

**Supreme Court of the United States**

IN THE

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO  
*Petitioner,*

v.

CONTINENTAL AIRLINES, INC.,  
*Respondent.*

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

**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether the decision below of the United States Court of Appeals for the Fifth Circuit manifests a continuing infidelity to the controlling precedents of this Court mandating only limited review of awards by system boards of adjustment under the Railway Labor Act, by invading the adjustment board's exclusive jurisdiction to resolve the merits of the parties' minor dispute and substituting its interpretation of the parties' agreement for that of the board, thereby warranting this Court's exercise of its supervisory authority?

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**PETITION FOR A WRIT OF CERTIORARI**  
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The International Brotherhood Teamsters, AFL-CIO (“IBT”), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 15, 2004.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 391 F.3d 613. Appdx. 1a-12a.<sup>1</sup> The decision of the United States District Court for the Southern District of Texas was not published. Appdx. 15a-29a.

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<sup>1</sup> References to the Petitioner’s appendix will be styled “Appdx. \_\_\_\_.”

## STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion on November 15, 2004. It issued its order denying the IBT's petition for rehearing en banc on December 14, 2004. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

### STATUTE INVOLVED IN THE CASE

Section 3, First (q) of the Railway Labor Act, 45 U.S.C. § 153, First(q) provides as follows:

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.

Section 201 of the RLA, 45 U.S.C. § 181, provides as follows:

All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Section 204 of the RLA, 45 U.S.C. § 184, provides as follows:

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.

#### STATEMENT OF THE CASE

The IBT and Continental Airlines, Inc. were parties to a collective bargaining agreement dated 1999-2001.<sup>2</sup> In August 2000, upon reporting to work, Continental aircraft mechanic Mark Johnson took an alcohol breath test that produced a result of .115 breath alcohol content. Continental terminated Mr. Johnson for reporting to work intoxicated.

Mr. Johnson grieved his discharge. That grievance was settled when Mr. Johnson, the IBT and Continental entered into a "last chance agreement," which provided for Mr. Johnson's reinstatement subject to certain conditions:

1. Submit to an initial evaluation by Continental's EAP Director or Director's designee.
2. Successfully complete the course of rehabilitation recommended by Continental's EAP, including all terms and conditions attached to such course of rehabilitation.
3. Execute and deliver to the EAP Director an undated letter of resignation to be used to terminate his em-

ployment should he fail to satisfy any terms of this Agreement or of the rehabilitation directed by EAP.

4. During the remainder of his career with Continental, should Johnson subsequently fail any drug or alcohol (.04 or greater) test, the undated letter of resignation will be accepted by the Company, and his employment severed.
5. Failure to comply with the provisions of his continuing employment, termination will result, and his right to challenge such termination through the grievance process shall be waived.
6. He acknowledges that he will have no right to file a grievance concerning the Company's acceptance and execution of his letter of resignation and/or termination of employment.
7. Johnson and IBT agree to withdraw the grievance contesting Johnson's termination.

As part of his conditional reinstatement, Mr. Johnson was referred to the Continental Employee Assistance Program ("EAP") for an evaluation and assessment. He was diagnosed with alcohol dependency and completed an alcohol treatment program. Prior to being cleared by EAP to return to work, Mr. Johnson executed an EAP rehabilitation agreement with the Company in which he agreed to fulfill the following conditions:

1. During the one-year rehabilitation period, commencing on the date of the Agreement, any use of alcohol or illicit drugs will be considered a violation of the Rehabilitation Agreement. This includes mouthwash or other medications/substances which may contain alcohol. If your doctor prescribes medication that contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.

<sup>2</sup> The parties entered an amended collective bargaining agreement that became effective on December 27, 2002.

2. You are subject to no-notice testing during the rehabilitation period. The no-notice test screens for ten drugs, plus alcohol.

3. Violation of the Rehabilitation Agreement would result in termination of employment without recourse to the grievance process.

Mr. Johnson was reinstated after passing an alcohol test. Following his reinstatement, Continental subjected Mr. Johnson to eleven no-notice alcohol tests and two Department of Transportation tests from November 2000 through March 2001. Mr. Johnson passed all of these tests.

On March 20, 2001, Johnson called Continental EAP Director Skidmore and notified him that "he was taking cough medication." Thereafter, on March 22, 2001, Continental scheduled Mr. Johnson for an alcohol test. That testing produced an initial result of .040 BAC on a test performed at 12:40 p.m. and a confirmation result of .029 BAC at 1:05 p.m. Continental thereupon purported to accept Mr. Johnson's previously executed letter of resignation and terminated his employment.

Mr. Johnson filed a grievance protesting his March 23, 2001 termination. Evidentiary hearings were conducted before the parties' system board of adjustment sitting with Arbitrator John Flagler as neutral chairman. The system board, through Mr. Flagler, issued its award on February 7, 2003 upholding the grievance and reinstating Mr. Johnson. The board found that the last chance agreement and EAP rehabilitation agreement (referred to collectively herein as "the last chance agreement" or "the agreement") were valid and binding on Johnson. It also found, as agreed to by Continental, that it had jurisdiction to determine whether Mr. Johnson violated the agreement.

After resolving these threshold issues, the board made factual findings from the record and evaluated these facts in light of the last chance agreement to determine whether

Johnson violated his obligations under the agreement. Under paragraph 1 of the EAP agreement, Johnson was required to notify the EAP staff if his doctor "prescribes" medication containing alcohol or narcotics. The Board found uncontroverted both that Johnson obtained his doctor's approval to take an over-the-counter cough medication and that he notified Skidmore he was taking the medication. Based on these facts, the board concluded that Johnson "fully met the letter and spirit of Paragraph 1."

The board found to be unsupported by evidence Continental's assertion that Johnson violated the last chance agreement's prohibition on registering an alcohol test result of .040 or higher. It noted the record evidence established that Johnson's confirmation test result registered only .029 BAC. On this basis, the board concluded "the .029 confirmatory alcohol test obviously did not qualify for summary acceptance of the Grievant's undated letter of resignation." Based on its factual findings and interpretation of the applicable contract language, the board concluded that Continental failed to prove Johnson violated the last chance agreement.

On March 6, 2003, Continental filed a lawsuit in the United States District Court for the Southern District of Texas seeking to have the award of the system board of adjustment vacated. On January 8, 2004, the district court granted the IBT's motion for summary judgment, holding that the board acted within its jurisdiction under the Railway Labor Act. Continental appealed to the United States Court of Appeals for the Fifth Circuit. The district court stayed its judgment pending appeal. In a decision issued on November 15, 2004, a three-judge panel reversed the district court and vacated the arbitration award, because it disagreed with the system board's interpretation of the Agreement. Request for rehearing was denied. Appdx. 13a-14a. Jurisdiction was properly laid in the district court pursuant to 28 U.S.C. § 1331 and in the court of appeals pursuant to 28 U.S.C. § 1291.

## REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS MANIFESTS INFIDELITY TO THE CONTROLLING PRECEDENTS OF THIS COURT GOVERNING JUDICIAL REVIEW OF AWARDS BY SYSTEM BOARDS OF ADJUSTMENT IN THAT THE LOWER COURT GAVE NO DEFERENCE TO THE BOARD'S INTERPRETATION OF THE PARTIES' AGREEMENT AND IT INVADDED THE BOARD'S EXCLUSIVE JURISDICTION OVER THIS MINOR DISPUTE BY RESOLVING THE MERITS OF THE DISPUTE; THE COURT OF APPEALS' ACTION REFLECTS A REBELLION BY THAT COURT AGAINST THE STATUTORY SCHEME OF THE RAILWAY LABOR ACT AND ESTABLISHED AUTHORITY FOR REVIEW OF LABOR ARBITRATION AWARDS THAT WARRANTS REVIEW BY THIS COURT

This case presents the Court with same challenge it faced in *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001). Here too, a court of appeals, after reciting the long-standing principles governing review of labor arbitration awards set forth in *Steelworkers Trilogy*<sup>3</sup> and its progeny, applied those principles in a manner that is "nothing short of baffling." 532 U.S. at 510. The court below ignored past admonitions of this Court that system boards of adjustment under the Railway Labor Act are "the complete and final means for settling minor disputes,"<sup>4</sup> and that "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts."<sup>5</sup> Plainly

<sup>3</sup> *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>4</sup> *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965).

<sup>5</sup> *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

exceeding its limited jurisdiction over such awards, described by this Court in *Sheehan* as "among the narrowest known to the law"<sup>6</sup>, the court of appeals paid no deference to the board's interpretation of the parties' last chance agreement. Rather, it took it upon itself to resolve the merits of the parties' minor dispute in order to vacate the decision of the adjustment board. Despite the court of appeals' recitation of the applicable standard of review, its decision represents nothing short of a usurpation of the statutorily-mandated jurisdiction of the adjustment board and infidelity to this Court's controlling precedent. Exercise of this Court's supervisory authority is therefore necessary to undo the harm done to the adjustment board procedures by that decision, and to confine the United States Court of Appeals for the Fifth Circuit to the limited role established for it under the Railway Labor Act by Congress and this Court.

The limited role of the federal courts in reviewing labor arbitration awards is long settled. In *Enterprise Wheel & Car*, 363 U.S. 593, this Court held "[t]he refusal of courts to review the merits of an arbitration award is the proper approach under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." 363 U.S. at 596. "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." *Id.* at 597. A mere ambiguity in the arbitrator's decision that may give rise to an inference he exceeded his authority is not a reason to vacate an award. *Id.* In *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, the Court noted: "the courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim or determining

<sup>6</sup> *Id.* at 91.

whether there is particular language in the written instrument which will support the claim." 363 U.S. at 567-68.<sup>7</sup>

The Court expanded on the principles of *Steelworkers Trilogy* in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). There, the Court held "the reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government" in the dispute. 484 U.S. at 37. The deference paid to arbitration decisions by the federal courts reflects also the recognition that it is the arbitrator's interpretation which the parties have agreed to accept, not that of the courts; therefore, the courts do not sit in review of the merits of that decision. *Id.* at 37-38. The court's mere disagreement with the arbitrator's findings of fact, even those which are improvident or silly, or his interpretation of the agreement is not sufficient to vacate an award. *Id.* at 38. So long as the arbitrator is even "arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.*

The scope of judicial review of adjustment board decisions under the Railway Labor Act is even narrower. Unlike the federal courts' jurisdiction under Section 301 of the Labor Management Relations Act to hear disputes arising from collective bargaining agreements, 29 U.S.C. § 185, the courts have no jurisdiction over the merits of "minor disputes" arising from grievances or other interpretive disputes under such contracts that are within the exclusive jurisdiction of adjust-

ment boards. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972); *Elgin, Joliet and Eastern Ry. v. Burley*, 325 U.S. 711, 727-28 (1946). Federal court review of these awards is "among the narrowest known to the law." *Sheehan*, 439 U.S. at 91. See also *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 563 (1987). The Act sets forth in Section 3, First(q) the three grounds upon which a court may vacate or remand the decision of an adjustment board.<sup>8</sup> This Court has emphasized repeatedly the language of Section 3, First(q) "means what it says" and "only upon one or more of these bases may a court set aside an order of the Adjustment Board." *Sheehan*, 439 U.S. at 93.

<sup>8</sup> Section 3, First(q) provides that a court may set aside the decision of an adjustment board only "for failure of the division to conform 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." 45 U.S.C. § 153, First(q).

While Section 3, First(q) does not apply directly to boards of adjustment under Title II of the Act, the framework of the Act, reflected in Section 204's requirement that airline system boards of adjustment be vested with the jurisdiction accorded to the Adjustment Board under Section 3, demonstrates Congress' intent that the federal court's authority to review the awards of system boards under Title II be no broader than the scope of review permitted under Section 3. 45 U.S.C. § 184. See also *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963)(mandate that parties adjust unresolved minor disputes before system board of adjustment is applicable to air as well as rail carriers; in view of the clearly stated purposes of the Act, Congress intended no hiatus in the statutory scheme for resolution of minor disputes in the air industry when it exempted air carriers from Section 3 and provided for the establishment of a separate national board of adjustment for the air industry). Accordingly, courts of appeal, including the court below, follow the strictures of Section 3, First(q) in reviewing decisions of airline system boards. Appdx. 6a. See also *Eastern Airlines v. Transport Workers Union*, 580 F.2d 169, 172 (5th Cir. 1978); *Air Line Pilots Ass'n v. Eastern Airlines*, 632 F.2d 1321, 1323 (5th Cir. 1980).

<sup>7</sup> The court of appeals held that the same deferential standard of review for interpreting arbitral awards under collective bargaining agreements applied to review of the system board's interpretation of the parties' last chance agreement. Appdx. 7a.

Given the exclusive jurisdiction of adjustment boards and their expertise in resolving minor disputes, the awards of such boards are entitled to presumptive weight. *Elgin, Joliet and Eastern Ry. v. Burley*, 327 U.S. 661, 664 (1946). Where the board of adjustment interprets the agreement, only if that interpretation is “wholly baseless and completely without reason” may it be set aside. *Gunther*, 382 U.S. at 261. While reciting the appropriate standard of review, the decision below failed to adhere to its exceedingly narrow jurisdiction under the RLA in passing on the award in the instant case. *See, e.g., Garvey*, 532 U.S. at 510 (“the court of appeals here recited these principles [for review of labor arbitration awards], but its application of them is nothing short of baffling.”).

In vacating the award, the court of appeals focused on the language of the parties’ EAP agreement that prohibited Johnson from using alcohol for a one-year period, including medication containing alcohol, but provided that “[i]f your doctor prescribes medication which contains alcohol/narcotic drugs, you are required to inform the EAP staff of such medication.” Appdx. 3a, 63a. The court below rejected both the system board’s conclusion that, by contacting his physician’s office and receiving instruction from the physician’s staff, as well as promptly notifying Continental’s EAP Director that he was taking the medication, Johnson “fully met the letter and spirit” of the parties’ agreement, Appdx. 10a, and the board’s underlying interpretation of the physician requirement of the agreement to be a prohibition on self-medication. *Id.*

The system board’s award was not an arguable construction of the parties’ last chance agreement, in the court of appeals’ view, because the arbitrator did not require “proof” of a doctor’s order that Johnson take cough medication.<sup>9</sup>

<sup>9</sup> Reviewing the burden of proof established by an arbitrator is an improper inquiry for a court. *Wilko v. Swan*, 346 U.S. 427, 436 (1953),

Appdx. 12a. The panel held “the Board’s interpretation effectively reads ‘doctor’ out of the EAP agreement.” *Id.* This conclusory assertion, however, simply masks what is a plain invasion of the adjustment board’s exclusive jurisdiction over the merits of the minor dispute. Since the court of appeals acknowledged that the record before it was silent on the question of whether the doctor instructed Johnson directly or indirectly through his medical staff,<sup>10</sup> it had no basis in the adjustment board’s findings to conclude “the uncontested evidence is that Johnson’s doctor never approved the use of the cough medicine he took, either orally or by a formal prescription.” Appdx. 11a-12a. It could reach this conclusion only by resolving for itself a factual issue on which the evidentiary record was silent.

Yet this Court holds that “established law ordinarily precludes a court from resolving the merits of the parties’ dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator’s decision.” *Garvey*, 532 U.S. at 511. Such a usurpation of the arbitrator’s fact-finding role is obviously erroneous under the Railway Labor Act since the federal courts are divested of jurisdiction over minor disputes like Johnson’s grievance. *Andrews*, 406 U.S. at 322. The courts are to accept the findings on the merits made by the adjustment board. *Gunther*, 382 U.S. at 263 (“the merits of the wrongful removal issue as decided by the Adjustment

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*overruled on other grounds, Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Further, adjustment boards are not restricted to common law rules of evidence in resolving minor disputes. *Gunther*, 382 U.S. at 262.

<sup>10</sup> The lower court acknowledged that prior to taking the cough medication Johnson contacted his doctor’s office and, after being told that the doctor would need to see him for an appointment before a prescription could be provided, was instructed by the staff to take over-the-counter cough medicine until his appointment date. Appdx. 10a, 11a. The record also established that Johnson informed Continental’s EAP director he was taking the medication. *Id.*

Board must be accepted by the District Court"). The court of appeals' reversal of the adjustment board's decision, therefore, rested on its improper exercise of jurisdiction over the merits of the parties' minor dispute.

To overturn the award, the court of appeals also forced upon the adjustment board a cramped and myopic reading of the parties' last chance agreement that "doctor" could mean only action literally by the physician himself, rather than including action undertaken by the staff under his supervision. The lower court's very narrow reading of the agreement is evocative of the Supreme Court's observation in *Gunther*, in reversing the court of appeals there, that the lower court's interpretation of the collective bargaining agreement "[paid] strict attention only to the bare words of the contract" and, thus, "went well beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement." 382 U.S. at 261. The court below ignored the expertise of the adjustment board in resolving disputes arising under collective agreements, and imposed its own interpretation of the last chance agreement in place of the board's. *Gunther*, 382 U.S. at 261 ("Congress has established an expert body to settle 'minor' grievances like the petitioner's"); *Burley*, 327 U.S. at 664-65 ("the Board is acquainted with established procedures, customs and usages in the railway labor world . . . Its expertise is adapted not only to interpreting the collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond that which the Act confers").

The court of appeals' analysis of the adjustment board's decision fails to reveal that award as "wholly baseless and completely without reason." *Gunther*, 382 U.S. at 261. Indeed, despite its accusation that the adjustment board read the term "doctor" out of the last chance agreement, the lower court's decision does not deny that the board interpreted the

parties' agreement;<sup>11</sup> it merely disagreed with that interpretation. *Enterprise Wheel & Car*, 363 U.S. at 598 ("The court of appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.").

The decision below undermines the minor dispute regime which is a fundamental element of the Railway Labor Act's structure. By usurping the adjustment board's exclusive jurisdiction over the minor dispute arising from Johnson's grievance and installing itself as a super-arbitration panel, the court of appeals violated the clear congressional policy identified by this Court in *Sheehan*, which "considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." 439 U.S. at 94.

The Court of Appeals for the Fifth Circuit earlier signaled its intent to break free of the strictures imposed by the Act and this Court on the review of adjustment board awards in *American Eagle Airlines, Inc. v. Air Line Pilots Ass'n*, 343 F.3d 401 (5th Cir. 2003). In the face of a dissent by Circuit Judge Dennis, which accused the panel majority of ignoring this Court's precedent for review of arbitral awards, the court of appeals affirmed a district court order vacating the system board award on the basis that it ignored the express language of the contract by setting aside a just cause discharge because the company failed to adhere to procedural requirements of the contract. 343 F.3d at 409. There, as here, the lower court ignored long-standing principles established by this Court regarding the authority of arbitrators to depart from the employer's choice of discipline, by holding that "if the relevant bargaining agreement requires just cause for dismissal,

<sup>11</sup> The court of appeals acknowledged that the adjustment board interpreted, and did not ignore, the last chance agreement. Appdx. 7a.

an arbitrator acts beyond its jurisdiction by fashioning an alternate remedy once it has concluded . . . that an employee's conduct constitutes just cause for dismissal as the Board did here." 343 F.3d at 410. See *Misco*, 484 U.S. at 41 ("Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct."); *Enterprise Wheel & Car*, 363 U.S. at 597 (an arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.");<sup>12</sup>

Perhaps emboldened by *American Eagle*, the court below expanded its holding in that case, which at least purported to rely on the arbitrator's implicit factual findings, by relying on its own resolution of factual disputes in order to conclude Johnson's physician had not directed his use of cough medication and thereby set aside the adjustment board award. The lower court's decision demonstrates its ever-developing refusal to adhere to this Court's jurisprudence for review of arbitral awards and the congressionally-mandated scheme for resolution of minor disputes. By providing for essentially de novo review of adjustment board awards, the Fifth Circuit Court of Appeals discards the principal tool making effective the minor dispute process: the finality of awards. *Sheehan*, 439 U.S. at 94 ("The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations."). Indeed, its action here was contrary to the normal purpose of finality in such awards, namely, to benefit the employee by providing a final decision without the time and expense created by drawn out litigation. *Id.* ("Normally finality will work to the benefit of the worker: He will receive

a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad.").

Mr. Johnson won before the tribunal mandated by the statute and the parties' agreement to resolve his dispute. The court of appeals, however, not content with its carefully circumscribed role, broke free of its limited jurisdiction to snatch away the victory he gained before the adjustment board. That is plainly not the purpose of the federal courts under the RLA identified by this Court. Returning the Fifth Circuit to the limited role created for it by Congress and this Court requires an admonishment as was delivered in *Garvey* when another court of appeals chafed at the restrictions placed upon it in reviewing arbitral awards. Review of the decision below is necessary to vindicate the statutory policy requiring the final and exclusive resolution of minor disputes before system boards of adjustment.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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<sup>12</sup> See also 343 F.3d at 412 (Judge Dennis citing 9 TIM BORNSTEIN ET AL., LABOR AND EMPLOYMENT LAW § 11.09 (2003) and noting "arbitrators have used this broad remedial power to reduce or reverse the discipline meted out to employees where an employer has not abided by the labor agreement's prescribed grievance process.").