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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This case presents two exceptionally important questions about the mandatory arbitration scheme set forth in the Railway Labor Act ("RLA"). Many circuits have recognized an unwritten, common-law exception to arbitration for disputes involving claims of anti-union animus directed against "representatives" within the meaning of 45 U.S.C. § 152 Third. This exception defies the RLA's text and purpose by opening federal courthouse doors to disputes that Congress and this Court have said belong in arbitration. The decision below goes one step further by expanding the definition of "representative" to encompass *any* union officer, rather than those few representatives engaged in collective bargaining—in direct conflict with decisions from other circuits.

Respondent—the Brotherhood of Locomotive Engineers and Trainmen—does not dispute the importance of this case. Its insistence that there is no circuit split (Opp. 25-30) rests on a gross misreading of what the court below actually held. And its plea that this Court validate the unwritten antiunion animus exception (Opp. 9-25) harkens back to a lost time in which courts took a more freewheeling approach to the text of federal statutes.

The decision below illustrates that the law in this area has gone seriously off track. Congress created what this Court has said is a "mandatory, exclusive, and comprehensive" arbitration regime for disciplinary disputes between rail or air carriers and their employees. *See Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963). Yet according to the court of appeals, the dispute in this case—arising from a fistfight between employees in a

restaurant parking lot—must be litigated in federal court. This is not the regime that Congress enacted.

The nation's leading railroads (through the Association of American Railroads) and the nation's leading air carriers (through Airlines for America) have each filed amicus briefs emphasizing the importance of the Court granting review in this case. The airlines (who are also governed by the RLA) explain that, if left standing, the decision below "threatens . . . substantial disruption in the nation's air . . . commerce." Airlines Amicus Br. 6. And the railroads put it even more starkly: "This is the most important case under the Railway Labor Act to come before this Court in more than 30 years." Railroads Amicus Br. 2.

I. The Circuits Are Divided Over Who Is A "Representative" Under 45 U.S.C. § 152 Third.

The circuits are intractably split over whether an antiunion animus claim may be brought based on actions aimed at individuals or entities that are not involved in the collective bargaining process. Because respondent cannot seriously dispute the existence of a circuit split, it argues that Union Pacific forfeited this issue. Opp. 26. Respondent is wrong. This Court's "traditional rule" is that a question is preserved for review so long as it was "pressed or passed upon" in the court below. *United States v. Williams*, 504 U.S. 36, 41 (1992). Here, the court of appeals plainly "passed upon" the question of who qualifies as a "representative" under Section 152 Third. It held that the union officers subject to the disciplinary investigation were "representatives" under Section 152 Third, and thus could bypass arbitration and bring their claims directly in federal court under the theory that Union

Pacific's investigation interfered with its employees' "choice of representatives." Pet. App. 14a-17a.

Respondent's claim that the circuits have not split mischaracterizes the decision below. Respondent argues that the court of appeals believed the "representative" in this case was the local division of the union rather than the individual union officials. *See* Opp. 27. But that is not what the court said. The court explained that the "representatives" covered by the statute need not hold any "particular offices or duties," and cited with approval decisions from other courts exercising jurisdiction over disciplinary actions that "targe[t] an *individual* union representative." Pet. App. 16a-17a (emphasis added).

Even if respondent's mistaken reading were correct, there would still be a circuit split. Respondent conceded below that neither the individuals involved in the fistfight nor the local Division 192 were involved in collective bargaining. *See* Hearing on Motion for Temporary and Preliminary Injunctive Relief at 20-22, No. 21-cv-122 (W.D. Tex. June 17, 2021), Dkt. 39 (agreeing that "[l]ocal officers of Division 192" "do not negotiate collective bargaining agreements with Union Pacific" and that collective bargaining is instead handled by the "general chairman or international officers") ("Hearing Tr.").[1] Thus, even if the court of appeals' decision could be construed as deeming the local division the "representative," that conclusion would directly conflict with the approaches followed by the Second and Sixth Circuits, both of which

[1] Respondent ignores this concession and cites a case where a steel-industry grievance procedure was viewed as "part of the continuous collective bargaining process." Opp. 28 n.10 (citation omitted). That is obviously not the case here.

require that a "representative"—whether an individual union officer or a local division—be involved in collective bargaining.

The Sixth Circuit held that the statutory protections afforded to "representatives" apply to individuals or entities that are involved in "the collective-bargaining process" or "other interactions between employer and employee that occur before the parties enter into (or re-negotiate) a collective bargaining agreement." *Int'l Bhd. of Teamsters v. United Parcel Serv. Co.*, 447 F.3d 491, 501 (6th Cir. 2006). Likewise, the Second Circuit held that "representative" means the entity that "treat[s]" with the carrier, *United Transp. Union v. Nat'l R.R. Passenger Corp.*, 588 F.3d 805, 812 (2d Cir. 2009) (citation omitted)—that is, the entity that "engages in collective bargaining," Opp. 27.

II. The Antiunion Animus Exception Conflicts With The Text Of The RLA And Decisions Of This Court.

The Court should enforce the RLA's plain language and hold that there is no antiunion animus exception. At a minimum, the Court should grant review to dispel the confusion in the circuits over the scope of the exception.

A. There Is No Antiunion Animus Exception To The RLA's Mandatory Arbitration Provisions.

Respondent offers a lengthy, tortured, and unpersuasive defense of the antiunion animus exception. Here too, respondent's forfeiture claim (Opp. 10) is baseless, as the court of appeals plainly "passed upon" the question whether the exception exists. *Williams*, 504 U.S. at 41. Indeed, the court relied on the exception to find federal jurisdiction. *See* Pet. App. 6a-14a.

Respondent does not argue that the plain text of the RLA contains an antiunion animus exception. Nor does respondent meaningfully address any of this Court's decisions cited in the petition (at 17-18, 25)—decisions that foreclose an animus exception as inconsistent with the RLA's "mandatory arbitral mechanism for the prompt and orderly settlement of . . . . minor disputes," *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994) (quotation marks omitted), and emphasize that Congress considered it "essential" to keep minor disputes "out of the courts," *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam); *see* Pet. 17-18, 25 (collecting this Court's cases recognizing that arbitration is mandatory). Instead, respondent relies on a host of policy, legislative history, and other atextual arguments in urging this Court to allow the unwritten exception to survive.

First, respondent attacks a straw man in claiming that "this Court has long recognized that enforcement of Section 2, Third and Fourth rights through federal litigation is essential to the RLA's design." Opp. 12-15. Recognizing an animus exception is not necessary to ensure that federal courts have a role in enforcing rights under the RLA. As the *United Transportation Union* court explained, federal courts have jurisdiction to review an arbitration order to determine whether it complies with Section 152 Third. *See* 588 F.3d at 811; 45 U.S.C. § 153 First (q).

Respondent cites several older decisions from this Court, but none of them support—let alone recognize—an animus exception. Respondent's primary authority is *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930). But this case was decided *before* the 1934

amendments to the RLA that made arbitration mandatory. *See id.* at 567 (stating that the RLA created "a plan for . . . voluntary arbitration of disputes between common carriers and their employees"). Congress' decision to enact a mandatory arbitration regime eliminated any suggestion that federal courts may decide minor disputes in the first instance, even those involving claims of antiunion animus. That is why courts do not regard *Steamship Clerks* as providing interpretive guidance on the modern version of the RLA. *See*, *e.g.*, *United Parcel Serv. Co.*, 447 F.3d at 503 (rejecting reliance on *Steamship Clerks* because it "pre-dates the 1934 amendments to the Railway Labor Act, which gave exclusive jurisdiction over 'minor disputes' to the National Railroad Arbitration Board").

Second, respondent argues that this case presents a statutory rather than a contractual dispute—and thus falls outside the RLA's mandatory arbitration provisions. Opp. 15-24. Not so. A dispute is "minor"—and thus subject to mandatory arbitration—if the employer "asserts a contractual right to take [a] contested action" that is "arguably justified by the terms of the parties' collective-bargaining agreement." *Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 307 (1989) ("*Conrail*"). That is precisely what happened here. The parties' collective bargaining agreement requires Union Pacific to conduct a formal investigation before disciplining any union-represented employees. *See* Decl. of Naomi Deines ¶ 10, No. 21-cv-122 (W.D. Tex. May 31, 2021), Dkt. 16-3. In response to the fistfight in the parking lot, Union Pacific abstained from imposing any immediate discipline and instead launched a formal investigation. From the start of this case, Union Pacific has asserted

that its actions are at least "arguably justified" by the collective bargaining agreement.

Nevertheless, respondent argues that it can sue in federal court because its claims arise from Section 152 Third rather than from the collective bargaining agreement. Opp. 16-18. But that is not the law. *Conrail* holds that whether a dispute is minor, and thus subject to mandatory arbitration, does not depend on how a plaintiff characterizes its claims; rather, a carrier can satisfy its "relatively light burden" of establishing that a dispute is minor so long as it identifies an "arguabl[e]" basis in the collective bargaining agreement for its challenged action. 491 U.S. at 307. Unlike in the cases respondent cites, here respondent's claim does not exist "[w]holly apart from any provision of the CBA." *Hawaiian Airlines*, 512 U.S. at 258 (allowing state-law whistleblower claim that had no connection to the CBA to proceed in court).

Third, respondent fails to rebut Union Pacific's showing that the antiunion exception conflicts with *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989) ("*TWA*"). *See* Opp. 18-20.

The Court held in *TWA* that "judicial intervention in RLA procedures [is] limited to 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 (quotation marks omitted). Critically, respondent never disputes that there *is* a remedy to enforce the statutory commands in Section 152 Third—those claims can be brought in arbitration. *See* Pet. 18-19. Arbitrators resolve claims of antiunion animus all the time. *See* Airlines Amicus Br. 17 (collecting cases). In fact, respondent conceded

below that arbitrators *can* issue remedies such as reinstatement or back pay when deciding minor disputes. *See* Hearing Tr. 27.

For this reason, the cases respondent cites as supporting an animus exception (Opp. 14) simply do not. Like *TWA*, they hold that courts may enforce the RLA's provisions only when there is no administrative remedy available. "The purport of the decisions of this Court" in *Virginian Railway Co. v. Railway Employees*, 300 U.S. 515 (1937), and *Steamship Clerks* was that, "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 300 (1943); *see also Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944) (judicial intervention is appropriate "[i]n the absence of any available administrative remedy"); *Gen. Comm. of Adjustment v. Mo.-Kan.-Tex. R.R. Co.*, 320 U.S. 323, 336–38 (1943) (refusing to find RLA provision judicially enforceable in light of available administrative remedy). Because arbitrators regularly decide cases involving alleged interference with a union "representative," respondent has an available administrative remedy.

TWA also recognized that Section 152 Third and Fourth primarily apply *before* employees choose a collective bargaining representative, and thus are rarely if ever applicable to "interference" claims arising in cases like this one, where a union has already been certified as the bargaining agent. *See* 489 U.S. at 440-41. Respondent claims *TWA* "was addressing solely [Section 152] Fourth, and not [Section 152] Third,"

Opp. 20, but that is wrong. *TWA* discusses "the 1934 amendments," and explains how those amendments "addres[s] primarily the precertification rights and freedoms of unorganized employees." 489 U.S. at 440. And the 1934 amendments modified both Section 152 Third and Fourth. *See id.* (citing § 2 Third, § 2 Fourth); Amendments to the Railway Labor Act, Pub. L. No. 73-442, 48 Stat. 1185 (1934).

B. The Circuits Have Recognized Antiunion Animus Exceptions Of Varying Scope.

Respondent is correct that many circuits have recognized an antiunion animus exception. *See* Opp. 11; *see also* Pet. 14-15. But this Court never has—and it has recently granted review in order to confirm that the statutory text controls, extinguishing judicially crafted exceptions to plain statutory language. *See, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (abrogating the judge-made "wholly groundless" exception to the Federal Arbitration Act); *Ross v. Blake*, 578 U.S. 632 (2016) (abrogating judge-made "special circumstances" exception to the statutory exhaustion requirements of the Prison Litigation Reform Act).

Respondent makes a critical concession when it admits that "[t]he courts of appeals do not describe the antiunion animus grounds for a Section [152], Third or Fourth claim in precisely the same terms." Opp. 11 n.3. This is a serious understatement and reflects far more than differences in "descri[ption]"—the circuits that have recognized an antiunion animus exception are applying different tests. Pet. 15-16.

Although respondent argues that there are no cases "in which similar facts were treated differently by the courts of appeals," Opp. 11 n.3, that is wrong.

The circuits have taken conflicting approaches over the common fact pattern presented by this case—whether a carrier's disciplinary investigation involving a union member can be directly challenged in federal court under the antiunion animus exception. While the Fifth Circuit holds that it may, *see* Pet. App. 14a, the First Circuit and the Second Circuit hold that it may not, *see Nat'l R.R. Passenger Corp. v. Int'l Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 53 (1st Cir. 1990) (even unjustified disciplinary investigations do not reflect the "the kind of extraordinary anti-union animus" allowing federal court jurisdiction); *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 789 F.2d 139, 141 (2d Cir. 1986) (arbitration boards "would seem to have exclusive jurisdiction" in cases where "the underlying dispute involves merely a disciplinary suspension").

This Court should grant review and hold that there is no antiunion animus exception—or, at a minimum, clarify its scope to ensure that the circuits are applying it consistently.

III. The Questions Presented Are Exceptionally Important.

Respondent does not deny that this case raises exceptionally important questions that will have a broad effect on rail and air carriers, and their employees. If garden-variety disciplinary proceedings can be challenged in federal court, that will devastate the carefully crafted congressional scheme to channel these disputes to mandatory arbitration.

Respondent contends that there will be little increase in federal-court litigation because antiunion animus claims have been allowed for many years. Opp. 25. But this ignores the breadth of the Fifth Cir-

cuit's holding. The court of appeals held that a "representative" under Section 152 Third includes *any* union officer—an enormous group that dwarfs the very small number of union officers engaged in collective bargaining—and thus opens the federal courthouse doors to claims that a disciplinary investigation of a union officer amounts to antiunion animus. Furthermore, the court did not even require *evidence* of antiunion animus to establish federal jurisdiction; it held that merely "alleging" antiunion animus is enough. Pet. App. 14a ("Federal courts thus have jurisdiction over postcertification disputes alleging that railroad conduct motivated by antiunion animus is interfering with the employees' 'choice of representatives.'" (quoting 45 U.S.C. § 152)). Expanding the universe of "representatives"—while declaring mere allegations sufficient to bypass arbitration—will substantially expand the number of minor disputes that get funneled into federal court, blowing wide open what even respondent admits should be a "narrow[ ]" exception to mandatory arbitration. Opp. 23.

This Court has long recognized that, by enacting the RLA's mandatory arbitration provisions, Congress deemed it "essential" to keep minor labor disputes in the nation's rail and airline industries "out of the courts." *Union Pac.*, 439 U.S. at 94. Yet the lower courts have rewritten the statutory text by creating a judge-made exception that allows plaintiffs to evade arbitration simply by claiming that a carrier's disciplinary decision was motivated by antiunion animus. And the court of appeals in this case has gone even farther by expanding the category of union "representative" well beyond (and in conflict with) the precedent of other circuits, meaning that "the number of

union employees who can now have their union litigate their minor disputes in federal court is mind boggling." Airlines Amicus Br. 11.

CONCLUSION

An unwritten antiunion animus exception cannot exist within what this Court has said is the Railway Labor Act's "mandatory, exclusive, and comprehensive" arbitration regime. *Bhd. of Locomotive Eng'rs*, 373 U.S. at 38. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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