No. 17-8960

In the Supreme Court of the United States

TIM HASKIN,
Petitioner,

v.

US AIRWAYS, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

THOMAS M. PETERSON
Counsel of Record
ROBERT JON HENDRICKS
DEBORAH E. QUICK
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, California 94105
Telephone: (415) 442-1000
Facsimile: (415) 442-1001
thomas.peterson@morganlewis.com

Counsel for Respondent

QUESTIONS PRESENTED

1. Is certiorari warranted to resolve an asserted conflict between the Second and Ninth Circuits regarding the scope of federal jurisdiction over an employee's breach of contract claim against his former employer, under the Railway Labor Act, 45 U.S.C. § 451 *et seq.*, when that claim is barred by the statute of limitations such that resolution of the asserted conflict, if it existed, would not affect the rights of the parties in this case?

2. Is certiorari warranted when the asserted conflict does not exist:

   a. The circuit courts—including the Second Circuit—uniformly agree with the Ninth Circuit here that, under the Railway Labor Act, 45 U.S.C. § 451 *et seq.*, a viable claim by an employee against his union for breach of the duty of fair representation is a predicate to federal court jurisdiction over a claim that a former employer breached a collective bargaining agreement?

   b. The case petitioner relies on for his claim of conflict, *White v. White Rose Food*, 128 F.3d 110 (2nd Cir. 1997), does not involve the Railway Labor Act, is based on the interpretation of a statute that does not apply here, and involves an unusual, non-recurring fact pattern?

3. Is certiorari warranted to review the fact-bound matter of whether the district court abused its discretion in dismissing without leave to amend petitioner's Title VII claims when the undisputed record establishes that any amendment would be futile?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 5

I. Haskin's Employment At The Airline. 5

II. Haskin's Post-Termination Failure To Pursue Any Grievance. 9

III. Haskin Completes An EEOC Intake Questionnaire And Files An EEOC Charge. 10

IV. Proceedings In The District Court. 11

V. Ninth Circuit Affirmance. 12

REASONS TO DENY THE WRIT 13

I. Petitioner's Claims Are Untimely; Certiorari Should Be Denied Because Reivew By This Court Would Have No Affect On The Rights Of The Parties. 13

II. Certiorari Should Be Denied Because The Circuit Courts Uniformly Dismiss For Lack Of Jurisdiction Breach Of Contract Claims Against Employers In Cases Governed By The RLA When No Claim Is Available Against A Union. 17

III. Haskin Was Properly Denied Leave To Amend His Title VII Claims; The Petition Fails To Present A Review-Worthy Issue. 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Arnold v. Air Midwest,
100 F.3d 857 (10th Cir. 1996) 13

Atkins v. Union Pac. R.R. Co.,
685 F.2d 1146 (9th Cir. 1982) 14

B'hd of R.R. Trainmen v. Jacksonville Terminal Co.,
394 U.S. 369 (1969) 18

B.K.B. v. Maui Police Dep't,
276 F.3d 1091 (9th Cir. 2002) 22, 23

Bautista v. Pan American World Airlines, Inc.,
828 F.2d 546 (9th Cir. 1987) 19

Benoni v. Boston & Me. Corp.,
828 F.2d 52 (1st Cir. 1987) 13

Byrd v. Donahoe,
No. C 11-4230 RS, 2013 WL 1962304 (N.D. Cal. May 10, 2013) 22

Carrion v. Enterprise Ass'n,
227 F.3d 29 (2nd Cir. 2000) 17

Chodos v. West Publ'g Co.,
292 F.3d 992 (9th Cir. 2002) 12, 21

DelCostello v. Int'l Bhd. of Teamsters,
462 U.S. 151 (1983) 1, 13, 15, 16

Edwards v. Int'l Union,
46 F.3d 1047 (10th Cir. 1995) 15

Evans v. Northwest Airlines, Inc.,
29 F.3d 438 (8th Cir. 1994) 20

Fechtelkotter v. Air Line Pilots Ass'n, Int'l,
693 F.3d 899 (9th Cir. 1982) 1

First Alabama Bank of Montgomery, N.A. v. First State Insurance Co.,
899 F.2d 1045 (11th Cir. 1990) 15

Ford Motor Co. v. Huffman,
345 U.S. 330 (1953) 1

Franklin v. S. Pac. Transp. Co.,
593 F.2d 899 (9th Cir. 1979) 19

Galindo v. Stoody Co.,
793 F.2d 1502 (9th Cir. 1986) 15

Glover v. St. Louis-S.F. Ry.,
393 U.S. 324 (1969) 1

Graf v. Elgin, Joliet and Eastern Ry. Co.,
697 F.2d 771 (7th Cir. 1983) 3, 19

Gvozdenovic v. United Airlines,
933 F.2d 1100 (2d Cir. 1991) 13

Hunt v. Missouri Pac. R.R.,
729 F.2d 578 (8th Cir. 1984) 13

Int'l Ass'n of Machinists v. S. Pac. Transp.,
626 F.2d 715 (9th Cir. 1980) 4

Lea v. Republic Airlines,
903 F.2d 624 (9th Cir. 1990) 13

Martin v. Am. Airlines, Inc.,
390 F.3d 601 (8th Cir. 2004) 20

Massey v. United Transp. Union,
868 F. Supp. 1385 (S.D. Ga. 1994) 14

McConnell v. Air Line Pilots Ass'n,
763 F. Supp. 2d 37 (D.D.C. 2011) 14

Metz v. Tootsie Roll,
715 F.2d 299 (7th Cir. 1983) 1

Missere v. St. John's Univ.,
No. 15CV771JMAAYS, 2018 WL 1701946 (E.D.N.Y. Mar. 31, 2018) 17

Mitchell v. Super. Ct.,
No. C 04-3135 VRW, 2007 WL 1655626 (N.D. Cal. June 7, 2007) 22

Nelmida v. Shelly Eurocars, Inc.,
112 F.3d 380 (9th Cir. 1997) 21

Ooley v. Schwitzer Div., Household Mfg. Inc.,
961 F.2d 1293 (7th Cir. 1992) 19

Perkins v. 199 SEIU United Healthcare Workers E.,
73 F.Supp.3d 278, 288–89 (S.D.N.Y. Sep. 17, 2014) 17

Peters v. Burlington N. RR. Co.,
931 F.2d 534 (9th Cir. 1990) 19

Raus v. Bhd. of Ry. Carmen of U.S. and Canada,
663 F.2d 791 (8th Cir. 1981) 3, 20

Robertson v. Burlington N. & Santa Fe Ry. Co.,
216 Fed. App'x 724 (10th Cir. 2007) 20

Robinson v. Pan Am. World Airways,
777 F.2d 84 (2d Cir. 1985)... 13

Samples v. Ryder Truck Lines,
755 F.2d 881 (11th Cir. 1985) 1

Sembach v. Club One,
No. 3:10-CV-00654-LRH, 2011 WL 6780881 (D. Nev. Dec. 27, 2011)................. 22

Sisco v. Consolidated Rail Corp.,
732 F.2d 1188 (3d Cir. 1984)... 13

Smallakoff v. Air Line Pilots Ass'n,
825 F.2d 1544 (11th Cir. 1987) 13

Spaulding v. United Transp. Union,
279 F.3d 901 (10th Cir. 2002) 2, 20

Stallcop v. Kaiser Foundation Hospitals,
820 F.3d 1044 (9th Cir. 1987) 14

Stanton v. Delta Air Lines, Inc.,
669 F.2d 833 (1st Cir. 1982)... 4, 18

Steele v. Louisville & Nashville Rail Road,
323 U.S. 192 (1944) 1

Trial v. Atchison, Topeka & Santa Fe Ry. Co.,
896 F.2d 120 (5th Cir. 1990) 2, 19

Triplett v. Bhd. of Ry. Clerks,
801 F.2d 700 (4th Cir. 1985) 13

Union Pacific R. Co. v. Sheehan,
439 U.S. 89 (1978) 18

United Indep. Flight Officers v. United Airlines,
756 F.2d 1262 (7th Cir. 1985) 13

United States v. Corinthian Colleges,
655 F.3d 984 (9th Cir. 2011) 21

Vaca v. Sipes,
386 U.S. 171 (1967) 1

White, *Urena v. Am. Airlines, Inc.*,
152 Fed.App'x 63 (2nd Cir. 2005) 3, 19

White v. White Rose Food,
128 F.3d 110 (2nd Cir. 1997).... *passim*

Wood v. Houston Belt & Terminal Ry.,
958 F.2d 95 (5th Cir. 1992) 13

Statutes

28 U.S.C. § 1331.... 1

29 U.S.C. § 141(b) 4

29 U.S.C. § 152(2) 17

29 U.S.C. § 152(3) 17

29 U.S.C. § 153.... *passim*

42 U.S.C. § 2000e-5(e)(1) 21, 23

45 U.S.C. § 151.... 17

45 U.S.C. § 151a.... 4, 18

45 U.S.C. § 184.... 3, 18

29 U.S.C. § 185(a) 4, 5, 16

Rule

SUP. CT. R. 10 17

INTRODUCTION

Petitioner Tim Haskin was discharged from his job as an airline customer service representative on February 9, 2012, following a lengthy process of workplace discipline stemming from his failure to follow numerous US Airways policies. When his employment was terminated Haskin failed to pursue the grievance-and-arbitration process provided to union members; had he pursued a grievance, that process would have concluded no later than May 2012.

Instead, Haskin sued in 2014, alleging his union had breached its duty of fair representation (the "DFR") and colluded with US Airways' breach of the collective bargaining agreement, resulting in his termination.[1] These "hybrid" claims—including the claim against the former employer—are subject to a six-month statute of limitations, running from the time Haskin knew or should have known of the alleged breach of the DFR.[2] The district court concluded that Haskin's 2014 claim

[1] In *Steele v. Louisville & Nashville Rail Road*, 323 U.S. 192 (1944), this Court recognized an implied duty of fair representation, or DFR, under the Railway Labor Act, 45 U.S.C. § 451 *et seq.* (the "RLA") imposed on labor unions as a "necessary corollary to the union's status as the exclusive representative of all the employees in a particular bargaining unit." *Fechtelkotter v. Air Line Pilots Ass'n, Int'l*, 693 F.3d 899, 902-03 (9th Cir. 1982), citing *Steele* at 203-04; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (recognizing that the DFR also arises under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* (the "LMRA"), and the Nation Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the "NLRA")). *Steele* also recognized federal court jurisdiction over claims for violation of the DFR pursuant to 28 U.S.C. § 1331, as claims arising the Constitution or laws of the United States. *Id.* at 204.

[2] In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court held an employee suing his union for breach of the DFR, could, in certain limited circumstances, also sue his employer ***without*** first exhausting a contractually mandated arbitration process. *Glover v. St. Louis-S.F. Ry.*, 393 U.S. 324 (1969) applied *Vaca* and held such intertwined claims may also be brought under the RLA. In *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169 (1983), the Court established a six-month limitations period for "hybrid" claims, running from when the employee knew or should have known of the breach of the DFR. Such claims accrue at the latest when the union's time for assserting a grievance has expired. *Metz v. Tootsie Roll*, 715 F.2d 299, 304 (7th Cir. 1983); *Samples v. Ryder Truck Lines*, 755 F.2d 881, 887 (11th Cir. 1985). Here, Haskin's hybrid claims accrued no later than May 2012, when any grievance process regarding his termination would have concluded.

against his union—based on an alleged breach of the DFR he should have been aware of no later than May 2012—was untimely. That same analysis applies to Haskin's claim against his former employer.

Petitioner posits conflict between the Second and Ninth Circuits on whether, in his case of hybrid claims brought under the RLA, an untimely claim against the union will deprive the court of federal jurisdiciton over a timely claim against the employer, citing *White v. White Rose Food*, 128 F.3d 110 (2nd Cir. 1997). There is no such conflict. But if there were, review by this Court could not benefit Haskin. Haskin's claim against US Airways was just as untimely as his claim against his union. For this reason, certiorari should be denied.

Certiorari should also be denied because there is no conflict between the Second and Ninth Circuits. This case arises under the RLA. *White* arose under the LMRA and the NLRA. The circuit courts uniformly and routinely hold, as the Ninth Circuit did here, that district court jurisdiction over the breach of contract portion of a hybrid claim *under the RLA* is "contingent upon a showing" of a "triable claim against the union." Dkt. Entry 31-1 at 2, citing *Peters v. Burlington N. RR. Co.*, 931 F.2d 534, 537 (9th Cir. 1990); *accord*, *Spaulding v. United Transp. Union*, 279 F.3d 901, 912 (10th Cir. 2002) ("a viable duty-of-fair-representation claim against an employee's union is the jurisdictional predicate for a correlative claim against the employer"); *Trial v. Atchison, Topeka & Santa Fe Ry. Co.*, 896 F.2d 120, 125 (5th Cir. 1990) (a timely breach of the DFR claim is the "jurisdictional predicate" for claims an employer has breached a collective bargaining agreement);

Graf v. Elgin, Joliet and Eastern Ry. Co., 697 F.2d 771, 781 (7th Cir. 1983) ("[I]f the claim against the union is dismissed, as it properly was here ... the "worker may not sue in court for breach of a collective bargaining contract; the Railway Labor Act confines him to arbitration and to the narrow judicial review of arbitration which the Act provides."); and *Raus v. Bhd. of Ry. Carmen of U.S. and Canada*, 663 F.2d 791, 798 (8th Cir. 1981) (allegations of a breach of the DFR are necessary to establish district court jurisdiction over a breach of contract claim). Among the circuits so holding is the Second Circuit in a decision post-dating *White*, *Urena v. Am. Airlines, Inc.*, 152 Fed.App'x 63, 66 (2nd Cir. 2005) ("[T]he dismissal of the duty of fair representation claim against the union" on statute of limitations grounds "requires the dismissal of the breach of contract claim against the employer."). Petitoner has not identified any contrary RLA authority. Thus, the conflict petitioner asserts does not exist.

This decisional uniformity grows from RLA section 153 First (i), which consigns ***all*** disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" to compulsory arbitration under the exclusive jurisdiction of the National Railroad Adjustment Board or, with respect to airline-employers, system, group or regional adjustment boards. 45 U.S.C. § 184. "Unlike the typical arbitration procedure under the [LMRA], the arbitration boards created by the Railway Labor Act are not voluntarily created by contracting parties, but they are bodies mandated by law." *Stanton v. Delta Air Lines, Inc.*, 669 F.2d 833, 838 (1st Cir. 1982).[3]

The RLA's mandatory arbitration requirement—irrespective of the terms of any collective bargaining agreement—and the narrow scope of federal court jurisdiction under that staute, differentiate the RLA from the LMRA-NLRA. While the RLA and the LMRA-NLRA all seek to preserve the flow of commerce whilst protecting workers' rights to organize and bargain collectively, the RLA 's purposes include "avoid[ing] ***any*** interruption to commerce or to the operation of ***any*** carrier engaged therein." 45 U.S.C. § 151a, *compare* 29 U.S.C. § 141(b), which seeks to "avoid or substantially minimize[]" "interfere[nce] with the normal flow of commerce."[4]

The Second Circuit in *White* applied the LMRA, not the RLA. The *White*-plaintiffs' claims against their union were dismissed as untimely. Despite this, the Second Circuit relied on LMRA section 301[5]—pursuant to which employees "may sue the union or the employer, or both, but must allege violations on the part of both"—as providing an independent statutory basis for federal court jurisdiction

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[3] Federal court jurisdiction "to review an award by" a RLA-adjustment board is "among the narrowest known to the law." *Int'l Ass'n of Machinists v. S. Pac. Transp.*, 626 F.2d 715, 717 (9th Cir. 1980). RLA section 153 First (q) provides that an adjustment board's findings

> shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

[4] Emphasis in quoted material has been added unless otherwise specified.

[5] 29 U.S.C. § 185(a): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act .... may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

over the plaintiffs' remaining breach of contract claims. 128 F.3d at 114. The RLA has no analogue to LMRA section 301. Rather, in RLA section 153 First, Congress imposed mandatory arbitration on employee claims for breach of contract. *White* has no application to Haskin's RLA-governed breach of contract claim.

Insofar as petitioner assigns error to the district court's denial of leave to amend his Title VII discrimination claims, that fact-depdendent determination presents no issue of law nor matter of broad importance for review by this Court.

STATEMENT OF THE CASE

I. Haskin's Employment At The Airline.

1. Petitioner Tim Haskin was hired as a customer service representative by America West Airlines in September 2005; America West subsequently merged with US Airways. First Amended Complaint, ECF Doc. 7 at 5.[6]

2. At the time of that merger, the Communications Workers of America and the International Brotherhood of the Teamsters joined together to create a Union representing the workers of the now-merged airline, US Airways. The union and US Airways entered into a collective bargaining agreement that includes a

[6] Haskin attached the following documents to his petition which shall be cited herein:

- Order denying petition for rehearing en banc, December 7, 2017, Ninth Circuit, Dkt. Entry 35;
- Memorandum affirming decision of the distrtict court, April 21, 2017, Ninth Cirucit, Dkt. Entry 31-1;
- Order granting Defendants' Motions for Summary Judgment, September 25, 2015, United States District Court Central District of California, ECF Doc. 126; and
- Order Granting Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, April 9, 2015, Unitied States District Court Central District of California, ECF Doc. 55.

grievance process by which employees may challenge workplace discipline actions and employment termination. Haskin was a member of the union. *Ibid.*

3. US Airways' system for addressing employee performance issues consisted of a progressive counseling-discipline system via a series of steps escalating in significance: coaching discussions, followed by written "Levels" of discipline, followed by discharge. The typical progression was as follows: a coaching discussion; a Level I counseling; a Level II counseling; a Level III counseling; discharge. An employee facing discipline could be suspended in connection with any of the progressive steps in the counseling sequence. If an employee was disciplined for a performance issue, but then had a twelve month period free of any further discipline, the discipline Level would be removed, *i.e.*, any subsequent discipline would begin the sequence from the beginning. However, if an employee faced a second performance issue within a twelve month period, the discipline process would typically start at the level where the last discipline ended. If the job misconduct at issue was serious, levels within the system could be skipped altogether; thus, in some cases employee misconduct could result in immediate termination. ECF Doc. 93 at 2-3, Exh. 1.

4. Haskin began working at Los Angeles International Airport in March 2008. He also took up an active role within his union. He was appointed shop steward. ECF Doc. 7 at 5. Fellow employees would seek Haskin out if they had questions about the collective bargaining agreement because he had "read the Contract." ECF Doc. 89-2 at 36. Haskin knew how to file written grievances because he

had done so in connection with corrective action prior to his termination. ECF Doc. 94 at 3.

5. Haskin alleged his union-involvement entailed conflict with his immediate supervisor, David Blakely, including his assistance to a fellow employee in filing an Equal Employment Opportunity Commission ("EEOC") charge following her termination. Haskin alleges that this angered Blakely, and Blakely then began to write up Haskin for deficient job performance in relation to minor issues. ECF Doc. 7 at 6-7.

According to Haskin, when he reported Blakely's inappropriate performance write ups to his union and a US Airways human resources manager, this caused Blakely to impose "differential discipline" on Haskin. ECF Doc. 7 at 7. Haskin was removed as shop steward in 2009. In 2010, the union filed grievances on behalf of Haskin, after which Haskin alleges Blakely's retaliation increased through "write-ups and disciplinary levels." *Ibid.*

6. Around this time, Haskin claims his co-workers began harassing him based on his sexuality and religious affiliation. *Ibid.* Haskin claims he reported this conduct to US Airways human resources and the union, resulting in further inappropriate disciplinary actions against Haskin. *Id.* at 8.

7. Beginning in May 2010 and continuing through his discharge in February 2012, Haskin engaged in conduct that violated company policies on numerous

documented occasions.[7] After each incident, Blakely consulted with other US Airways supervisorial and human resources management staff and a labor relations representative, resulting in collective decisions about appropriate correction action and discipline in compliance with US Airways policy and the collective bargaining agreement. ECF Doc. 91 at 7.

8. Haskin alleges Blakely's retaliatory conduct continued in 2011 and into the beginning of 2012. ECF Doc. 36 at 5-6. Between May 2010 and February 2012, Haskin had a coaching discussion with a manager and received Levels I, II, and III counseling because he had not followed various company policies. ECF Doc. 91 at 3. Haskin was suspended on February 5, 2012, in connection with an incident on January 11, 2012, when Haskin upgraded a passenger without authorization and subsequently provided false information during US Airways' review of the incident. *Ibid.* Following an investigation and taking into account Haskin's earlier, documented performance shortcomings, Haskin's employment was terminated on February 9, 2012. ECF Doc. 91 at 4.

9. Prior to suspending and ultimately terminating Haskin's employment, Blakely consulted with Haskin's direct supervisors, the US Airways duty manager, the US Airways Los Angeles Airport customer service station Manager, a US Airways human resources manager and a labor relations representative. *Ibid.* Based on these consultations and his review of Haskin's disciplinary history, Blakely de-

[7] Haskin failed to meet assigned flights, refused to enforce carry-on baggage regulations or to comply with manager instructions, and provided complementary upgrades to passengers without authorization. ECF Doc. 91 at 3.

termined that termination of Haskin's employment was warranted. *Ibid.* Blakely did not base his discharge decision on any prior complaints that Haskin had made concerning any issue or on any otherwise impermissible or unlawful basis. *Ibid.*

II. Haskin's Post-Termination Failure To Pursue Any Grievance.

10. Haskin alleged that he orally grieved his termination at a February 9, 2012 meeting where his termination was announced. ECF Doc. 126 at 2. US Airways and the union dispute Haskin's assertion. While Haskin claims he had various communications with co-workers and US Airways management following his discharge, he admits he never filed a written grievance. ECF Doc. 89-2 at 18. US Airways' records show Haskin told US Airways management several days after his discharge that he would not file a written grievance. ECF Doc. 93 at 4.

11. Under the governing collective bargaining agreement, if Haskin had initiated a grievance regarding his termination, various things would have occurred in fairly rapid succession, as Haskin has admitted. Thus, if Haskin had presented an oral or written grievance on February 9, then he should have had a "Step 3" hearing by February 19, 2012; a written response to his grievance should have been issued by February 29, 2012; Haskin could have appealed an unfavorable grievance outcome by March 14, 2012; and any "Step 4" process (as a result of an appeal) would have had to have been completed in May 2012. ECF Doc. 89-2 at 19-26.

Haskin admits he never received any decision, written or otherwise, from a Step 3 process connected with his termination. ECF Doc. 89-2 at 23-24. And he admits that in May 2012 he still had no idea what the union was doing to resolve his alleged oral grievance of his termination. ECF Doc. 89-2 at 25.

III. Haskin Completes An EEOC Intake Questionnaire And Files An EEOC Charge.

12. On November 27, 2012, Haskin completed and signed an Equal Employment Opportunity Commission ("EEOC") intake questionnaire alleging that US Airways terminated his employment in retaliation for him "helping other employees file living wage and EEOC claims." ECF Doc. 56 at 44. In response to the question "why do you believe these actions were discriminatory?" Haskin wrote "on the job injury – terminated on next shift after requesting the OJI number." *Ibid.*[8]

On January 29, 2013, Haskin filed a charge with the EEOC and the California Department of Fair Employment & Housing. He alleged that US Airways had discriminated against him based on his race (White / American Indian), sex (male), and religion (Christian) in violation of Title VII. ECF Doc. 56 at 46. Haskin also alleged that co-workers harassed him and that US Airways retaliated against him when he complained about harassment. *Ibid.* On January 15, 2014, the EEOC notified Haskin that it was closing his case. A right-to-sue notice issued. ECF Doc. 56 at 47.

[8] On July 31, 2011, Haskin suffered an on-the-job injury when a ramp agent ran into him, knocking out part of his front tooth. ECF Doc. 36 at 7. Haskin was allegedly instructed to stop any on-the-job injury claims and stop talking with fellow employees in the break room. *Ibid.* On January 21, 2012, Haskin received a past due bill from his dentist for the patch work on his tooth. *Ibid.* On February 3, 2012, Haskin spoke to the shift manager, to whom he allegedly reported his on-the-job injury. He asked about his claim and was allegedly told by the shift manager that she thought Haskin had dropped the claim. The shift manager emailed Blakely about Haskin's claim. *Id.* at 8. Haskin was suspended during his next shift. *Ibid.*

IV. Proceedings In The District Court.

13. On April 15, 2014, Haskin filed suit alleging termination in violation of Title VII. ECF Doc. 1. Haskin's First Amended Complaint (filed September 19, 2014), alleges Title VII hostile work environment and retaliatory discharge claims against US Airways and a breach of contract claim against US Airways, AMR Corporation, and American Airlines, Inc. ECF Doc. 7 at 10-11, 13. The First Amended Complaint also alleged against the union a claim for breach of the DFR, in violation of the RLA. ECF Doc. 7 at 12. Haskin added American Airlines, Inc., and AMR Corp. as defendants, but did not include any allegations against them. Defendants moved to dismiss. ECF Doc. 20 and 21. The district court granted those motions with leave to amend. ECF Doc. 35.

Haskin filed his Second Amended Complaint on January 30, 2015. ECF Doc. 37. Defendants again sought dismissal. ECF Doc. 38 and 40. The court dismissed Haskin's hostile work environment and retaliatory discharge claims with prejudice, finding that (i) the discrimination claims he included on his timely-filed EEOC intake questionnaire were not cognizable under Title VII, and (ii) the discrimination claims in his EEOC formal charge were not reasonably related to any claims or facts in his questionnaire, so his formal charge was an untimely-filed amended charge that did not exhaust his administrative remedies. ECF Doc. 55 at 6-13. It dismissed his breach of contract and breach of the DFR claims without prejudice. The court ordered that any further dispositive motions on these claims be brought via summary judgment given Haskin's allegation, voiced for the very first time at the hearing on the motions to dismiss his Second Amended Complaint, that he orally grieved his termination on February 9, 2012—a factual allegation defendants contested. ECF Doc. 55 at 16-17. The district court also ordered that "any subsequent challenge to claims against AMR and American Airlines based on Haskin's failure to allege specific facts" be brought "as a motion for summary judgment" as "resolution of this issue will require evidence of the corporate relationships between each of the Airline Defendants." ECF Doc. 55 at 17-18.

Filed on May 11, 2015, Haskin's Third Amended Complaint alleges a breach of the DFR claim against the union and a breach of contract claim against US Airways. ECF Doc. 56 at f11-13. Haskin did not name either American Airlines, Inc., or AMR Corporation as defendants. ECF Doc. 56 at 2. US Airways answered on May 29, 2015. ECF Doc. 64. On September 25, 2015, the district court issued summary judgment to US Airways and the Union, thereby completing final disposition of all of Haskin's various claims. ECF Doc. 126.

V. Ninth Circuit Affirmance.

14. Following *de novo* review, the Ninth Circuit affirmed. Dkt. Entry 31-1. In its unpublished memorandum decision the court perceived no abuse of discretion in the district court denying Haskin leave to amend his dismissed Title VII claims on the grounds further amendment would be futile. Dkt. Entry 31-1 at 2-3, citing *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011), and *Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

As for Haskin's "hybrid" DFR-breach of contract claims under the RLA, the court held summary judgment was properly granted on Haskin's DFR claim because it was brought outside the six-month statute of limitations. Dkt. Entry 31-1 at 2, citing *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509-11 (9th Cir. 1986). The breach of contract claim was therefore properly dismissed for lack of jurisdiction, as "the district court's jurisdiction 'over the contractual claim against [US Airways] was contingent upon a showing by [Haskin] that he had a triable claim against the union.'" Dkt. Entry 31-1 at 2, quoting *Peters*, 931 F.2d at 537.

Lastly, the Court held Haskin waived any challenge to the dismissal of his breach of contract against AMR Corp. and American Airlines, Inc., because he failed to re-plead that claim in his Third Amended Complaint. Dkt. Entry 31-1 at 3, citing *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012).

REASONS TO DENY THE WRIT

I. Petitioner's Claims Are Untimely; Certiorari Should Be Denied Because Reivew By This Court Would Have No Affect On The Rights Of The Parties.

Certiorari should be denied because a reversal of the Ninth Circuit's decision on the basis of the alleged conflict asserted in the petition would have no affect on the rights of the parties.

In *DelCostello*, 462 U.S. 151, 169, this Court established a six-month limitations period for hybrid claims under the LMRA-NLRA, running from when the employee knew or should have known of the breach of the DFR. The circuit courts uniformly apply this same limitations period to hybrid claims under the RLA.[9]

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[9] *Arnold v. Air Midwest*, 100 F.3d 857 (10th Cir. 1996); *Wood v. Houston Belt & Terminal Ry.*, 958 F.2d 95, 97 (5th Cir. 1992); *Gvozdenovic v. United Airlines*, 933 F.2d 1100 (2d Cir. 1991); *Lea v. Republic Airlines*, 903 F.2d 624 (9th Cir. 1990); *Benoni v. Boston & Me. Corp.*, 828 F.2d 52 (1st Cir. 1987); *Smallakoff v. Air Line Pilots Ass'n*, 825 F.2d 1544 (11th Cir. 1987); *Triplett v. Bhd. of Ry. Clerks*, 801 F.2d 700 (4th Cir. 1985) (on rehearing en banc); *Robinson v. Pan Am. World Airways*, 777 F.2d 84 (2d Cir. 1985); *United Indep. Flight Officers v. United Airlines*, 756 F.2d 1262 (7th Cir. 1985); *Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188 (3d Cir. 1984); *Hunt v. Missouri Pac. R.R.*, 729

Haskin's employment was terminated on February 9, 2012. ECF Doc. 91 at 4. Haskin admits he filed no written grievance. ECF Doc. 89-1 at 23. Even assuming Haskin orally grieved his termination on February 9, 2012 (which US Airways disputes), the collective bargaining agreement provides that Haskin would have been contacted by the union and had various hearing and appeal opportunities; he would have received written responses to his claims from US Airways; and the entire grievance process would have concluded no later than May 2012. ECF Doc. 89-1 at 19-26.

Haskin admits that from March 2012 through May 2012 he did not know whether, or what, his union was doing with regard to his alleged oral grievance. ECF Doc. 89-1 at 23-24. He admits he received no decision, either written or oral. ECF Doc. 89-1 at 23-25. He admits that, in May 2012, when the grievance process should have been winding up, he had no idea what, if anything, his union was doing to pursue his grievance. ECF Doc. 89-1 at 25. These admission are particularly telling given Haskin's admitted familiarity with the collective bargaining agreement and its grievance-arbitration procedures gained during his time serving as shop steward.[10]

F.2d 578 (8th Cir. 1984); *Massey v. United Transp. Union*, 868 F. Supp. 1385 (S.D. Ga. 1994), aff'd without op., 65 F.3d 183 (11th Cir. 1995); *see also McConnell v. Air Line Pilots Ass'n*, 763 F. Supp. 2d 37, 41 (D.D.C. 2011).

[10] This record presents no basis to excuse Haskin's failure to timely pursue a grievance or institute suit. Equitable tolling may apply where a union misleads an employee as to the limitations period for bringing suit. *Stallcop v. Kaiser Foundation Hospitals*, 820 F.3d 1044, 1050 (9th Cir. 1987). A union or an employer may be equitably estopped from asserting the six-month limitations period for hybrid claims where by its conduct or representation defendant "tends to lull the employee into a false sense of security." *Atkins v. Union Pac. R.R. Co.*, 685 F.2d 1146, 1148 (9th Cir. 1982). Haskin admits his familiarity with the timeline and processes for pursuing a grievance. Neither the

Under *DelCostello*, Haskin had six months to bring his hybrid claims measured from the time he knew or should have known of the union's failure to pursue his grievance. The facts establish that Haskin was discharged on February 9, 2012, and that the last possible date he could have expected a grievance process to conclude was May 2012. Haskin first asserted his hybrid claims on September 19, 2014, when he filed his First Amended Complaint. The date on which a statute of limitations begins to run is a legal, not a factual, issue where, as here, the material facts are undisputed. *Edwards v. Int'l Union*, 46 F.3d 1047, 1050 (10th Cir. 1995); *First Alabama Bank of Montgomery, N.A. v. First State Insurance Co.*, 899 F.2d 1045, 1055 (11th Cir. 1990); *Galindo*, 793 F.2d at 1508. Thus, Haskin's hybrid claims against both the union and US Airways are time-barred and would remain so even if the Court considrered the alleged between the Second and the Ninth Circuits offered by petitioner. On this basis, certiorari should be denied.

Nothing about the *White* decision suggests Haskin's claim against his employer is other than barred by the statute of limitations. The *White* plaintiffs sued their employer for breach of contract; the district court granted summary judgment to the employer because the plaintiffs had not pursued a mandatory grievance-arbitration process or alleged breach of the DFR by the union. 128 F.3d at 113. In response to this ruling the plaintiffs "formally requested" that their union file a grievance against the employer. "The union ... responded that it did not believe that a breach of contract had occurred, and that it would not pursue the matter to arbi-

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union nor US Airways made any representations to Haskin that a grievance process was underway or about the applicable statute of limitations.

tration." *Ibid.* As a result, the district court vacated its prior decision, and granted plaintiffs leave to amend to allege their union breached its DFR. *Ibid.* On appeal from the subsequent summary judgment, the Second Circuit held that plaintiffs' claims against the union were time-barred because the union was not joined as a defendant until "more than two years after" the alleged breach of the DFR and plaintiffs had waited nineteen months to file a formal grievance, well outside the six-month limitations period established in *DelCostello*. *Id.* at 114-15.

Turning to the breach of contract claim against the employer, the Second Circuit noted that, under LMRA section 301,[11] in bringing hybrid claims an employee-plaintiff "may sue the union or the employer, or both, but must allege violations on the part of both." *Id.* at 114, citing *DelCostello*, 462 U.S. at 165. Thus, the Second Circuit decided there was jurisdiction over the claims against the employer.

> The fact that the plaintiffs are time-barred from bringing a claim against the union does not mean that 'the plaintiffs cannot prove that Local 138 breached its duty of fair representation' in an action against White Rose. .... [P]laintiffs suing under a § 301/DFR theory need not sue their union at all: it could hardly be that the running of the limitations period as to the union extinguishes the right of action against the employer.

Id. at 116.

Haskin's case does not concern LMRA section 301—the statute applied in *White*. *White* did not consider the RLA, the statute governing Haskin's hybrid claims. And Haskin's case does not involve—as *White* did—different timetables and

[11] Codified at 29 U.S.C. § 185(a): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act .... may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

calculations for applying the statute of limitations to claims against the employer the union, respectively.[12] Nothing about *White* suggests Haskin's claims are anything but untimely as to both the union and US Airways as they were all filed outside of the six-month statute of limitaitons period for hybrid cliams under the RLA. A decision by this Court could have no affect on the rights of the parties.

II. Certiorari Should Be Denied Because The Circuit Courts Uniformly Dismiss For Lack Of Jurisdiction Breach Of Contract Claims Against Employers In Cases Governed By The RLA When No Claim Is Available Against A Union.

Haskin asserts a conflict between the Second and Ninth Circuits over whether federal courts have jurisdiction over a breach of contract claim against an employer when the plaintiff has no viable claim against the union, citing *White*, 128 F.3d at 116. But there is no such conflict and no basis for certiorari.[13]

White arose under the LMRA-NLRA; Haskin's hybrid claims are governed by the RLA. 29 U.S.C. § 152(2), (3) (exempting from the NLRA employees and employers subject to the RLA); 45 U.S.C. § 151 (defining interstate railroads as "carriers"), § 181 (including airlines within the RLA-definition of "carrier"), § 152 (bringing disputes between carriers and their employees within the ambit of the RLA). While

[12] *White*'s peculiar fact pattern marks it out from the mainstream of Second Circuit authority under the LMRA. In *Carrion v. Enterprise Ass'n*, 227 F.3d 29 (2nd Cir. 2000), the Second Circuit affirmed the dismissal of untimely hybrid claims, rejecting—without citing or discussing *White*—the plaintiffs' argument that the district court "erred in failing to address [plaintiff's] claims against [the employer] separately from [the claims against] the Union[ ]." *Id.* at 34. District courts within the Second Circuit have rejected *White* as a basis to save untimely claims against employers. *See Missere v. St. John's Univ.*, No. 15CV771JMAAYS, 2018 WL 1701946 at *1 (E.D.N.Y. Mar. 31, 2018) ("[P]laintiff's claim against his employer is untimely for the same reasons that any claims against the Unions would be untimely."), and *Perkins v. 199 SEIU United Healthcare Workers E.*, 73 F.Supp.3d 278, 288–89 (S.D.N.Y. Sep. 17, 2014) (hybrid claims against both union and employer filed "years after the limitations period had expired" must all be dismissed as time-barred).

[13] Rule 10 envisions certiorari "only for compelling reasons," including to resolve a conflict among decisions of the courts of appeal "on the same important matter" of federal law.

this Court has recognized these federal statutory schemes share many similar provisions, they include material differences and caution is warranted in applying judicial authority developed under one statute to the other. *B'hd of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969) ("This is a railroad dispute, pure and simple. And although we shall make use of analogies drawn from the NLRA to determine the rights of employees subject to the Railway Labor Act ... the NLRA has no direct application to the present case.").

RLA section 153 First (i) sends ***all*** disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," otherwise known as "minor disputes," to compulsory arbitration under the exclusive jurisdiction of the National Railroad Adjustment Board or, with respect to airline-employers, system, group or regional adjustment boards. 45 U.S.C. § 184. "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978). "Unlike the typical arbitration procedure under the [LMRA], the arbitration boards created by the Railway Labor Act are not voluntarily created by contracting parties, but they are bodies mandated by law." *Stanton*, 669 F.2d at 838. This is consistent with the RLA 's purpose of "avoid[ing] ***any*** interruption to commerce or to the operation of ***any*** carrier engaged therein." 45 U.S.C. § 151a.

Applying the statutory framework of the RLA, the Ninth Circuit held in 1979 that "[a]bsent a breach of [the] duty of fair representation, the district court had no jurisdiction over [an employee's] wrongful discharge claim," jurisdiction over such minor disputes resting exclusively with the statutorily-mandated arbitration board. *Franklin v. S. Pac. Transp. Co.*, 593 F.2d 899, 902 (9th Cir. 1979). In *Bautista v. Pan American World Airlines, Inc.*, 828 F.2d 546, 551-52 (9th Cir. 1987), the court held that in the absence of a "triable claim against the union," the futility exception to the arbitration board's jurisdiction "does not apply" and there is no district court jurisdiction to entertain a breach of contract claim against a carrier-employer. *See also Peters*, 931 F.2d at 537. In applying this well-established rule to resolve Haskin's claims against US Airways, the Ninth Circuit acted in accord with the decisions from other Circuits that have addressed this fact of the RLA.

Thus, the Second Circuit itself, in the non-precedential *Urena*, 152 Fed.App'x at 66, decided "the dismissal of the duty of fair representation claim against the union" on statute of limitations grounds "requires the dismissal of the breach of contract claim against the employer," citing *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 (1981). The Fifth Circuit denominates a timely breach of the DFR claim as the "jurisdictional predicate" for claims a carrier-employer has breached a collective bargaining agreement. *Trial v. Atchison Topeka & Santa Fe Ry. Co.*, 896 F.2d 120, 125 (5th Cir. 1990). The Seventh Circuit explained in *Graf*, 697 F.2d at 781,[14] that

> unless the union has breached its duty of fair representation, a worker may not sue in court for breach of a collective bargaining

[14] Abrogation on other grounds recognized by *Ooley v. Schwitzer Div., Household Mfg. Inc.*, 961 F.2d 1293, 1302 (7th Cir. 1992).

> contract; the Railway Labor Act confines him to arbitration and to the narrow judicial review of arbitration which the Act provides. *Order of Railway Conductors of America v. Pitney,* 326 U.S. 561, 565–66, 66 S.Ct. 322, 324, 90 L.Ed. 318 (1946); *Slocum v. Delaware, Lackawanna & W.R.R.,* 339 U.S. 239, 244, 70 S.Ct. 577, 579, 94 L.Ed. 795 (1950). Therefore, if the claim against the union is dismissed, as it properly was here, the claim against the company must be dismissed too.

In *Raus*, 663 F.2d at 798, the Eighth Circuit held "good faith allegations and facts supporting those allegations indicating collusion" between the union and the carrier-employer are necessary to establish district court jurisdiction over a breach of contract claim. In *Evans v. Northwest Airlines, Inc.*, 29 F.3d 438, 442 (8th Cir. 1994), that same Court held that breach of contract claims against the airline-defendant were properly dismissed for lack of subject matter jurisdiction when the breach of the DFR claims against the union were dismissed as time-barred. In *Martin v. Am. Airlines, Inc.*, 390 F.3d 601 (8th Cir. 2004), the Eighth Circuit held that breach of contract claims against a carrier are within the "jurisdiction" of the carrier's "System Board of Adjustment" when the plaintiff-employee does not establish a breach of the DFR. *Id.* at 609. The Tenth Circuit holds that "a viable duty-of-representation claim against an employee's union is the jurisdictional predicate for a correlative claim against the employer" (*Spaulding v. United Transp. Union*, 279 F.3d 901, 912 (10th Cir. 2002)), and later applied this holding to affirm dismissal of a breach of contract claim against a carrier when the plaintiffs "failed to assert a viable fair-representation claim against" the union. *Robertson v. Burlington N. & Santa Fe Ry. Co.*, 216 Fed. App'x 724, 728 (10th Cir. 2007).

In sum, there is no conflict. The Ninth Circuit's decision is solidly aligned with other circuits in holding federal courts do not have jurisdiction under the RLA to entertain breach of contract claims against carrier-employers unless the plaintiff-employee has a viable cause of action against the union.

III. Haskin Was Properly Denied Leave To Amend His Title VII Claims; The Petition Fails To Present A Review-Worthy Issue.

Petitioner questions whether the Ninth Circuit properly affirmed the dismissal without leave to amend of Haskin's Title VII retaliatory discharge claims. The district court engaged in a fact-dependent analysis of Haskin's administrative filings in arriving at its conclusion that any amendment Haskin might make would be futile; the Ninth Circuit affirmed. The petition identifies no grounds for certiorari arising out of the unremarkable resolution of Haskin's untimely Title VII claims for case-specific reasons.

Denial of leave to amend after a responsive pleading has been filed is reviewed for abuse of discretion. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). District courts have "particularly broad" discretion to dismiss with prejudice when the plaintiff has previously been granted leave to amend, as occurred here. *Chodos,* 292 F.3d at 1003.

Before a claimant may file a Title VII civil action, he must timely file a charge of discrimination with the EEOC. *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 383 (9th Cir. 1997). 42 U.S.C. section 2000e-5(e)(1) provides that a plaintiff must file his EEOC charge within 180 days of the alleged unlawful employment practice, unless the plaintiff initially institutes proceedings with a state or local agency, in which case the EEOC charge must be filed within 300 days of the last discriminatory act.

In any subsequent lawsuit, the district court's jurisdiction is limited to "allegations of discrimination that either 'fall within the scope of the EEOC's *actual* investigation or an EEOC investigation which *can reasonably be expected* to grow out of the charge of discrimination.'" *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002), quoting *EEOC v. Farmer Bros.,* 31 F.3d 891, 899 (9th Cir. 1994) (emphasis original).

Haskin's submission to the EEOC on November 27, 2012 did not present "retaliation-hostile work environment" claims under Title VII. ECF Doc. 55 at 17. His EEOC submission only established jurisdiction over retaliation claims "arising from [Haskin's] assertion of an on-the-job injury and from his assistance to other employees in filing Living Wage and EEOC charges." ECF Doc. 55 at 10. But filing or inquiring about worker's compensation for an on-the-job injury is not a "protected activity" under Title VII,[15] and assisting other workers in filing EEOC and Living Wage claims is not protected activity either.[16]

Subsequently, on January 29, 2013, Haskin tendered to the EEOC a formal charge of discrimination (also filed with California's Department of Fair Employ-

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[15] *Sembach v. Club One*, No. 3:10-CV-00654-LRH, 2011 WL 6780881, *4 (D. Nev. Dec. 27, 2011).

[16] *Byrd v. Donahoe*, No. C 11-4230 RS, 2013 WL 1962304, at *6 (N.D. Cal. May 10, 2013) (dismissing plaintiff's retaliation claim based on "union-related activities" because it was not actionable under Title VII); *Mitchell v. Super. Ct.*, No. C 04-3135 VRW, 2007 WL 1655626, at *17 (N.D. Cal. June 7, 2007) (finding that plaintiff's "claims of retaliation based on union activity are not within the purview of Title VII").

ment & Housing). ECF Doc. 55 at 6-8. These submissions were untimely because they were filed 355 days after the last allegedly discriminatory act: Haskin's February 9, 2012 discharge.[17]

Haskin's submissions do not present a situation where "allegations of discrimination that … 'fall within the scope of … an EEOC investigation ... *can reasonably be expected* to grow out of the charge of discrimination.'" *B.K.B.*, 276 F.3d at 1100, quoting *Farmer Bros.,* 31 F.3d at 899 (emphasis original). In other words, in certain circumstances an untimely formal charge will be treated as amending an earlier timely-filed intake questionnaire. But this was only possible for Haskin if "any claims based on the facts alleged for the first time in the January 29 formal charge are reasonably related to any claim included in the intake questionnaire." ECF Doc. 55 at 10.

That is not the case here and this case-specific issue does not justify this Court's review. Haskin's claims of harassment by co-workers "would not reasonably be expected to grow out of an investigation of the claims he assert[ed] in his intake questionnaire," namely, that he was retaliated against for assisting those same co-workers in filing EEOC and Living Wage claims. ECF Doc. 55 at 10.

As the district court correctly concluded, "the January 29 formal charge functions as an untimely-filed amended charge … asserting claims that do not relate back to the original charge," *i.e.*, the intake questionnaire, and the claims in the

[17] This is true even if one assumes, as the district court did, that by also filing with the California Department of Fair Employment & Housing on January 29, 2013, Haskin instituted proceedings with a state or local agency sufficient to trigger the longer limitations period under 42 U.S.C. § 2000e-5(e)(1).

timely-filed document "define the scope of this Court's jurisdiction." *Id.* at 11-12. Haskin failed to timely exhaust his hostile work environment and retaliation claims in his January 29, 2013 formal charge, and those Title VII claims were properly dismissed by the district court. No amendment would save Haskin's Title VII cause of action.

CONCLUSION

The petition for a writ of certiorari should be denied.

September 24, 2018

Respectfully submitted,

By: ______________________

THOMAS M. PETERSON
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, California 94105
Telephone: (415) 442-1000
Facsimile: (415) 442-1001
thomas.peterson@morganlewis.com
Counsel for Respondents

29 U.S.C. § 141

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 185(a)

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

45 U.S.C. § 153 First (i) and (q)

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

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(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

45 U.S.C. § 184

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.