No. 21-956

IN THE
Supreme Court of the United States

SOJOURNER RUDISILL,
Petitioner,
v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

JACOB KARABELL
(*Counsel of Record*)
BRUCE R. LERNER
BREDHOFF & KAISER,
P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
202.842.2600
jkarabell@bredhoff.com

Mosaic - (301) 927-3800 - Cheverly, MD

QUESTION PRESENTED

Whether an arbitration award issued by a board of adjustment—which consists of a private arbitrator, a union representative, and an airline representative—can be vacated by a federal court on the ground that the arbitration violated an airline employee's constitutional due-process rights.

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STATEMENT

A. Congress passed the Railway Labor Act ("RLA" or "Act") "to provide a framework for peaceful settlement of labor disputes between carriers and their employees." *Union Pac. R.R. v. Price*, 360 U.S. 601, 609 (1959). While the RLA originally applied only to the railroad industry, Congress amended the Act in 1936 "to cover the then small-but-growing air transportation industry." *IAM v. Cent. Airlines*, 372 U.S. 682, 685 (1963).

When Congress extended the RLA to the airline industry, it had the "general aim" of treating airlines similarly to railroads. *Id.* There is one "significant variation" in the treatment of airlines and railroads under the statute, however: The two industries are subject to different dispute-resolution mechanisms. *Id.* For railroads, the RLA provides that unresolved disputes between unions and employers are heard by the National Railroad Adjustment Board ("NRAB"), a permanent national board consisting of 34 members appointed by labor and management. 45 U.S.C. § 153-First (a), (i).[1] Under the statute, once the NRAB issues a decision, a party dissatisfied with the decision can file a petition for review in federal court on one of three enumerated grounds: that the decision did not comply with the RLA, that the NRAB exceeded its jurisdiction, or that a member of the NRAB had been

[1] A railroad and a union can mutually agree to establish "system, group, or regional boards of adjustment" to hear disputes that otherwise would be within the jurisdiction of the NRAB. *See* 45 U.S.C. § 153-Second. Even where such a board of adjustment is established, however, any party can elect to invoke the NRAB's jurisdiction over a dispute with 90 days' notice. *Id.*

subject to fraud or corruption. *Id.* § 153-First (q); *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 93-94 (1978) (per curiam).

The NRAB has no jurisdiction over airlines, however. Instead, the RLA requires a union and an airline to "establish a board of adjustment" to adjudicate any unresolved disputes. 45 U.S.C. § 184. The Act places no parameters on how a board of adjustment should be comprised or the procedures such a board should follow, and it does not specify the grounds on which board-of-adjustment awards can be reviewed in federal court.

As relevant here, Respondent International Association of Machinists and Aerospace Workers ("IAM") and Respondent American Airlines[2] agreed to establish a System Board of Arbitration ("System Board") to resolve any disputes involving grievances brought under the parties' collective bargaining agreement. CBA Art. 21.[3] The parties agreed that the System Board would consist of three members: a member selected by the Union, a member selected by American Airlines, and a neutral referee. *Id.* Art. 21.B. The parties also agreed that "[a]n employee covered by this Agreement may be represented at [System] Board

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[2] American Airlines is the successor to US Airways, which was the named party in the operative collective bargaining agreement.

[3] The operative collective bargaining agreement between IAM and US Airways can be found at: https://twu514.org/files/2012/04/IAM-FS_2008-12-2011_Contract_Final_to_Print_102808.pdf. It is incorporated into Petitioner's complaint by reference. D. Ct. Dkt. No. 1 at 9.

hearings by any person designated by him." *Id.* Art. 21.I.

B. Petitioner Sojourner Rudisill was employed by American Airlines in a bargaining unit represented by IAM. In August 2012, Petitioner, the Union, and American Airlines jointly entered into a "last-chance agreement" providing that, for a period of twelve months, any violation of company policy would be just cause for the immediate termination of Petitioner's employment. Dist. Ct. Dkt. No. 30-3 at 11. Pursuant to that agreement, American Airlines terminated Petitioner's employment in April 2013 after the airline concluded that Petitioner did not timely complete four required training sessions. *Id.* at 11-13.

IAM filed a grievance on Petitioner's behalf contesting the termination, which was advanced to the System Board. Petitioner testified at the arbitration hearing, and counsel for the Union cross-examined both of American Airlines' witnesses. Dist. Ct. Dkt. No. 13-4. Following the hearing, the System Board issued an award in December 2016 concluding that American Airlines had proven that Petitioner violated the last-chance agreement; on that basis, the System Board upheld Petitioner's termination. Dist. Ct. Dkt. No. 30-3 at 23-25. The System Board member appointed by the Union dissented. *Id.* at 29.

C. Petitioner filed suit in the district court against American Airlines and IAM in December 2018. Her complaint alleged that, on the day of the System Board hearing, Petitioner and her personal attorney "were approached by a representative from the [IAM] who indicated that both [IAM and American Airlines] objected to outside counsel attending the hearing and that he must leave for the hearing to take place." Dist. Ct. Dkt. No. 1 at 8. The complaint further alleged that

the IAM representative told Petitioner "that the neutral member of the System Board was in agreement" that Petitioner's personal attorney could not attend the hearing. *Id.* Petitioner, however, never raised the issue of whether her personal attorney could participate in the System Board proceedings before the System Board itself—notwithstanding that the neutral referee serving as chairperson of the System Board repeatedly asked all parties on the record if they had any questions before the hearing began. Dist. Ct. Dkt. No. 13-4 at 20 ("Are there any questions about how we're going to proceed[?]") ("[A]ny other questions or comments before we get started?").

Based on these allegations, Petitioner asked the district court to set aside the System Board award on the ground that the System Board proceedings violated her constitutional due-process rights, violated the collective bargaining agreement between IAM and American Airlines, and were tainted by the "fraud or corruption" of a System Board member. Dist. Ct. Dkt. No. 1 at 9. The district court dismissed the complaint. The court held that Third Circuit precedent foreclosed both Petitioner's constitutional due-process claim and her claim that the System Board proceedings violated the collective bargaining agreement. App. 24-26 (citing *Steelworkers Local 1913 v. Union R.R.*, 648 F.2d 905 (3d Cir. 1981) and *Zurawski v. SEPTA*, 441 F. App'x 133 (3d Cir. 2011)). The court also dismissed Petitioner's "fraud or corruption" claim against both Respondents because none of Petitioner's allegations implicated the System Board. App. 26-27. The court

added that IAM was not a proper party to such a claim under the RLA in any event. App. 28 n.4.

Petitioner then amended her complaint, adding a claim that IAM breached its duty of fair representation in the manner that it handled Petitioner's grievance. Dist. Ct. Dkt. No. 29 at 13-14. The district court dismissed this claim as time-barred by the applicable statute of limitations. App. 17.

On appeal, Petitioner challenged only the district court's disposition of her constitutional due-process claim. App. 6. The Third Circuit affirmed in a non-precedential opinion. App. 6-7.

REASONS FOR DENYING THE WRIT

Contrary to Petitioner's submission, this case does not present an opportunity for the Court to address whether 45 U.S.C. § 153-First (q) forecloses constitutional due-process challenges. That is because this is an airline case, and the dispute-resolution procedures set forth in § 153 expressly do *not* apply to airlines. Indeed, should this Court grant certiorari in this airline case, the Court would enter a thicket of legal issues interrelated with the question presented by the Petition. Those issues would include not just whether the enumerated grounds for a petition for review in § 153-First (q) apply to airline cases, but also, equally fundamentally, whether an arbitration proceeding conducted by a board of adjustment—such as the System Board here—is attributable to the state such that its procedures and awards are even subject to the Fifth Amendment's Due Process Clause.

Moreover, even if this case properly presented the lower-court division that Petitioner claims it does, this

case would not be a proper vehicle to address that division. That is because the Union is not a proper party to a petition for review under the RLA, as well as because Petitioner's constitutional due-process claim is not in genuine controversy.

For these reasons, the Petition should be denied.

I. This case does not present the question of whether constitutional due-process challenges can be brought under § 153-First (q) of the RLA.

A. Petitioner asks this Court to grant certiorari to address the disagreement among the lower courts concerning the interpretation of this Court's decision in *Union Pacific Railroad v. Sheehan*, 439 U.S. 89 (1978) (per curiam). *See* Petition at 7-9. The Petition, however, misstates the issue on which the lower courts have disagreed. *See* Petition at 9 (contending that lower courts disagree on "whether due process review of *arbitration board decisions* is permissible under the RLA" (emphasis added)). In fact, as this Court observed in *Union Pacific Railroad v. Trainmen*, 558 U.S. 67 (2009), the issue on which the lower courts have disagreed is whether § 153-First (q) "precludes judicial review of *NRAB proceedings* for due process violations." *Id.* at 75 (emphasis added). Because this case does not involve an appeal from an NRAB proceeding, it does not present an opportunity for this Court to address the disagreement that the Court acknowledged but did not resolve in *Union Pacific*.

In *Sheehan*, the respondent employee had been discharged for violating a work rule. Because the employee was employed by a railroad, the termination was referred to the NRAB pursuant to § 153-First (i); the NRAB ruled against the employee on timeliness

grounds. *Sheehan*, 439 U.S. at 89. The employee then petitioned for review of the NRAB's decision in federal court.

After the Tenth Circuit vacated the NRAB's decision on constitutional due-process grounds, this Court summarily reversed. The Court held that judicial review of the NRAB's decision was not available because § 153-First (q) limits the grounds on which an NRAB decision can be challenged, and "respondent simply failed to demonstrate the existence of any of the [specific] grounds for review." *Id.* at 93.

Thirty years later, in the *Union Pacific* case, this Court granted certiorari "to determine whether a reviewing court may set aside NRAB orders for failure to comply with due process notwithstanding the limited grounds for review specified in § 153 First (q)." 558 U.S. at 79. Although the Court observed that "Courts of Appeals have divided on this issue" since *Sheehan*, *id.*, the Court did not resolve it. Instead, the Court decided the case on statutory grounds by concluding that "the NRAB panel failed 'to conform, or confine itself,' to the jurisdiction Congress gave it." *Id.* at 86 (quoting 45 U.S.C. § 153-First (q)).

B. Unlike *Sheehan* and *Union Pacific*, this case does not involve a petition for review of an NRAB decision issued pursuant to § 153-First. It instead involves a petition for review of an arbitration award issued by a "board of adjustment," 45 U.S.C. § 184, which IAM and American Airlines established through their collective bargaining agreement. *See supra* pp. 2-3.

That distinction is critical, because Congress expressly provided that § 153-First does *not* apply to airlines. *See* 45 U.S.C. § 181 ("[a]ll of the provisions of

subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air"). It is thus far from apparent why the lower-court disagreement about how to interpret § 153-First (q)—specifically, whether "federal courts may review due process claims arising from Adjustment Board decisions," *Kinross v. Utah Ry.*, 362 F.3d 658, 661 (10th Cir. 2004)—would have bearing in this airline case, which is *not* governed by § 153-First (q).

Of particular note, Judge Wilkinson, writing for the Fourth Circuit, persuasively has rejected an attempt to equate the dispute-resolution provisions for railroads and airlines under the RLA. There, the plaintiff union, which represented airline pilots, argued that the defendant airlines were required to resolve certain disputes before a "group" adjustment board with multiple unions and multiple carriers. As relevant here, the union argued that the dispute had to be arbitrated before a group adjustment board because Congress had established a group adjustment board—the NRAB—to resolve similar railroad disputes. *Air Line Pilots Ass'n* v. *US Airways Grp.*, 609 F.3d 338, 344-45 (4th Cir. 2010).

The court of appeals rejected the union's argument, explaining that "Section 3-First of the RLA applies only to the railroad industry," and "[i]n the airline industry, there is no comparable provision to Section 3-First." *Id.* at 345; *see also id.* ("In fact, in extending the RLA to air carriers, Congress specifically decided *not* to create a national board."). This decision confirms what the RLA says in plain terms: The dispute-resolution provisions of § 153-First cannot be carbon copied onto the airline industry, as Petitioner would have it.

To be sure, in some cases challenging an arbitration award issued by an airline board of adjustment, lower courts have *borrowed* the standard for judicial review set forth in § 153-First (q). *See, e.g.*, *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1354-55 (9th Cir. 1981). These decisions contain little reasoning as to why § 153-First (q) necessarily should be borrowed in airline cases. For example, *Shafii v. PLC British Airways*, 22 F.3d 59 (2d Cir. 1994) (cited in Petition at 7), applies § 153-First in an airline case without even mentioning that the RLA expressly excludes airlines from the dispute-resolution provisions in § 153.[4]

While the proper standard for judicial review of the arbitration award of an airline board of adjustment remains underdeveloped in the lower courts, for present purposes the dispositive point is that this is a separate question from the circuit split on which the Petition is premised. That circuit split is whether § 153-First precludes judicial review of *NRAB proceedings* for due process violations. *See* Petition at 7 (citing, *inter alia*, *Trainmen v. Union Pac. R.R.*, 522 F.3d 746 (7th Cir. 2008), *aff'd on other grounds*, 558 U.S. 67 (2009)). Because § 153-First does not apply to airlines, that circuit split is not presented by this case.

C. Attempting to address this circuit split in an airline case, moreover, would implicate the additional question of whether the proceedings of an airline

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[4] In this case, Petitioner conceded below that the Third Circuit's railroad precedent in *Steelworkers Local 1913 v. Union Railroad*, 648 F.2d 905 (3d Cir. 1981), foreclosed her constitutional due-process claim. CA3 Dkt. No. 10 at 23 ("Plaintiff-Appellant respectfully requests that this Court overturn" the *Steelworkers Local 1913* case). The court of appeals thus had no reason to delve into the question of whether *Steelworkers Local 1913* should be borrowed in airline cases.

board of adjustment, established by agreement of two private parties, are covered by the Fifth Amendment's Due Process Clause at all. While Petitioner appears to assume that such board-of-adjustment arbitration proceedings are subject to the constraints of the Due Process Clause, that assumption is dubious under this Court's state-action precedents.

As this Court has held, for a private-party defendant to be liable for a constitutional violation, a plaintiff must show that the specific conduct alleged to be unconstitutional "is fairly attributable to the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982).

Actions taken by a board of adjustment established by two private parties—here, a System Board established by an airline and a union—are not plausibly attributable to the state under these precedents. As the Fourth Circuit has put it, airline boards of adjustment are "creatures of contract," with Congress leaving it to airlines and unions to determine the composition of such boards, as well as the rules and procedures they will follow. *Air Line Pilots Ass'n*, 609 F.3d at 343. Because these decisions are entirely left up to private parties and are not guided by parameters set by the state, the rulings and decisions of airline boards of adjustment do not amount to state action that can be challenged under the Due Process Clause. *Cf. Elmore v. Chi. & Ill. Midland Ry.*, 782 F.2d 94, 96 (7th Cir. 1986) (Posner, J.) (railroad's pre-arbitration grievance procedure not "a governmental procedure required to conform to the requirements of due process," even though RLA required railroad and

union to establish a pre-arbitration grievance procedure).[5]

This case illustrates the point. The gravamen of Petitioner's complaint is that IAM and American Airlines violated Petitioner's constitutional due-process rights when an IAM representative informed Petitioner that the parties had decided that Petitioner's private attorney could not participate in the System Board arbitration hearing. *See supra* pp. 3-4. But this alleged action was taken by IAM and American Airlines, and Petitioner does not allege that the State somehow compelled (or even encouraged) this specific action. *See Blum*, 457 U.S. at 1004 (state must be responsible "for the specific conduct of which the plaintiff complains" to satisfy state-action requirement). More broadly, under the parties' collective bargaining agreement, the System Board is an arbitration board comprised of three private parties that must follow the procedures set forth in the applicable agreement between IAM and American Airlines. The substance of the System Board's rulings and decisions are therefore attributable entirely to private action, not state action. *See generally FDIC v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987) (rejecting argument that plaintiff had due-process right to oral arbitration hearing because "[t]he arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator").

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[5] This Court's decision in *IAM v. Central Airlines*, 372 U.S. 682 (1983), is not to the contrary. There, the Court held that there is federal jurisdiction to enforce an arbitration award issued by an airline board of adjustment. *Id.* at 692. The Court did not address whether there was state action sufficient to support a constitutional claim.

The question of whether actions taken by an airline board of adjustment are even subject to the Due Process Clause is further reason why, if this Court has interest in resolving the lower-court disagreement it identified in *Union Pacific*, it should resolve that disagreement by granting certiorari in a petition for review from an NRAB decision (as *Union Pacific* itself was)—not in an airline case.[6]

II. Even if this case presented the question of whether constitutional due-process challenges can be brought under § 153-First (q), this case would be an improper vehicle to resolve that question.

Even if this case did fairly present the division among the lower courts that the Petition claims it does, this Court nonetheless should not grant certiorari for at least two additional reasons.

First, IAM is not a proper party to this case. As the district court held, a union is not a proper party to a petition for review that challenges an arbitration award upholding the discipline of an employee. In so holding, the court relied on the Second Circuit's decision in *Ollman v. Special Board of Adjustment No. 1063*, 527 F.3d 239 (2d Cir. 2008). App. 28 n.4. That decision, in turn, held that the defendant union "was properly made party to the petition for review only to the extent that [the plaintiff] asserted a claim that [the union] breached its duty of fair representation owed to him. . . . The appropriate respondent was [the

[6] As the NRAB is an entity expressly created by Congress, its decisions—unlike the decisions of airline boards of adjustment—likely are attributable to the state for purposes of state-action analysis. *See Sullivan*, 526 U.S. at 54 (decision of government agency "may properly be considered state action").

employer], the party whose disciplinary actions [were] contested before the Board." *Id.* at 250-51.

Although the district court here expressly dismissed only Petitioner's "fraud or corruption" claim against IAM on this basis, the district court's rationale for dismissing that claim—that a union is not a proper party to a petition for review of an arbitration award upholding an employer's imposition of discipline—applies with equal force to Petitioner's constitutional due-process claim. And as IAM has argued that it is not a proper party to Petitioner's constitutional due-process claim at every stage of the proceedings below, the issue would be ripe for consideration by this Court if it granted certiorari. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) ("[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court"). The pendency of this additional issue—on which there is no disagreement among the lower courts—is further reason to deny the Petition.

Second, this case is not one in which a constitutional due-process claim is in genuine controversy. In *Union Pacific*, after this Court granted certiorari to resolve the lower-court disagreement about whether constitutional due-process review of an NRAB decision is available, it did not decide the issue; it instead resolved the case on statutory grounds. 558 U.S. at 80. The Court explained that "[g]iven this statutory ground for relief, there is no due process issue alive in this case." *Id.* It added that an answer to the question on which it granted certiorari "must await a case in which the issue is genuinely in controversy," although

"[a] case of that order would be uncommon." *Id.* at 80-81 & n.7.

This is not the uncommon RLA case that presents a genuine due-process claim. Taking as true Petitioner's allegation that an IAM representative told Petitioner that her personal attorney could not attend the arbitration hearing, Petitioner could have argued before the System Board that she had a contractual entitlement to have her personal attorney represent her at the hearing. Or she could have brought a lawsuit against IAM within the applicable statute of limitations alleging that the Union's actions violated the duty of fair representation. *See English v. Burlington N. R.R.*, 18 F.3d 741, 745 (9th Cir. 1994) ("If the union representative does not fully inform the employee about the Board hearing or misleads the employee about his rights in those proceedings, the employee has a statutory remedy against the union for breach of its duty of fair representation.").

Petitioner took neither of these actions. She instead pursued a constitutional due-process claim against Respondents in federal court. This is therefore one of the many RLA cases where a plaintiff has brought "ostensibly extra-statutory due process objections [that] could have been accommodated within the statutory framework." *Union Pacific*, 558 U.S. at 81 n.7 (citation omitted). The fact that the constitutional due-process issue is not in genuine controversy is another reason why this Court should not grant certiorari.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JACOB KARABELL
(*Counsel of Record*)
BRUCE R. LERNER
BREDHOFF & KAISER,
P.L.L.C.
805 15th Street N.W.
Suite 1000
Washington, DC 20005
202.842.2600
jkarabell@bredhoff.com

Counsel for Respondent International Association of Machinists and Aerospace Workers

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