, civil, & constitutional rights which shall be established in the Appellant's petition for writ of certiorari to the United States Supreme Court.

For the foregoing reasons, the Appellant respectfully moves the Court for an order staying the issuance of the mandate in the above triad cases pending filing a petition for writ of certiorari in the Supreme Court of the United States. Pursuant [to] Rule 41 (d)(2)(B), the stay should be extended upon the filing of the petition, and it should remain in place until the Supreme Court's final disposition.

* * *