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

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Association of American Railroads ("AAR") is a trade association whose membership includes freight railroads that operate approximately 77 percent of the U.S. rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 94 percent of all railroad employees. The AAR's members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. The AAR frequently appears before Congress, the courts, and administrative agencies on issues of national concern to the railroad industry.

The National Railway Labor Conference ("NRLC") is an unincorporated association of all of the nation's Class I freight railroads and a number of smaller freight and passenger railroads. The NRLC represents its members in multi-employer collective bargaining under the RLA and with regard to other labor-related matters of concern to the railroad industry as a whole.

The AAR and the NRLC (and their respective members) have a substantial interest in this case because the result below implicates the employee disciplinary dispute resolution process in the railroad industry. For the better part of 100 years, employee dis-

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[1] In accordance with Supreme Court Rule 37.6, *amici* AAR and NRLC state that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than AAR, NRLC and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief in compliance with Supreme Court Rule 37.2, and each has consented in writing to the filing of this brief.

cipline disputes have been resolved through arbitration under Section 3 First of the RLA. Because arbitration is the most efficient and effective way of resolving employee discipline claims, the industry has a keen interest in keeping "these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978).

SUMMARY OF ARGUMENT

This is the most important case under the Railway Labor Act to come before this Court in more than 30 years, since this Court's decision in *Consolidated Rail Corporation v. Railway Labor Executives' Association*, 491 U.S. 299 (1989) ("*Conrail*"). For decades, labor unions and rail carriers have battled over how to handle disputes that implicate the interpretation or application of collective bargaining agreements, including challenges to employee discipline. Railroads (and airlines) have fought to preserve arbitration as the exclusive venue for employee claims. Unions, by contrast, often want to bring these claims in court, on the theory that judges—who are less familiar than arbitrators with the nuances of the parties' agreements—are more likely to rule in the employees' favor.

Until now, the unions have largely failed in their attempts to circumvent arbitration. But the Fifth Circuit's ill-advised ruling in this case enables and invites litigation over run-of-the-mill discipline cases in federal court. It also perpetuates the invalid notion that Section 2 Third provides a private right of action for employees and unions, separate and apart from the process for enforcing Section 2 Third set forth in Section 2 Tenth of the RLA.

To best ensure the efficient functioning of the national transportation system, arbitration must remain the exclusive venue for the hundreds of railroad discipline cases that are filed each year. As it has in the past when RLA arbitration has been questioned, this Court should grant certiorari to preserve that statutorily-mandated dispute resolution process.

The Court should also grant certiorari to clear up the confusion in the lower courts over the scope of Section 2 Third. Aside from the specific circuit split identified by Union Pacific in its petition—concerning the meaning of the term "representative" in Section 2 Third—the lower courts have also announced varied and conflicting standards for what constitutes a violation of Section 2 Third. The existing body of case law therefore fails to provide clear guidance to litigants (on both sides) about how to interpret and apply Section 2 Third.

ARGUMENT

I. The Issues in This Case Are of Vital Importance to the National Interest in the Operation of the Railroad and Airline Industries.

Since 1926, when the RLA was enacted, this Court has repeatedly granted certiorari to address questions concerning the statutory process for resolving railroad employee disputes. In doing so, this Court has recognized that "the peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern." *Virginian Ry. v. Sys. Fed'n*, 300 U.S. 515, 552 (1937); *see also, e.g.*, *Conrail*, 491 U.S. at 311. The time has

come for the Court to once again uphold these important interests.

A. Railroad Employee Disciplinary Disputes Belong in Arbitration.

One of the most foundational principles of federal railroad labor law is that disagreements between employees and rail carriers over employee discipline (and related grievances) must be resolved through the mandatory and exclusive "minor dispute" procedures—including arbitration—set forth in Section 3 of the RLA, 45 U.S.C. § 153. This Court has repeatedly held that these disputes belong before an arbitrator and not in court. *See, e.g.*, *Conrail*, 491 U.S. at 303–04; *Sheehan*, 439 U.S. at 94; *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972); *Slocum v. Del., Lackawanna & W. R.R.*, 339 U.S. 239, 243–44 (1950); *Order of Ry. Conductors of Am. v. Pitney*, 326 U.S. 561, 567 (1946).

There are several reasons why this is so. First, reliance on the Section 3 procedures helps to "'maintain agreements', by assuring that collective-bargaining contracts are enforced by arbitrators who are experts in 'the common law of'" the industry. *Conrail*, 491 U.S. at 310 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960)). As this Court has explained,

> The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers

> and employers, and knows the industry's language, customs, and practices. . . . Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field.

Gunther v. San Diego & Ariz. E. Ry., 382 U.S. 257, 261–62 (1965). *See also Slocum*, 339 U.S. at 243–44 (railroad grievances must be left for "determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field."); *Pitney*, 326 U.S. at 567 ("An agency especially competent and specifically designated to deal with [labor disputes] has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue.").

Second, channeling these matters into arbitration avoids unnecessary burdens on the courts. Railroad employees and unions file thousands of claims every year across the industry as a whole. *See* National Mediation Board Open/Closed Case Report, available at https://nmbworkspace.secure.force.com/openclosed (last visited Oct. 4, 2022) (noting there are currently 5,553 open claims). Inviting or encouraging transfer of even a small percentage of those claims to the federal courts would greatly increase the workload of the nation's judicial system.

Third, the Section 3 process offers a fair and comprehensive means of addressing employee grievances, including challenges to discipline. In particular, as Union Pacific points out, arbitrators are fully capable of assessing claims that discipline was motivated by anti-union animus, and are empowered to offer a remedy if the claim is proven.[2] In this case, for example, if the employees' position were sustained in arbitration, the arbitrator could make them whole, including by ordering full back pay for any period during which the employees were dismissed or otherwise held out of service. *Gen. Comm. of Adjustment, UTU v. CSX R.R.*, 893 F.2d 584, 593 (3d Cir. 1990) (arbitrator "can grant a complete and adequate remedy to the prevailing party."); *see also Conrail*, 491 U.S. at 310 n.8 ("In most cases where the Board determines that the employer's conduct was not justified by the contract, the Board will be able to fashion an appropriate compensatory remedy which takes account of the delay."). Thus, despite union efforts to characterize railroad labor arbitration as a second-tier dispute resolution system that deprives employees of a fair hearing or adequate remedies, it is, in fact, more-than sufficient to address any form of challenge to discipline.

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[2] *See, e.g.*, *UTU v. Soo Line R.R.*, Award No. 25200, NRAB First Div. (Peterson, Arb.) (May 14, 2001), available at https://knowledgestore.nmb.gov (board had authority to consider a properly filed claim that exclusion of representative from disciplinary hearing was result of anti-union animus); *BMWE v. CSX Transp., Inc.*, Award No. 35022, NRAB Third Div. (Kenis, Arb.) (Oct. 25, 2000), available at https://knowledgestore.nmb.gov (rejecting claim that discipline was motivated by anti-union animus); *TCU v. Chi., Cent. & Pac. R.R.*, Award No. 30681, NRAB Third Div. (Malin, Arb.) (Jan. 31, 1995), available at https://knowledgestore.nmb.gov (same).

B. The Fifth Circuit's Ruling Allows Unions to Evade Arbitration.

Despite the ready availability and obvious advantages of specialized railroad labor arbitration, many unions spend a great deal of time and effort trying to convince federal courts that various employee disciplinary disputes are, in fact, "statutory" in nature and therefore within the jurisdiction of the courts. For example, some unions have tried recasting disciplinary issues as a question of the parties' duty to exert "reasonable efforts" under Section 2 First of the RLA. *E.g.*, *BMWED v. Norfolk S. Ry.*, 745 F.3d 808, 814 (7th Cir. 2014). They have also argued that employee discipline can and should be viewed as a question of "retaliation" for filing grievances under Section 3. *BMWED v. BNSF Ry.*, 134 F. Supp. 3d 1208, 1214 (C.D. Cal. 2015). And, as the union did in this case, they claim that discipline violates the representation provisions set forth in Sections 2 Third and Fourth of the RLA. *See, e.g.*, *UTU v. Amtrak*, 588 F.3d 805, 812 (2d Cir. 2009); *Ass'n of Flight Attendants, AFL-CIO v. Horizon Air Indus., Inc.*, 280 F.3d 901, 906 (9th Cir. 2002); *Amtrak v. IAMAW*, 915 F.2d 43, 51 (1st Cir. 1990); *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 789 F.2d 139, 142 (2d Cir. 1986); *IAMAW v. Nw. Airlines, Inc.*, 673 F.2d 700, 707–08 (3rd Cir. 1982).

Relying on this Court's decision in *Conrail*, 491 U.S. at 303–04, the lower federal courts have usually rejected efforts to reframe minor disputes as some form of "statutory" issue (such as a violation of Section 2 Third and/or Fourth). *See, e.g.*, *Int'l Bhd. of Teamsters, AFL-CIO v. UPS Co.*, 447 F.3d 491, 503 (6th Cir. 2006) ("The union offers no explanation why we

should ignore the path charted by other courts that have addressed this issue and why instead we should grant federal jurisdiction to post-certification 'representation' disputes over the meaning of a collective bargaining agreement, notwithstanding the existence of the system adjustment boards, which were established for this precise purpose.").[3] In doing so, the lower courts have generally adhered to this Court's admonition that they should be wary of any invitation to intervene in a minor dispute—including disputes over employee discipline—given the availability of arbitration under the RLA. *See Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 441 (1989) ("*TWA*") (cautioning against "judicial intervention in RLA procedures" except where "'there would be no remedy to enforce the statutory commands'" of the RLA).

Now, however, the unions can point to the Fifth Circuit's decision, saying it throws open the courthouse doors to any aggrieved employee who merely alleges that his or her discipline was motivated by "anti-union animus." While tacitly acknowledging that the

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[3] *See also, e.g.*, *Norfolk S. Ry.*, 745 F.3d at 815 (in case where "dispute grew out of the application of the parties' collective bargaining agreement in employee disciplinary actions," union cannot rely on § 2 First to establish federal court jurisdiction); *BMWED v. CSX Transp., Inc.*, 143 F. App'x 155, 160–62 (11th Cir. 2005) ("Virtually any dispute over the meaning of a term of an agreement could be recast as a dispute over the corresponding § 2 First requirements . . ."); *Horizon Air*, 280 F.3d at 906 (dispute over wearing of union pins can be decided in arbitration, rejecting argument that the dispute is statutory in nature); *BRC v. Atchison, Topeka & Santa Fe Ry.*, 894 F.2d 1463, 1466–69 (5th Cir. 1990) (*Conrail* analysis applies despite union argument regarding "direct statutory violation of the RLA's prohibition against direct dealing").

disciplinary question could be handled by an arbitrator, the Fifth Circuit nevertheless concluded that a union can still bring a claim in court so long as the employee discipline at issue allegedly "target[s] an individual union representative or a particular union branch." Pet. App. 16a.

That is a radical expansion of judicial oversight of railroad employee disciplinary matters. Unions decide which and how many of their members should have some official position in the organization. In the industry's estimation, at least ten percent of the approximately 100,000 unionized employees of the Class I freight railroads—as many as 10,000 individuals—claim to have some form of union role or status. Many of them are so-called "working" local officers, meaning that they hold full-time jobs with a railroad but also perform some union-related duties on the side. Moreover, even employees who have no official role in the union could presumably allege that they have been singled out for discipline because of their pro-union sympathies or support for their organization. *See, e.g.*, *Horizon Air*, 280 F.3d at 903–04 (alleged retaliation against flight attendants who wore pro-union pins). Under the Fifth Circuit's reasoning, any of those employees can now challenge virtually any discipline in court rather than in arbitration.[4] And with hundreds of discipline-related grievances filed each year, it is easy to see how this could quickly become a

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[4] It is little comfort to say that an employee must be able to allege discriminatory animus in order to file in court. The experience of the federal courts with the volume of cases under Title VII and similar anti-discrimination laws shows how easy it is for a disgruntled employee to allege that almost any adverse employment action was motivated by protected status.

strain on the resources of both the railroads and the courts.

Such an unwarranted expansion of Section 2 Third is of concern not just to Union Pacific, but to all railroads subject to the RLA (and presumably to airlines as well, who are subject to essentially the same statutory scheme for resolution of employee disciplinary grievances). Given the significance of these industries to the national economy and the major impact that the ruling below would have on the efficient resolution of employee disputes in the transportation sector, this Court should grant certiorari and restore Section 3 arbitration as the mandatory and exclusive forum for disciplinary grievances.

C. The Fifth Circuit's Ruling Perpetuates the Mistaken Assumption that Section 2 Third Provides an Implied Cause of Action.

In addition to its overly expansive interpretation of Section 2 Third, the Fifth Circuit assumed that Section 2 Third provides an implied cause of action for employees and unions. This Court should grant certiorari to correct that long-standing but clearly erroneous view.

Many years ago—in the era when this Court last addressed the meaning of Section 2 Third—federal courts generally believed that it was their duty to "provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). However, as this Court explained in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that is no longer the law. Modern jurisprudence provides that "private rights of action to enforce federal law must be created

by Congress." *Id.* at 286. And whether Congress has created a private right of action is a question of statutory intent, as revealed, first and foremost, by the text of the statute in question. *Id.* at 286–87 ("Without [congressional intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."); *Thompson v. Thompson*, 484 U.S. 174, 179, (1988) ("[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.").

In determining whether Congress intended to create an implied private right of action, this Court has emphasized that the existence of an express cause of action will typically foreclose judicial creation of additional rights. *See, e.g.*, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 20, 23–24 (1979) ("In view of these express provisions for enforcing the duties imposed . . . , it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'"); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.").

When these modern rules are applied to Section 2 Third, it is quite clear that there is no implied right of action. In Section 2 Tenth of the RLA, Congress expressly provided a process for addressing violations of Section 2 Third. It provides that the "willful failure or refusal of any carrier . . . to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph

of this section shall be a misdemeanor . . . ." 45 U.S.C. § 152 Tenth.[5] It further provides that the "duly designated representative of a carrier's employees"—*i.e.* a labor union—must "apply" to the United States attorney in the "proper court," who then must prosecute the matter "under the direction of the Attorney General of the United States." *Id.* There is no mention of an additional or alternative private right of action by unions or their members.

The lower courts' mistaken creation of an implied cause of action under Section 2 Third has been a significant burden for the railroads (and airlines), who are forced to litigate those claims. That burden will now only grow with the Fifth Circuit's expansion of the private cause of action. The Court should grant certiorari and hold that, as the text of the RLA states, unions and employees need to apply to the United States attorney if they wish to pursue a claim under Section 2 Third.

II. The Court Should Resolve the Confusion in the Lower Courts Over the Scope and Meaning of Section 2 Third.

In its Petition, Union Pacific sets forth a complete and cogent explanation of how the circuits are split on the meaning of the term "representative" under Section 2 Third. Pet. at 11–14. As it shows, the lower

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[5] The other provisions of Section 2 are not mentioned in Section 2 Tenth, indicating that Congress intended that those provisions would be enforceable by private right of action. *See Chi. & N. W. Ry. v. United Transp. Union*, 402 U.S. 570, 577 (1971) (finding that Section 2 First of the RLA is "enforceable by whatever appropriate means might be developed on a case-by-case basis").

courts have adopted multiple inconsistent interpretations. At one end of the spectrum, the Second Circuit has held that "representative" means the singular entity—the organization—that is the duly designated bargaining representative, not officers of the union. At the other end, we now have the Fifth Circuit's holding that "representative" encompasses any individual officer (even if the person has no role in collective bargaining). The Sixth Circuit is somewhere in-between. The industry agrees with Union Pacific that these courts' interpretations of "representative" are irreconcilable and thus reflect a clear and mature circuit split that this Court should resolve.

There is, however, a further problem with the body of case law under Section 2 Third that this Court should also address. The circuit courts have adopted widely varying standards regarding what is necessary to show a violation of Section 2 Third (and/or Section 2 Fourth of the RLA, which both courts and parties often treat as interchangeable with 2 Third). Those formulations include—but are not limited to—the following:

- **First Circuit**: "[W]e will intervene upon demonstration of carrier conduct reflecting anti-union animus, an attempt to interfere with employee choice of collective bargaining representative, discrimination, or coercion. In addition, we will intervene when a carrier commits acts of intimidation that cannot be remedied by administrative means, or commits a fundamental attack on the collective bargaining process or makes a direct attempt to de-

stroy a union." *Wightman v. Springfield Terminal Ry.*, 100 F.3d 228, 234 (1st Cir. 1996) (citation omitted).

- **Second Circuit**: "[F]ederal judicial intervention" is "warranted[] only where" "the statutorily-created adjustment board procedure might . . . be considered ineffective . . . ." *Indep. Union of Flight Attendants*, 789 F.2d at 141–42.
- **Seventh Circuit**: "The only basis for judicial intervention pursuant to Section 2, Fourth at this [post-certification] stage is when either side to the dispute has employed self-help measures that are 'inherently destructive of union or employer activity.'" *Dempsey v. Atchison, Topeka & Santa Fe Ry.*, 16 F.3d 832, 841 (7th Cir. 1994).
- **Eighth Circuit**: "[N]o cause of action lies under § 2 Third when the complaining party 'fail[s] to present adequate evidence that [the railroad's] actions have been motivated by anti-union animus or that [the railroad's] actions were an attempt to interfere with its employees' choice of their collective bargaining representative.'" *Bhd. of Locomotive Eng'rs v. Kan. City S. Ry.*, 26 F.3d 787, 795 (8th Cir. 1994).
- **Ninth Circuit**: "Judicial intervention in post-certification RLA cases has traditionally been limited to those instances where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into

> the Railway Labor Act.'" *Horizon Air*, 280 F.3d at 905 (quoting *TWA*, 489 U.S. at 441).

Given the inconsistent language in these decisions, the current state of the law under Section 2 Third is, at best, murky. What is required for an employee or a union to bring a claim? Just an allegation of any form of "anti-union animus"? Or does the claimant have to plead a "fundamental attack" that amounts to an attempt to "destroy" the union? Is it necessary to show that Section 3 arbitration would be "ineffective" or unavailable? Or, as the Fifth Circuit held in this case, is a claimant entitled to proceed in court even though the allegations could be addressed in arbitration? As matters stand, parties are left to guess.

* * *

It has been 33 years since this Court last addressed Section 2 Third. In that time, the debates between railroads and unions over arbitration of disciplinary disputes have intensified, while the lower courts have (in many cases) drifted away from the text of the statute. Thus, the time has come for the Court to once again provide direction as to the proper interpretation of this important provision of the Railway Labor Act.

CONCLUSION

The Court should grant the petition for writ of certiorari.

OCTOBER 7, 2022 Respectfully submitted,

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