No. 22-220

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,
Respondent.

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

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

According to the district court's unchallenged factual findings, Petitioner Union Pacific used the pretext of an off-site and off-duty fistfight at a union membership meeting to eradicate the union's presence at its El Paso terminals. The fight—between a union officer and a rank-and-file member—was the result of an internal union dispute over the latter's acceptance of extra shifts with Union Pacific, which the union actively discourages because it creates a safety risk. Instead of disciplining both combatants in accordance with its past practice, Union Pacific suspended only the union officer for fighting. It then also suspended five other active El Paso union officers—who were merely bystanders to the fight—while allowing a rank-and-file bystander who supported the carrier's position on extra shifts to continue to work. In the end, El Paso union members were left with no union representation at their workplace.

Sections 2, Third and Fourth of the Railway Labor Act ("RLA" or "Act"), 45 U.S.C. §§ 152, Third and Fourth, prohibit this type of intentional interference with union members' chosen representative, and, for almost one hundred years, this Court has allowed unions to enforce that prohibition in federal court. Petitioner concedes that each court of appeals presented with the issue has held that unions may access federal court to enforce Sections 2, Third and Fourth in those exceptional circumstance where an employer acts to deprive employees of union representation and is motivated by antiunion animus. This case sits so squarely within settled precedent that not one Fifth Circuit judge requested a vote regarding rehearing en banc.

In petitioning for certiorari, Union Pacific—for the first time—posits a split among circuits that simply is

not there, and asks this Court to wipe away decades of precedent that all flow in the same direction as the decision below. There is no warrant to grant that request. The petition should be denied.

STATEMENT

1. Petitioner Union Pacific Railroad Company ("Union Pacific" or "Carrier") is a national rail carrier with operations throughout the western United States. Pet.App. 2a. The Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "Union") is a labor union that represents over 5,000 Union Pacific engineers. Pet.App. 2a. The Union is made up of a number of local units or "divisions." Ibid. Each division provides representation to Union members in its geographic area. Elected representatives from each division also serve on general committees, which together negotiate collective bargaining agreements ("CBAs") with carriers like Union Pacific. *Ibid*. BLET's Division 192 is the exclusive bargaining representative for about 150 engineers working at the Carrier's El Paso-area rail yard operations. *Ibid*. Division 192's officers perform the Union's day-to-day representation within the Division's geographic jurisdiction; their duties include ensuring that Union Pacific is abiding by the collective bargaining agreement and filing grievances—or "time claims"—where it does not, reviewing rules and policies, representing Union members at disciplinary meetings, ensuring that Union Pacific upholds its duties to provide a safe working environment, and educating members about their rights under the CBA. Decl. of Peter Shepard ¶ 5, *Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, No. 21-cv-122 (W.D. Tex. June 17, 2021) ("*BLET*") Dkt. 3-2; Hearing on Motion for Temporary and Preliminary Injunctive Relief at 22, 34, *BLET*, Dkt. 39

("Hearing Transcript"). The Union officers must be on-site to perform their Union duties. Pet.App. 4a-5a.

2. This case began when BLET filed suit in federal district court after the Carrier suspended all active Division 192 officers, effectively eliminating all Division 192 representation from the Carrier's El Paso rail yards. The suspensions were ostensibly over an off-duty, off-site, and two-month-old event in which rank-and-file BLET member David Cisneros attacked the Division's Vice Local Chairman Joe Reyes in a restaurant parking lot just prior to a Union membership meeting. Cisneros was upset that Reyes had sent him confrontational messages over his acceptance of "shoves" offered by the Carrier. Pet.App.2a-3a. Engineers who take shoves voluntarily agree to extra shifts outside their regular assignment—thereby "shoving" off their regular assignment—when the Carrier does not have an available engineer to fill the shifts. Hearing Transcript at 52-53. When an engineer accepts a shove, that engineer is removed from the regularly rotating pool of engineers, and so the remaining engineers—who are on call 24/7—are called back to work earlier than they would be otherwise. Hearing Transcript at 53-54. The Union considers this a safety risk, and actively discourages its members from accepting shoves. Pet.App. 2a; Decl. of Jose Reyes, Jr. ¶ 6, *BLET*, Dkt. 3-2.

Nearly two months after the attack, Cisneros filed a complaint with the Carrier that alleged that Division 192's Local Chairman Peter Shepard and Reyes had threatened and physically assaulted him in retaliation for taking shoves. Pet.App. 3a. The Carrier engaged in a truncated investigation, interviewing only Cisneros and taking statements from just two other Union members. *Ibid*. One of those members, Jason

Barnett, witnessed only part of the fight, while the other, Mark Fraire, was not present at the fight but alleged that he had suffered similar harassment by Reyes for taking shoves. *Ibid.* The Carrier did not interview or take statements from any of the Union officers. Pet.App. 4a.

Following this limited investigation, the Carrier indefinitely suspended without pay Shepard, Reyes, and the three other active Union officers, and told them they would be subjected to disciplinary proceedings that could result in termination.[1] Pet.App. 4a. The three other Union officers and the additional suspended member were not named in Cisneros's report, and were merely bystanders. *Ibid.*

The Carrier charged Shepard and Reyes with violating a policy prohibiting violence and abusive behavior in the workplace, and another policy prohibiting discourteous, immoral, or quarrelsome behavior. *Ibid.* The bystander Union officers were charged with failing to take any action to stop the off-site and off-duty fight or report it to management. *Ibid.* The Union officers were issued Notices of Investigation that explicitly linked their discipline to the Union's attempt to discourage the taking of shoves. *See* Complaint ¶ 16, *BLET*, Dkt. 1 ("The alleged physical attack appeared to further be in retaliation for this employee's decision to accept certain types of service permitted under the collective bargaining agreement. . . . These actions undermine the Carrier's ability to maintain a harassment-free workplace and to manage its working forces as permitted by the collective bargaining agreement and applicable law.") ("Complaint").

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[1] The Carrier suspended one other union member who it treated like the Union officers. Pet.App. 4a.

Cisneros was not suspended, even though the Carrier's conceded practice had been to discipline all participants in an altercation. Pet.App. 4a. Barnett was also not disciplined, even though he too witnessed the fistfight and failed to report it to management. *Ibid*. Hence, the employees who supported the Carrier's position on shoves were spared any discipline while the Union officers who did not were suspended indefinitely without pay.

The suspension of all active union officers left Division 192 members with no Union representation on Carrier premises.[2] *Ibid*. This is so because the officers could not perform their duties remotely. Pet.App. 4a-5a. Accordingly, there were no Union officers available to represent members in disciplinary hearings, or investigate potential contractual violations in-person, let alone oppose the Carrier's shoving practices.

3. Within days of the suspension, the Union filed suit to enjoin the suspensions and order the return of the Union officers to work. The Union alleged that the Carrier retaliated against the Union for discouraging shoves by removing the Union officers, in violation of Sections 2, Third and Fourth of the Railway Labor Act (RLA), 45 U.S.C. §§ 152, Third and Fourth. Pet.App. 5a; Complaint at Count I and Count 2. The RLA's Section 2, Third protects the right of a carrier and its employees to designate "[r]epresentatives . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." 45 U.S.C. § 152, Third. Section 2, Fourth further provides that "[e]mployees shall have the right to organize and bar-

[2] The one remaining union officer was on long-term medical leave at the time. Pet.App. 4a.

gain collectively through representatives of their own choosing," and that it shall be "unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." 45 U.S.C. § 152, Fourth. To support its claims, the Union specifically alleged facts that demonstrated the Carrier's conduct was motivated by antiunion animus, including the selective and disparate discipline applied to the Union officers as opposed to the rank-and-file members who supported the Carrier's position on shoves. Complaint ¶¶ 2, 22, 23, 26, 28, 42, 46.

In issuing its preliminary injunction, the district court acknowledged that disputes over discipline generally are so-called "minor disputes" under the RLA, which are subject to compulsory arbitration and outside federal court jurisdiction. Pet.App. 29a; *see* 45 U.S.C. §§ 151a, 152, Sixth, and 153. However, the court recognized that certain exceptional circumstances involving conduct by a carrier intending to weaken or destroy a union can give rise to federal court jurisdiction. Pet.App. 30a, *citing Bhd. of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry.*, 894 F.2d 1463, 1468 n. 10 (5th Cir. 1990), *cert. denied*, 498 U.S. 846 (1990) (*citing Bhd. of R.R. Trainmen v. Cent. of Georgia Ry. Co.*, 305 F.2d 605, 608 (5th Cir. 1962) ("*Central of Georgia*")).

Following an evidentiary hearing, the district court held that the Union was likely to succeed on its claims. The court found "substantial evidence that [the Carrier] is trying to weaken the union, thus creating the exceptional circumstance that warrants the [c]ourt's jurisdiction." Pet.App. 31a. The district court pointed to the fact that the Carrier selectively suspended Shepard and Reyes for their involvement in the fight, but not

Cisneros, which was contrary to the Carrier's practice of suspending all participants in a fight. *Ibid.* It further noted that the Carrier disciplined three additional Union officers who were merely bystanders to the fight. *Ibid.* These facts led the district court "to the conclusion that, in disciplining the union members, [the Carrier] was motivated by a desire to weaken the local division and used the fight as pretext for its actions." *Ibid.*; *see also* Pet.App. 33a ("The [c]ourt finds that [the Carrier] has used disciplinary proceedings concerning the fight as a pretext for undermining BLET.").

Because of this, the district court found substantial and irreparable injury to employees' rights—pursuant to Sections 2, Third and Fourth—to engage in organizing and union activity without interference, influence, or coercion. Pet.App. 19a. The five Union officers were returned to work following issuance of the preliminary injunction.

The Carrier appealed, and the court of appeals found no abuse of discretion in the district court's grant of injunctive relief. The court of appeals agreed that federal courts have jurisdiction over cases presenting the type of extraordinary circumstances evident here; that is, where carrier "conduct motivated by antiunion animus is interfering with the employees' 'choice of representative.'" Pet.App. 14a, *quoting* 45 U.S.C. § 152, Third. The court of appeals explained that Section 2, Third "and similar provisions of the RLA are judicially enforceable because noninterference with employees' chosen representative is a statutory right crucial to the [RLA]'s functioning." Pet. App. 7a-8a, *citing Tex. & N. O. R. Co. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 569 (1930) ("*S.S. Clerks*"); *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 545-46 (1937). Furthermore, "[a]nimus

claims" under Sections 2, Third and Fourth "may be litigated in federal court" instead of submitted to arbitration "because they cannot 'be conclusively resolved' by interpreting or applying a CBA." Pet.App. 12a, *quoting Consolidated Rail Corp. v. Ry. Lab. Executives' Ass'n*, 491 U.S. 305 (1989) ("*Conrail*"). As the court explained, "[t]he question to be answered in this case [] is whether the railroad interfered with the employees' choice of representation[;]" "[t]hat is a statutory question, not a contractual one." Pet.App. 12a.

The court of appeals further supported the district court's jurisdictional finding by pointing to its own precedent that has long recognized interference under Section 2, Third as a federal statutory claim cognizable in court. Pet.App. 8a-9a, *citing Central of Georgia*, *supra*. The court explained that in- and out-of-circuit decisions have continued to recognize Section 2, Third and Fourth interference claims where the union is established—or "postcertification"—following this Court's decision in *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989) ("*TWA*"), which said that Section 2, Fourth addresses "primarily the precertification rights and freedoms of unorganized employees." Pet.App. 9a-12a.

The court of appeals also found no abuse of discretion in the district court's fact-finding. Pet.App. 15a. The court held that the district court's finding that the Carrier was motivated by a desire to weaken the local division was amply supported by the following facts:

> (1) Union Pacific indefinitely suspended all of Division 192's active duty leadership because of a dispute they had with an employee who favored the [Carrier]'s position in a policy dispute; (2) Union Pacific premised the discipline on a fight that occurred off-duty and outside the workplace, even

> though four of the suspended union officials did not participate in the fight; (3) the pro-[Carrier] employee who started the fight was not disciplined, despite the [Carrier]'s policy of disciplining all participants in a physical altercation; and (4) Union Pacific took a statement from the pro-[Carrier] employee but did not take a statement from the union officials before suspending them.

Pet.App. 15a-16a.

The Carrier petitioned for rehearing en banc. The court of appeals denied the petition, with no judge in active service requesting a vote. Pet.App. 41a.

ARGUMENT

In its Petition, Union Pacific presents two questions for this Court to consider. The first alleges that the courts of appeals are split over the meaning of "representative" in Section 2, Third. Pet. i. The second asks whether there exists any federal claim under the RLA for intentional interference motivated by antiunion animus, or if these claims must be submitted to arbitration. *Ibid*. We address these questions in reverse order so that this Court may understand the statutory framework before considering the alleged split among the circuits.

I. The Courts of Appeals' Uniform Recognition that Sections 2, Third and Fourth are Enforceable in Federal Court Against Claims of Interference Motivated by Antiunion Animus Effectuates the Statutory Design and Adheres to the Decisions of this Court

Union Pacific's primary argument for a grant of certiorari is that this Court should entirely erase fed-

eral jurisdiction to hear the narrow band of cases under Section 2, Third that allege carrier conduct motivated by antiunion animus interferes with an established—or "postcertification"—labor union. Pet. 16-18. The Carrier argues recognition of this type of claim defies the statute's text because all such interference claims are "minor disputes" that must be arbitrated under the RLA, and it cites as support this Court's decisions enforcing compulsory arbitration of minor disputes. Pet. 16-18.

Unfortunately for the Carrier, it failed to preserve this argument. The Carrier accepted below that, in "extraordinary circumstances[,]" federal courts had jurisdiction over certain postcertification Section 2, Third or Fourth claims; it simply argued that the instant factual scenario did not fit the recognized claim. *See* Pet.App. 13a; *see also* Brief for Appellant at p. 25, *Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 31 F.4th 337 (5th Cir. 2022), 2021 WL 3822940 ("Courts May Enjoin Carrier Actions In A Minor Dispute Only In Extraordinary Circumstances"); Petition for Rehearing En Banc at 8, *id.*, 21-50544, Doc. 516297773 (arguing that courts that have allowed claims alleging violation of Section 2, Third or Fourth due to interference motivated by antiunion animus "have relied on extraordinary, narrowly-circumscribed circumstances justifying federal court intervention"). The Carrier's argument was then not preserved.

Even if it were preserved, Union Pacific's argument is counter to the uniform position of the courts of appeals as well as the statutory design and this Court's decisions on the reach of the RLA's compulsory arbitration provisions.

A. As Union Pacific Concedes, Every Court of Appeals that has Addressed the Question has Found that Federal Courts have Jurisdiction Over Section 2, Third and Fourth Claims Alleging Interference Motivated by Antiunion Animus

The courts of appeals for decades have recognized a right to sue in federal court to enforce Sections 2, Third and Fourth where a carrier intentionally interferes with the employees' choice of representative through conduct that is motivated by antiunion animus; indeed, the Carrier concedes that every court of appeals that has addressed the issue has found that courts may hear such claims. Pet. 14-15; *See, e.g., Central of Georgia*, 305 F.2d at 605; *Ry. Lab. Executives' Ass'n v. Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986); *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 789 F.2d 139 (2d Cir. 1986); *Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986); *Tello v. Soo Line R.R Co.*, 772 F.2d 458 (8th Cir. 1985); *Fennessy v. Southwest Airlines*, 91 F.3d 1359 (9th Cir. 1996); *Davies v. Am. Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992); *Stewart v. Spirit Airlines, Inc.*, 503 Fed. Appx. 814 (11th Cir. 2013). This uniformity among the courts of appeals alone strongly counsels against a grant of certiorari. But these decisions are also compelled by the statutory design and this Court's decisions.[3]

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[3] The courts of appeals do not describe the antiunion animus grounds for a Section 2, Third or Fourth claim in precisely the same terms. The Carrier suggests that this Court should grant certiorari to clarify the scope of the antiunion animus claim. Pet. 16. However, the Carrier does not—and cannot—point to any cases in which similar facts were treated differently by the courts of appeals. Accordingly, there is no need to grant certiorari to clarify the scope of the antiunion animus claims that are cognizable in court.

B. This Court has Held that Judicial Enforcement of Sections 2, Third and Fourth is Essential to the RLA's Statutory Design, and that Need for Judicial Enforcement Exists Throughout the Collective Bargaining Relationship

As this Court has stated, "[t]he purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees[.]" *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 609 (1959). And because the "assumption as well as the aim of th[e] Act is a process of permanent conference and negotiations between the carriers on the one hand and the employees through their union on the other[,]" *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 753 (1945), "[f]reedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme." *S.S. Clerks*, 281 U.S. at 569. As such, this Court has long recognized that enforcement of Section 2, Third and Fourth rights through federal litigation is essential to the RLA's design.

In passing the RLA in 1926, Congress was informed by the failure of prior legislation that solely encouraged voluntary action. *Gen. Comm. of Adjustment v. Mo.-Kan.-Tex. R.R. Co.*, 320 U.S. 323, 328-29 and n. 3 (1943). In particular, Congress looked to the failings of the Railroad Labor Board, created under the Transportation Act of 1920. *S.S. Clerks*, 281 U.S. at 560-61. Soon after its creation, this Court held that the Railroad Labor Board's decisions were not legally enforceable. *See Penn. R.R. Co. v. U.S. R.R. Labor Board*, 261 U.S. 72 (1923) (holding that the railroad did not have to comply with Labor Board decision settling a dispute over representation, after the railroad refused to

recognize the union and instead conducted its own representation election); *Penn. R.R. Sys. & Allied Lines Fed'n No. 90 v. Penn. R.R. Co.*, 267 U.S. 203, 217 (1925) (holding that, even though the railroad was "seeking to control its employees by agreements free from the influence of an independent trade union" and was "thus defeating the purpose of Congress," it did not have to comply with the Labor Board's decision).

The RLA then "made a basic change in the pattern of the railway labor legislation which had preceded" it. *Mo.-Kan.-Tex. R.R. Co.*, 320 U.S. at 329. "While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy by creating certain definite legal obligations." *S.S. Clerks*, 281 U.S. at 564.

In *S.S. Clerks*, this Court held that Section 2, Third provided one of those legal obligations "enforceable by judicial proceedings." *Id.* at 567. There, a dispute arose between the railroad and its recognized, independent union over wages; the railroad responded to the dispute by creating a company union and coerced employees to abandon the recognized union and join the carrier-dominated one. *Id.* at 555. The independent union sued in federal court, alleging that the carrier's actions violated the newly passed Section 2, Third by "prevent[ing] the railway clerks from freely designating their representatives[.]" *Id.* at 555, 557. The district court enjoined the carrier's actions, and this Court affirmed. The Court reasoned that because "the entire policy of the act[ ] depend[s] for success on the uncoerced action of each party through its own representatives[,]" "the conclusion must be that enforcement [of Section 2, Third] was contemplated" by Congress. *Ibid.*

Accordingly, by finding Section 2, Third judicially enforceable, "what had long been a 'right' of employees enforcible only by strikes and other methods of industrial warfare emerged as a 'right' enforcible by judicial decree." *Mo.-Kan.-Tex. R.R. Co.*, 320 U.S. at 330.

In 1934, Congress amended the RLA, and the "prohibition against interference was continued and made more explicit" with the addition of, among other things, Section 2, Fourth. *Virginian Ry. Co.*, 300 U.S. at 543. "A primary purpose of the major revisions made in 1934 was to strengthen the position of the labor organizations vis-a-vis the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 759.

Following the 1934 amendment, this Court continued to acknowledge that Section 2, Third—and now Fourth—are judicially enforceable. *Virginian Ry. Co.*, 300 U.S. at 544; *Mo.-Kan.-Tex. R.R. Co.*, 320 U.S. at 329-32; *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 207 (1944). And this Court built on its holding that Section 2, Third is enforceable in federal court to find that other provisions of the RLA also grant judicially enforceable rights. *See, e.g., Virginian Ry. Co.*, 300 U.S. at 545 (holding that Section 2, Ninth's requirements that employer treat with union certified by the National Mediation Board and exert every reasonable effort to make and maintain collective bargaining agreements was judicially enforceable); *Steele*, 323 U.S. at 207 (holding that employees represented by a union may bring a claim in federal court that union breached its duty to represent them fairly).

Accordingly, for nearly the entire life of the RLA, this Court has recognized that Sections 2, Third and

Fourth grant rights that the statutory design requires to be judicially enforceable. Indeed, the statutory design requires courts to protect the parties' choice of representative even after a union is established. *See S.S. Clerks*, 281 U.S. at 555 (reporting that employer had recognized the union prior to coercing employees to join carrier-dominated one). The statute's design depends on the parties' freedom to choose representatives at all times; otherwise, the "process of permanent conference and negotiations" would fail.

C. This Court Has Clarified that only Contractual—and not Statutory—Disputes are Subject to Arbitration under the RLA

In addition to creating certain statutory protections, "the RLA establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement' of two classes of disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). These two classes are known as "major disputes" and "minor disputes," "terminology[] drawn from the vocabulary of rail management and rail labor[.]" *Conrail*, 491 U.S. at 302. Major disputes are those "concerning rates of pay, rules or working conditions[,]" 45 U.S.C. § 151a, and so "relate to the formation of collective bargaining agreements or efforts to secure them." *Hawaiian Airlines*, 512 U.S. at 252 (cleaned up). Minor disputes are those "growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions[,]" 45 U.S.C. § 151a, and so "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian Airlines*, 512 U.S. at 252 (cleaned up). In sum, "major disputes seek to create contractual rights, minor disputes to enforce them." *Conrail*, 491 U.S. at 302.

The RLA subjects the two disputes to different treatment. For major disputes, "the RLA requires the parties to undergo a lengthy process of bargaining and mediation." *Conrail*, 491 U.S. at 302; *see also Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969) (summarizing major dispute procedures under the RLA). In contrast, "[a] minor dispute in the railroad industry is subject to compulsory and binding arbitration before the National Railroad Adjustment Board, or before an adjustment board established by the employer and the unions representing the employees." *Conrail*, 491 U.S. at 303 (cleaned up).

The Carrier suggests that any dispute between a carrier and an established union is a minor dispute subject to the RLA's "mandatory, exclusive, and comprehensive" arbitration provisions. Pet. 16, *quoting Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963). However, this Court has made clear that the RLA's compulsory arbitration provisions for minor disputes are exclusive only with respect to disputes arising from a collective bargaining agreement. *Hawaiian Airlines*, 512 U.S. at 253-254; *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952) ("The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board[.]"). Indeed, this Court has repeatedly declined to apply the RLA's compulsory arbitration provisions to claims that are independent of a CBA. *See, e.g., Hawaiian Airlines*, at 266 (holding that state law claims of discharge in violation of public policy and a state whistleblower law are not minor disputes subject to the RLA's arbitration provisions, even where the parties' CBA contains a just cause discharge provision); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 565-66 (1987)

(holding that a claim under the Federal Employers' Liability Act that could also be a grievance was not a minor dispute subject to the RLA's arbitration provisions); *Terminal R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 7 (1943) (holding that the parties' dispute over the railroad's compliance with a state law requirement for the provision of cabooses was not a minor dispute subject to the RLA's arbitration provisions, even where the parties' CBA addressed the provision of cabooses); *Mo. Pac. R. Co. v. Norwood*, 283 U.S. 249, 258 (1931) (holding that state law regulating the number of workers required to operate certain equipment was not preempted by the RLA's arbitration provisions); *cf. Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988) (holding that, "as long as the state-law claim can be resolved without interpreting" the CBA, an employee's claim of unlawful discharge in retaliation for exercising worker's compensation rights was not pre-empted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, even where the CBA contained a just cause discharge provision). This is so even where the claim is based on a statutory right found—as with the instant case—in the RLA itself. *Howard*, 343 U.S. at 774 (claim brought to enforce right under the RLA to not be discriminated against by a labor union not subject to compulsory arbitration).[4]

Accordingly, this Court has conclusively held that claims independent of the CBA are not minor disputes subject to the compulsory arbitration provisions of the RLA, even where employees may also have a contrac-

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[4] Additionally, "the adjustment boards charged with administration of the minor-dispute provisions have understood those provisions as pertaining only to disputes invoking contract-based rights." *Hawaiian Airlines*, 512 U.S. at 254 (collecting cases).

tual grievance that is subject to arbitration. Indeed, this Court has refused to order to arbitration claims borne of the very type of disciplinary action that Union Pacific asserts "must be arbitrated." Pet. 11; *compare Hawaiian Airlines*, 512 U.S. at 258 (finding a whistleblower retaliation claim was not subject to RLA's arbitration provisions because "the CBA is not the only source of respondent's right not to be discharged wrongfully[,]" and that the employee's claim asserted only the statutory right to not be discharged in retaliation for his whistleblowing (cleaned up)), *with Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972) ("Here it is conceded by all that the only source of petitioner's right not to be discharged . . . is the [CBA]," and because "the disagreement turns" "on the interpretation of the [CBA,]" petitioner's "claim is [ ] subject to the Act's requirement that it be submitted to the Board for adjustment.").

That such statutory disputes are resolved by federal courts is uncontroversial amongst the management and labor bar. *See* DOUGLAS W. HALL AND MARCUS MIGLIORE, EDS., THE RAILWAY LABOR ACT, Ch. 1.III.D., p. 19 (BNA 2021) ("These disputes, described in this treatise as 'statutory disputes' to distinguish them from the other categories of disputes, fall within the jurisdiction of the courts. Examples of such disputes are those over the rights and obligations arising under RLA Section 2, Third (parties' right to designate representatives without interference or coercion) [and] Section 2, Fourth (right of employees to organize and bargain through freely chosen representatives)" (cleaned up)).

Thus, the Carrier is clearly wrong when it argues that this Court's *TWA* decision requires federal jurisdiction to give way where congressionally established remedies—here, compulsory arbitration—are avail-

able. Pet. 18-19. Compulsory arbitration under the RLA is exclusive only to disputes arising out of a CBA. For those claims not arising from a CBA, this Court has held that judicial intervention is warranted where, "but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress has written into the Railway Labor Act." *TWA*, 489 U.S. at 441, *quoting Switchmen's Union v. NMB*, 320 U.S. 297, 300 (1943).

The Carrier fairs no better by arguing that *TWA* recognized that Section 2, Third "primarily applies *before* employees choose a collective-bargaining representative[,]" and that allowing claims brought pursuant to that provision postcertification would improperly inject federal courts into minor disputes. Pet. 19-20 (emphasis in original). As support, the Carrier points to *TWA*'s statement that Section 2, Fourth "address[es] primarily the precertification rights and freedoms of unorganized employees." 489 U.S. at 440. But, on its face, this language does not foreclose postcertification claims; as the district court below explained, it simply indicates that Section 2, Fourth "primarily" addresses precertification rights. Pet.App. 35a. Moreover, the Court was not addressing whether a violation of Section 2, Fourth constituted a minor dispute that was subject to arbitration, but instead was responding to the union's argument that Section 2, Fourth limited the self-help activities that the airline could engage in upon completion of the negotiation and mediation procedures for a major dispute. *TWA*, 489 U.S. at 440. The Court emphasized Section 2, Fourth's primary focus on initial union organizing only to show that Congress did not intend for that provision to limit the use of economic weapons once parties had exhausted the procedural framework for major disputes. *Id*. at 441-42. Addi-

tionally, the Court was addressing solely Section 2, Fourth, and not Section 2, Third. The district court based its preliminary injunction on both Sections 2, Third and Fourth. Pet.App. 9a. The two provisions differ in language[5] and history[6], such that *TWA*'s discussion of one cannot simply be extended to the other. As such, as the court of appeals below indicated, the lower courts have not understood *TWA* to foreclose postcertification Section 2, Third or Fourth claims. Pet.App. 9a-11a (collecting post-*TWA* cases recognizing such claims).

D. The Courts of Appeals' Recognition of Section 2, Third and Fourth Claims of Interference Motivated by Antiunion Animus Flows Directly from this Court's Decisions Regarding the RLA's Design and the Reach of the Statute's Arbitration Provisions

Adhering to this Court's decisions, the courts of appeals have thus repeatedly held that Section 2, Third and Fourth claims for intentional interference motivated by antiunion animus are claims enforcing statutory rights and so fall outside the RLA's compulsory arbitration provisions. The first court of appeals to directly

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[5] Section 2, Fourth's primary emphasis on the right to organize is clear from its repeated references to that right. *See*, *e.g.*, 45 U.S.C. § 152, Fourth ("Employees shall have the right to organize and bargain collectively through representatives of their own choosing."; "No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice."). In contrast, the Section 2, Third does not reference the right to organize.

[6] Section 2, Third was included in the original Act, while Section 2, Fourth was added in 1934 when company unions became a hurdle to organizing. *Virginian Ry. Co.*, 300 U.S. at 545-46.

address the issue was the Fifth Circuit in *Central of Georgia*, *supra*.[7] There, the employer issued a notice of discipline for disloyalty to the chairman of the union's grievance committee. 305 F.2d at 606. The charge of disloyalty was due to the advice the chairman gave to employees in the course of his union duties. *Ibid.* The union sought an injunction in federal court, and alleged that the railroad intended to discharge the chairman in an effort to "hamper, impede, and hinder" the union. *Id.* at 607. Initially, the court held that the personal claim the chairman had against the carrier as an employee of the carrier was a minor dispute that was subject to arbitration. *Ibid.* But the court pointed out that any claim of the representative pursuant to the carrier's discipline of the chair must be analyzed differently. *Ibid.* Relying on *S.S. Clerks*, the court of appeals agreed that the union's claim, taken as true, was cognizable in federal court. *Id.* at 608. "If a carrier must recognize and bargain in good faith with the representative—and it surely must—then it is not free to destroy the process of collective bargaining and resolution of industrial grievances by wrongly destroying the effectiveness of the chosen representative." *Ibid.*

Since *Central of Georgia*, the courts of appeals have uniformly continued to recognize that claims under

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[7] The Sixth Circuit earlier issued an injunction against a carrier and union that attempted to apply their CBA's union security clause against an employee who also performed work in another craft, and who was a member in good standing of the union of that other craft. *Bhd. of R.R. Trainmen v. Smith*, 251 F.2d 282 (6th Cir. 1958). There, the court of appeals held it had jurisdiction because the controversy turned on the meaning of the statute, not the collective bargaining agreement. *Id.* at 285. Though the court of appeals primarily looked to Section 2, Eleventh (a), 45 U.S.C. § 152, Eleventh (a), as the source of the statutory violation, it also relied on Section 2, Fourth to support its injunction. *Id.* at 286-87.

Sections 2, Third and Fourth of carrier interference motivated by antiunion animus fall outside the RLA's compulsory arbitration provisions. *See, e.g., Boston & Maine Corp.*, 808 F.2d at 157-58 ("The case against [the railroad] presents a claim of *statutory* violation. In our opinion such a controversy involves the substantive rights protected by the RLA and is within the competency of the district courts because these are claims that cannot be resolved by interpretation of the collective bargaining agreement." (emphasis in original)); *Fennessy*, 91 F.3d at 1363 (explaining that if an employee's "statutory rights have been violated, the fact that [his union] may represent him before the Adjustment Board does nothing to remedy that problem. Judicial recognition of his cause of action would therefore seem to be one of those cases where but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress has written into the [RLA]." (cleaned up)). Indeed, to emphasize the distinction between statutory and contractual claims courts of appeals have made clear that "[a]nti-union motivation invalidates even a discharge which could be justified on independent grounds." *Conrad v. Delta Airlines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974); *Davies*, 971 F.2d at 466 ("The gravamen of [plaintiff's] action is that [the airline's] actual or primary motivation in firing him, irrespective of any 'just cause' it may have had under the CBA, was to stop his union organizing. Thus, . . . [the] action does not require interpretation of the CBA and is therefore not preempted by the RLA on that ground.").[8]

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[8] Union Pacific claims that Section 2, Third or Fourth claims can be addressed by arbitrators because Section 2, Eighth requires that those paragraphs be incorporated into collective bargaining agreements. Pet. 20 n. 1; 45 U.S.C. § 152, Eighth. Not so. The language of Section 2, Eighth "makes it clear that these pro-

The injunctive relief issued in the instant case further illustrates the differences in statutory and contractual claims, as that relief is not available in arbitration.

While the courts of appeals have recognized Sections 2, Third and Fourth claims involving intentional interference motivated by antiunion animus, they have highlighted the narrowness of cognizable claims, particularly postcertification. *See, e.g., Bhd. of Locomotive Eng'rs v. Kansas City Southern Ry. Co.*, 26 F.3d 787, 795 (8th Cir. 1994) ("no cause lies under § 2 Third when the complaining party fails to present adequate evidence that the railroad's action have been motivated by anti-union animus or that the railroad's actions were an attempt to interfere with its employees' choice of their collective bargaining representative" (cleaned up)); *Ass'n of Flight Attendants v. Horizon Air Industries, Inc.*, 280 F.3d 901, 906 (9th Cir. 2002) ("the facts in this case do not reveal any 'exceptional circumstances' necessitating judicial intervention, such as a policy motivated by anti-union animus or circumstances that significantly undermine the functioning of the union."). The narrowness of a claim of unlawful interference motivated by antiunion animus then fits within the limits this Court articulated to postcertification Section 2, Fourth claims in *TWA*: "those cases where, but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress has written into the Railway Labor Act." 489 U.S at 441.

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visions are incorporated within the individual contract of employment between the employer and employee rather than the collective bargaining agreement, which is referred to in the [RLA] as the 'agreement concerning rates of pay, rules and working conditions.'" *Texas Int'l Airlines, Inc. v. Ass'n of Flight Attendants*, 498 F. Supp. 437, 447 (S.D. Tex. 1980), *aff'd sub nom. Texas Int'l v. Ass'n of Flight Attendants*, 667 F.2d 1169 (5th Cir. 1982).

The decision of the court of appeals below squarely fits this Court's precedent and the decades long treatment of antiunion animus claims under Sections 2, Third and Fourth. The court of appeals understood that the claim of interference under Section 2, Third was recognized by this Court in *S.S. Clerks* and *Virginian Ry. Co.* Pet.App. 7a-8a. It further acknowledged that its own precedent, as well as its sister circuits' precedent, allowed for federal jurisdiction over claims of intentional interference motivated by antiunion animus under Section 2, Third, including after this Court's decision in *TWA*. Pet.App. 7a-11a. The court found that animus claims like the instant one may be litigated in federal court—as opposed to arbitration—because they cannot "be conclusively resolved" by interpreting or applying the CBA. Pet.App. 12a, *quoting Conrail*, 491 U.S. at 305. Moreover, it appreciated that the grounds for a claim were narrow, and limited to the "exceptional circumstance" that the district court found to be present. Pet.App. 13a. And it determined that the district court found ample facts to support the claim of antiunion animus. Pet.App. 15a-16a.

As the decision comports with the statutory design and this Court's precedent, as well as that of the courts of appeals, there is no basis for this Court to grant certiorari.

II. The Court of Appeals Decision Does Not Allow Unions to Escape Arbitration of Disciplinary Matters By Simply Alleging Antiunion Animus

Union Pacific argues that the court of appeals' decision will lead to unions flooding the federal courts with routine disciplinary matters by merely alleging the discipline of union officers was motivated by anti-

union animus. Pet. 23-24. This is simply not so. *First*, as demonstrated above, the courts of appeals have recognized a narrow claim of interference under Section 2, Third involving antiunion animus for over sixty-years, and there has been no inundation of the federal courts with routine disciplinary matters in that time. *Second*, the Union's instant Complaint did not merely allege an antiunion motivation; it alleged specific facts that supported the legal conclusions. *See* Complaint ¶¶ 2, 22, 23, 26, 28, 42, 46. It then proved those facts before the district court through evidence and sworn testimony presented in support of and during the preliminary injunction hearing. As the case law described above indicates, a bare allegation of antiunion animus without any supporting facts would not state a cognizable claim. There is then no warrant for this Court to grant certiorari to protect the courts of appeals from an imaginary avalanche of cases.

III. Section 2, Third Prohibits Interference with the Parties' Designated "Representative," and there is no Circuit Split Over Which "Representative" That Is

Before the court of appeals, the Carrier argued that federal courts may hear claims under Section 2, Third only if a union alleges that the carrier undermined the union nationally, and not just at the local level. *See* Pet.App. 16a. In dismissing this argument, the court of appeals noted that "[n]o authority support[ed] that view[,]" and indeed, courts have exercised jurisdiction over claims "involving disciplinary actions that targeted an individual union representative or a particular union branch." *Ibid.* (citations omitted). The court of appeals further observed that the "RLA's text" does not "create a national/local distinction." *Ibid.* Instead, "[i]t says that carriers shall not 'seek in any manner'

to interfere with employees' 'choice of representatives'; there is no mention of particular offices or duties those representatives must have." *Ibid.* In context, the court of appeals plainly indicated that Section 2, Third's prohibition applies to efforts to interfere with a chosen representative whether that interference is at the national or—as here—at the local level.

Yet, the Carrier pounces on this last statement to claim that the court of appeals' decision expansively "holds that 'representative' includes *any* union officer who represents union members for any purpose or in any capacity[,]" "even if they have no involvement in collective bargaining." Pet. 11 (emphasis in original). The Carrier then claims—for the first time in this litigation—that this conflicts with decisions in the Sixth Circuit—which limits "representative" to "a collective bargaining representative," *citing Int'l Bhd. of Teamsters v. United Parcel Serv. Co.*, 447 F.3d 491 (6th Cir. 2006)—and the Second Circuit—which limits "representative" to "the union itself, not an individual union officer," *quoting United Transp. Union v. Nat'l Railroad Passenger Corp.*, 588 F.3d 805 (2d Cir. 2009) ("*Amtrak*"). Pet. 12. Thus, according to the Carrier, local union officers are the designated "representatives" for purposes of Section 2, Third in the Fifth Circuit, but not in the Sixth and Second Circuits. Not only is this a novel, and thus unpreserved, argument, but it takes the court of appeals' statement out of context, and misunderstands basic labor law terminology.

There is no split among the courts of appeals over the meaning of "representative." Curiously, in its Petition, Union Pacific fails to mention that the RLA supplies a definition of "representative"—"any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or

by its or their employees, to act for it or them." 45 U.S.C. § 151, Sixth. Accordingly, Section 2, Third's references to employees' "representative" means the person, union, or other organization designated by the employees to represent them, and with whom the employer must "treat," that is, engage in collective bargaining. *See generally* 45 U.S.C. § 152, Ninth. Here, that is the Union, Pet.App. 19a, and not individual Union officers, just as it was in *UPS* and *Amtrak*.

Here, the court of appeals plainly understood the "representative" the Carrier unlawfully interfered with was the Union. In summarizing the district court's conclusions, the court of appeals stated that "Union Pacific had used its disciplinary proceedings 'as pretext for undermining' *the union*." Pet.App. 6a, *quoting* Pet.App. 33a (emphasis added). It described the Union's claim as alleging "that the [disciplinary] charges are pretext for a plot to inhibit the employees' ability to act as union representatives and *thereby weaken the union*." Pet.App. 9a (emphasis added). It found ample support for the district court's finding that the Union was likely to succeed in showing that the discipline was "motivated by a desire to weaken *the local division*" of the Union. *Id.* at 15a, *quoting* Pet.App. 31a (emphasis added). Accordingly, the court of appeals agreed with the district court's jurisdictional determination not because the Carrier disciplined all five active union officers, but because it disciplined all five active union members as a pretext to weaken Division 192, *i.e.,* to weaken the Union.

This decision is entirely consistent with the cited decisions in the Sixth and Second Circuits. As an initial matter, any claim that the term "collective bargaining representative" refers to an individual union officer who engages in collective bargaining—as op-

posed to referring to "the union itself"—is entirely misplaced. A union designated under the RLA *is* the collective bargaining representative. *See, e.g., Mo.-Kan.-Tex. R. Co.*, 320 U.S. at 325 ("The petitioner . . . is a committee of the Brotherhood of Locomotive Engineers which has been and is the duly designated bargaining representative of the craft of engineers employed by the carrier."); *Steele*, 323 U.S. at 194 ("Respondent Brotherhood, a labor organization, is, as provided under Section 2, Fourth of the Railway Labor Act, the exclusive bargaining representative of the craft of firemen employed by the Railroad and is recognized as such by it and the members of the craft.").[9] There is then no conflict among the courts of appeals, as in each case cited by Union Pacific, the court understood the "representative" to be the union.[10]

Additionally, just as the court of appeals below did, the Sixth and Second Circuits understood that Section 2, Third's reference to "representative" meant the employees' chosen representative under the RLA—in each case, the union—as opposed to individual union officers. In *UPS* (a case the Carrier never cited be-

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[9] The Carrier's argument that this Court's decisions suggest an understanding of "representative" to mean individual union officers who participate in collective bargaining, Pet. 14, fails for the same reason—it is premised on a miscomprehension of the term "collective bargaining representative."

[10] Even if somehow this Court were to construe "representative" to be union officers who participate in collective bargaining, that would be apply to the five suspended Union officers. These officers play a vital role in processing grievances under the CBA. Decl. of Peter Shepard, *supra*. This Court has explicitly held that the grievance procedure is an extension of the collective bargaining process. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) ("The grievance procedure is . . . a part of the continuous collective bargaining process.").

low), the Sixth Circuit dismissed the union's Section 2, Third claim of interference where the employer and union had a dispute over who had authority to appoint the chair of a joint safety committee that the parties' CBA created. 447 F.3d at 496, 500-01. The court of appeals initially held that the parties' dispute was a minor dispute, as it could be conclusively resolved through interpretation of the parties' CBA. *Id*. at 499-500. The court of appeals then correctly held that the disputed appointee was not the representative referenced in Section 2, Third. *Id*. at 501. The court properly recognized that "representative" referred to the collective bargaining representative—*i.e*, the union—and that the disputed appointee was not himself the employees' designate representative with whom the employer was required to treat for collective bargaining purposes, but rather the chair of a *joint* union-management committee. *Ibid*. ("Had [the disputed union appointee] been the representative of UPS employees for negotiating a collective bargaining agreement with the Carrier, that might have been a different matter.").[11] Since there were no allegations that the employer was interfering with the union itself, as opposed to the CBA-created joint safety committee, there was no cognizable claim under Section 2, Third. *See id*. at 502 (finding that there were no allegations of antiunion animus, coercion, or intimidation, and that the employer was willing to treat with the disputed appointee in his other union roles).

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[11] The designated representative under the RLA does not have to be a union. *See* 45 U.S.C. §151, Sixth (defining "representative" to include "any person or persons, labor union, organization, or corporation"); *Russell v. NMB*, 714 F.2d 1332, 1341 (5th Cir. 1983) (holding that NMB must process representation petition filed by individual seeking to replace certified union).

In *Amtrak*, the Second Circuit dismissed the union's claim that Section 2, Third immunized an individual union official from any discipline for misconduct—there, attempting to bribe a witness—while performing union activities. 588 F.3d at 808, 814. In dismissing the union's argument, the court of appeals noted that "the term 'representative,' as used in the RLA, refers to a union or other organization designated to represent an employee, and not merely to an individual official." *Id*. at 814. Because the union was challenging an arbitration award, and did not rely on the antiunion animus basis to sue directly in federal court, there was no allegation that the discipline was a pretext for an effort to undermine the union. *See id.* at 814.

All three court of appeals' decisions are then entirely consistent. Each reads the protections in Section 2, Third to extend to—consistent with the statutory definition—the employees' designated representative. In each case, that was the employees' union. In *UPS* and *Amtrak*, there were no allegations that the employer's conduct undermined or interfered with the union, and so there was no violation of Section 2, Third. In the instant matter, the Union did allege—and the district court found—that the discipline of the five active union officers was intended to interfere with the Union's local division, and so there was a violation of Section 2, Third.

Accordingly, there is no basis for granting certiorari on the Carrier's first question presented, as there is no circuit split to resolve.

CONCLUSION

The petition for certiorari should be denied.

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Date: November 10, 2022