No. 21-956

In The Supreme Court of the United States

SOJOURNER RUDISILL,

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Everyone agrees that an intractable and acknowledged split persists on the question presented. *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 75 (2009) (acknowledging split). The Court granted review of that question once before. It should do so again to resolve the question it left unanswered. The question is critical to the fair resolution of labor disputes in transportation industries employing hundreds of thousands of Americans. With livelihoods at stake, it is vital for this Court to establish a uniform national rule regarding whether judicial review is available to preserve the constitutional guarantee of fundamentally fair hearings before government-mandated arbitration boards.

This case is a clean vehicle to resolve this important and outcome-determinative issue. It is squarely presented here because, consistent with the near-unanimous agreement of the courts of appeals, all parties and the courts below applied § 153 First(q) to this airline-related case. And as in other cases, the availability of due process review is dispositive for Petitioner's claims. This record is well suited to answer the question presented. Respondents' focus on issues that may remain for the district court on remand cannot mask the pressing need for this Court's guidance.

ARGUMENT

I. The Question Presented Is Recurring, Important, And Implicated Here.

A. Section 153 First(q) Applies Here.

1. As the case comes to the Court, that Petitioner was employed by an airline rather than a railroad is a distinction without a difference. Courts routinely apply 45 U.S.C. § 153 First(q) to airlines. *See, e.g.*, *Hart v. Overseas Nat'l Airways, Inc.*, 541 F.2d 386, 392 n.15 (3d Cir. 1976); *Airline Prof'ls Ass'n of the Int'l Bhd. of Teamsters, Local Union No. 1224 v. ABX Air, Inc.*, 274 F.3d 1023, 1030 (6th Cir. 2001); *Betts v. United Airlines, Inc.*, 768 F. App'x 577, 578-79 (7th Cir. 2019); *Sullivan v. Endeavor Air, Inc.*, 856 F.3d 533, 536 (8th Cir. 2017); *Chernak v. Sw. Airlines Co.*, 778 F.2d 578, 580 (10th Cir. 1985); *Loveless v. E. Air Lines*, 681 F.2d 1272, 1275 (11th Cir. 1982); *Nw. Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 530 F.2d 1048, 1049-50 (D.C. Cir. 1976). Same when they are considering due process. *See, e.g.*, *Shafii v. PLC British Airways*, 22 F.3d 59, 63-64 (2d Cir. 1994); *Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 841-42 (9th Cir. 1989); *Hall v. E. Air Lines, Inc.*, 511 F.2d 663, 663-64 (5th Cir. 1975).

The Court need not decide whether most courts of appeals are right to apply § 153 First(q) to airlines, because throughout this entire litigation, *all* of the parties asserted that it applied. *See, e.g.*, Dist. Ct. Dkt. 9 at 6; Dist. Ct. Dkt. 30 at 9-10; Dist. Ct. Dkt. 13 at 9; Dist. Ct. Dkt. 31 at 9; 3d Cir. Dkt. 19 at 7; 3d Cir. Dkt.

14 at 8.[1] Moreover, both the district court and Third Circuit decided the case by applying § 153 First(q). Pet. App. 6, 12, 24-25. This Court can decide the question on the same grounds. *See Briscoe v. Lahue*, 460 U.S. 325, 328 n.3 (1983) ("[W]e make the same assumptions [as the court of appeals] for purposes of deciding this case.").

2. Although the Court need not address this issue, there is no reason to think that § 153 First(q) does not apply to review of airline System Review Board ("Board") decisions. As the Second Circuit explained, "[b]ecause the [Board] occupies the position of the statutorily-created NRAB, [it] is subject to the same statutory and constitutional constraints as the NRAB." *Shafii*, 22 F.3d at 61; *see also*, *e.g.*, *Hart*, 541 F.2d at 392 n.15 ("[T]he arbitration provisions of § 153 were…to be utilized by analogy in airline disputes in the same fashion as in railway controversies."); *Hunt v. Nw. Airlines, Inc.*, 600 F.2d 176, 178-79 (8th Cir. 1979) (citing cases beginning in 1967).

Respondents nevertheless suggest that § 153 First(q) cannot permit due process review of airline Boards because these Boards are not state actors. AA BIO 21; IAM BIO 8-9. But as courts (and even American, BIO 21) have acknowledged, this Court held otherwise in *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). There, the

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[1] American Airlines ("American") argued (before the district court only) that § 153's statute of limitations did not apply to air carriers, Dist. Ct. Dkt. 13 at 8 n.7, but it nevertheless argued that the § 153 First(q) jurisdictional limits prohibited review of Petitioner's due process claims. *Id.* at 11-12; Dist. Ct. Dkt. 31 at 9.

Court explained that "when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it intended the Board to be and to act as a public agency, not as a private go-between [and for] its awards to have legal effect, not merely that of private advice." *Id.* at 695. In the context of the entire statutory scheme, Congress's requirement that airline employees use the Boards as mandatory dispute mechanisms is sufficient to confer "public agency" status on the Boards for purposes of state action.

B. The Availability of Due Process Review Is Outcome Dispositive Here and in Other Cases.

The availability of judicial review for due process violations is an important and recurring issue. American argues it isn't, on the theory that every potential due process claim could be reviewed under one of the three delineated grounds in § 153 First(q) instead. But the courts that review due process claims do not regard them as merely duplicative of the listed grounds. *See, e.g.*, *United Transp. Union v. Union Pac. R.R. Co.*, 116 F.3d 430, 432 (9th Cir. 1997) (describing due process as an "independent ground, in addition to the three enumerated in the statute"). Contrary to American's suggestion, BIO 17, courts have continued to view due process as a separate, additional ground after this Court's 2009 decision in *Union Pacific*. *See, e.g.*, *Bhd. of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 905 F.3d 537, 542-43 (7th Cir. 2018); *Martino v. Metro N. Commuter R.R. Co.*, 582 F. App'x 27, 29 (2d Cir. 2014). And cases show that it matters

whether or not an employee can obtain judicial review for due process violations.

For instance, in *International Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter Railroad*, 24 F.3d 369 (2d Cir. 1994), the plaintiff objected because an arbitrator had a conflict of interest, having served as "both an IAM employee and a voting member of the NRAB division empowered to decide the [] dispute." *Id.* at 371. The court found that "none of the[] [§ 153 First(q)] grounds" applied, but nonetheless affirmed the district court's order setting aside an award because it violated due process. *Id.* at 371-72; *see also Pokuta v. TWA*, 191 F.3d 834, 839-40 (7th Cir. 1999) (reviewing claim that "[fell] within none of [the § 153 First(q)] categories" under due process, though finding no violation).

And in *Kinross,* the district court initially found an arbitration award invalid on due process grounds because the arbitration board had "improperly considered" certain testimony and submissions. *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 660 (10th Cir. 2004). On appeal, the Tenth Circuit vacated and remanded the district court's decision, holding that § 153 First(q) did not allow due process review. *Id.* at 662. On remand, the district *rejected* the statute-based objections and affirmed the arbitration award. *Kinross v. Utah Ry. Co.*, No. 2:01-CV-0010BSJ, 2006 U.S. Dist. LEXIS 23162 (D. Utah Apr. 6, 2006); *Kinross v. Utah Ry. Co.*, No. 2:01-CV0010J, 2006 U.S. Dist. LEXIS 87749 (D. Utah Oct. 24, 2006). Thus, the availability of due process review was outcome-determinative.

The availability of due process review is dispositive here, too, given the way this case was pled by Petitioner, proceeding pro se. A plaintiff

"is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Perhaps, as American suggests (BIO 15), a careful attorney would have relied on the RLA's guarantee that parties "may be heard…by counsel, or other representatives, as they may respectively elect." 45 U.S.C. § 153 First(j). Yet here, Petitioner's complaint does not allege failure to follow RLA procedures, but rather a violation of due process, Court of Appeals Appendix, Dkt. 11, No. 21-1093 (3d Cir.) (C.A.) 35, and therefore succeeds or fails on that basis alone.

Even if successful due process claims are rare, judicial review is critical when mandatory arbitration boards so transgress fundamental fairness and procedural norms as to violate due process—whether or not a creative lawyer might be able to shoehorn the claim into a statutory violation. Absent this Court's guidance, such judicial review will be available in some places and not others, yielding divergent results and differential protection of constitutional rights based solely on geography.

II. The Question Is Cleanly Presented.

The complaint, which must be accepted at this stage, alleges that the Board effectively requested the expulsion of Petitioner's counsel from the hearing. The petition cleanly presents the question whether § 153 First(q) bars judicial review of Petitioner's due process claim based on this expulsion.

A. No Forfeiture Stands in the Way of Review.

American now argues that Petitioner forfeited her due process claim by failing to object to the Board. But American itself forfeited this argument by not making it to the district court. *See* Dist. Ct. Dkt. 13.[2] American did raise forfeiture in the Third Circuit, but that court did not decide the case on that ground, resting its decision on the question presented, which suffices for this Court's review. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented[.]").

Even if American had not forfeited its forfeiture objection, a court applying the correct interpretation of § 153 First(q) would reach the merits of Petitioner's due process claim. The requirement to raise an issue before the Board is not jurisdictional and therefore may be excused, *see United Transp. Union (C) & (T) v. Union Pac. R.R. Co.*, 812 F.2d 630, 631-32 (10th Cir. 1987), and would be here for a number of reasons. First, Petitioner was effectively pro se on this issue, because her union counsel was the one who conveyed the apparent agreement between the Board, American, and IAM that her counsel of choice had to leave. C.A. 45 (¶¶43-45). Forfeiture is frequently

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[2] American argued to the district court that there was no state action because the Board had not officially ruled on Petitioner's counsel's expulsion, and that Petitioner's right to counsel under the CBA was inapposite because the Board had not ruled on this CBA-bound issue, *id.* at 11-12 nn.8-9, but did not argue that Petitioner had forfeited her *due process* argument by failing to explicitly raise it.

excused for pro se parties. *See, e.g.*, *Cirko ex rel. Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 157 (3d Cir. 2020).

Second, there is no forfeiture where objection "would have been futile" because the ground was "already thoroughly discussed." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994); *see also, e.g.*, *Keach v. New Brunswick S. Ry. Ltd.*, 953 F.3d 29, 38 n.2 (1st Cir. 2020) (no waiver where "there would have been no reason for [plaintiff] to argue this point"). Counsel for IAM told Petitioner, in full sight and hearing of the Board, that her counsel had to leave and that the neutral member of the Board concurred in this decision. C.A. 45 ¶¶43-46. The Board heard this exchange and watched counsel leave and said nothing. *Id.* at 45-46 ¶¶46-48, 48 ¶70. There was no response from the Board when IAM counsel indicated that the hearing would be cancelled if her private counsel was not removed. *Id.* at 46 ¶47. To Petitioner, it was clear that the Board, acting through IAM's counsel, had expelled her attorney, making objection futile. "[A] litigant [need not] engage in futile gestures merely to avoid a claim of waiver." *Chassen v. Fid. Nat'l Fin., Inc.*, 836 F.3d 291, 293 (3d Cir. 2016) (second alteration in original) (citation omitted).

B. The Merit of Petitioner's Due Process Claim Is an Issue for Remand.

American argues (BIO 20-22) that the Court should not resolve whether Petitioner is entitled to judicial review because her claim would fail on the merits. That puts the cart before the horse. The RLA's counsel guarantee, § 153 First(j), reinforces that

Petitioner did not receive the fair hearing she was due, but setting aside whether Petitioner will ultimately win on the merits, the question here is whether she even has the right to try. The Third Circuit said no because of its *per se* bar on due process claims, not because it peeked at the likely results. The Court should not delay reviewing this important question simply because there are follow-on issues to be determined by the district court on remand.[3]

Nor is the result preordained based on the district court's resolution of Petitioner's other claims. In the context of Petitioner's fraud claim, the district court found that Petitioner had not alleged sufficient (mis)conduct by the Board, "considering the extremely high degree of improper conduct" required under the fraud standard. Pet. App. 15. That is not the same as holding Petitioner had alleged *no* conduct by the Board that could constitute state action. Indeed, the district court went on to analyze the fraud claim "[e]ven assuming that…[the allegations are] sufficient to allege conduct by the Board itself," and found that the claim failed for other reasons applicable only to the fraud standard. *Id.* at 15-16. Whether the Board's apparent request to exclude Petitioner's counsel constitutes "state action" is a question that no court has ruled on in Petitioner's case, even implicitly, and it does not stand in the way of the Court reaching the question presented.

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[3] Similarly, whether IAM is a valid party does not affect the suitability of this case as a vehicle because all agree that American is a proper party. IAM BIO 12-13. IAM's status poses no bar to resolving the question presented, and can be addressed on remand.

III. The Decision Is Wrong.

The RLA does not foreclose due process review of arbitrator decisions. The Third Circuit's contrary position, shared by the Sixth, Tenth, and Eleventh Circuits, is wrong and requires review.

Courts historically reviewed RLA arbitration decisions for due process violations. Then, in *Union Pacific Railroad Co. v. Price*, 360 U.S. 601 (1959), the Supreme Court held that RLA arbitration decisions could be reviewed *only* for constitutional errors.

In enacting § 153 First(q), Congress's purpose was to ameliorate this unfairness and *expand*, not limit, judicial review. S. Rep. No. 89-1201, at 3 (1966) ("If...an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained...[T]his result is unfair."). Congress did not say that the new statutory grounds were "exclusive," or in any way indicate that it was withdrawing well-established due process review. *See Edelman*, 892 F.2d at 846-47 (legislative history contains no indication of any intention to restrict pre-existing review). The absence of a clear withdrawal is dispositive. *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear."). And the implication that Congress would bar judicial due process review *sub silentio* is even weaker where, as here, courts had previously exercised jurisdiction over these claims. *Utah v. Evans*, 536 U.S. 452, 463 (2002).

Consistent with these principles, after 1966, courts continued to review due process claims. *See, e.g., Rosen v. E. Air Lines*, 400 F.2d 462, 464 (5th Cir.), *cert. denied*, 394 U.S. 959 (1968); *Kotakis v. Elgin, J.*

& E. Ry. Co., 520 F.2d 570, 574 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975). The uncertainty about such review only arose after this Court's decision in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), based on a misreading of the case.

In *Sheehan*, a railroad employee claimed that he was denied due process by the NRAB when it rejected his argument about tolling the time limit in the collective bargaining agreement. *Id.* at 90. The Tenth Circuit held that the NRAB's failure to consider the merits of Sheehan's claims was a denial of due process. *Sheehan v. Union Pac. R.R. Co.*, 576 F.2d 854, 856 (10th Cir. 1978). In a brief *per curiam* opinion, the Court reversed. The Court was unsure of the basis of the Tenth Circuit's ruling; if the basis was the denial of due process for failing to consider Sheehan's claim, then the Tenth Circuit was "simply mistaken," because the NRAB did consider (and reject) it. 439 U.S. at 92. But if the Tenth Circuit was reversing on the merits of the tolling issue, it had exceeded its jurisdiction under the RLA. *Id.* at 92-93. The Court explained that the Tenth Circuit had no authority to overrule a "purely legal" decision of the NRAB interpreting the collective bargaining agreement. *Id.* at 91, 93. It was in this context that the Court discussed the narrowness of the review provisions of the RLA. *Id*. at 93.

As the Second, Seventh, and Ninth Circuits have explicitly held, *Sheehan* did not hold that the RLA bars review of due process claims. *Shafii*, 22 F.3d at 63-64; *Edelman*, 892 F.2d at 846-47; *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment v. Union Pac. R.R. Co.*, 522 F.3d 746, 751 (7th Cir. 2008). In fact, *Sheehan* itself considered the due process

claim on the merits, 439 U.S. at 92, and it repeatedly cites *Price*, which allows due process review*, id.* at 94. The Third Circuit, like the three other courts of appeals to have misinterpreted § 153 First(q), have simply over-read *Sheehan*, without much analysis, to announce a statutory interpretation it never countenanced. Only this Court can correct this error and restore uniformity to the law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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May 2022