No. 07-872

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

UNITED TRANSPORTATION UNION *ET AL.*,

Respondents.

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

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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February 4, 2008

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

The National Railway Labor Conference is an unincorporated association of all of the nation's Class I freight railroads and a number of smaller freight railroads. It represents member railroads in multi-employer collective bargaining under the Railway Labor Act and in regard to other labor-related matters of concern to the railroad industry generally.

The Airline Industrial Relations Conference is an unincorporated association of most of the major scheduled air carriers in the United States. Its purpose is to facilitate the exchange of information concerning personnel and labor issues and to represent its members in connection with legislative, judicial, and administrative proceedings regarding labor issues.

The ruling below – delivered in a footnote in an unpublished decision – might not appear at first glance to be an obvious candidate for certiorari. But this footnote represents the application of a settled rule in the Eleventh Circuit prohibiting "John and Jane Doe" defendants, making this a case of vital

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made such a contribution.

importance to the entire railroad and airline industries and to the public they serve. The Eleventh Circuit's rule threatens to have a pernicious and far-reaching adverse impact on commerce in the Southeast and across the Nation, for it seriously hampers the ability of rail and air carriers to secure emergency relief against wildcat strikes and other job actions in which the union's role is ambiguous or concealed. When a strike occurs, speed is of the essence: a quick halt to the illegal activity is essential in order to avoid damage to the carrier, its shippers or passengers, and the public at large. Because a railroad or airline facing a wildcat strike does not always have time to determine which of its employees are absent from work for legitimate reasons, it must name John and Jane Doe defendants.

There are no countervailing considerations in support of the Eleventh Circuit's rule. The Doe defendants are not "fictitious" in the sense that they are imaginary. Rather, those names are simply placeholders, used only until the carrier learns which of its employees are acting illegally. No cognizable interests are harmed by allowing a carrier to proceed initially against John and Jane Does and then to name specific individuals as their identities are ascertained.

Accordingly, before application of the Eleventh Circuit's ill-conceived rule causes significant damage to rail or air carriers and their customers, this Court

should grant review and reverse.[2] Indeed, because the Eleventh Circuit's ruling is so clearly incorrect, this case is a fitting one for summary reversal.

ARGUMENT

A. The Eleventh Circuit's Rule Undermines the Railway Labor Act's Purpose of Preventing Illegal Strikes.

1. Rail and Air Strikes Harm Interstate Commerce.

The significance of this case arises from its potential impact on the vital and long-standing national policy of avoiding interruptions to rail and air service caused by labor unrest. For decades, both Congress and the courts have recognized that strikes and other forms of work stoppages in the rail and air industries can cause massive and irreparable harm to carriers, their customers, and the public at large.

Strikes against rail and air carriers are particularly devastating because, "[u]nlike manufacturing industries and even some service industries, the transportation industry does not

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[2] In Florida, Georgia, and Alabama, the states covered by the Eleventh Circuit, four Class I Railroads (CSX, Norfolk Southern, Grand Trunk, and BSNF) operate over nearly 8,000 miles of track; two regional railroads operate over 775 miles; and thirty local and switching railroads operate over nearly 1,500 miles. They carried more than 9 million carloads of freight in 2007. Over 15,000 rail employees live in those three states. Likewise, 14 major airlines operate in those jurisdictions, carrying millions of passengers per year. Major air traffic hubs in the Eleventh Circuit include Atlanta – the nation's busiest airport – Orlando, Miami, Tampa, and Fort Lauderdale.

produce a storable commodity, and so it cannot produce inventory in anticipation of a strike or accelerate production afterward to make up for lost production during the strike. It is therefore peculiarly vulnerable to a strike." *Chicago & Northwestern Transp. Co. v. Railway Labor Executives Ass'n,* 908 F.2d 144, 148 (7th Cir. 1990) (Posner, J.); *see also, e.g., Air Line Pilots Ass'n Int'l v. Civil Aeronautics Board*, 502 F.2d 453, 458 (D.C. Cir. 1974) (noting that "the air transport industry suffers a greater impact by strike than do other industries and is therefore more vulnerable to strike[s]"); *American Airlines, Inc. v. Allied Pilots Ass'n*, 53 F. Supp. 2d 909, 936 (N.D. Tex. 1999) (finding that losses to carrier as a result of 10-day work stoppage were approximately $200 to 250 million), *aff'd*, 228 F.3d 574 (5th Cir. 2000).

Moreover, economic warfare against even one major carrier can cause nationwide disruptions of vital transportation services. Rail carriers exchange traffic with one another at hundreds of interchange points across the country, and shutdowns and delays on one system quickly cause havoc on the others as well. Cars pile up on the sidings, traffic must be rerouted, crucial timetables are destroyed, connections are missed, and critical delivery obligations cannot be met. Other carriers are thereby deprived of revenue and customer goodwill.

The airline industry is vulnerable to similar ripple effects from a strike against a single carrier. Disruptions on one major system – even if localized at a single hub – can cause delays and cancellations across the nation. *See Air Line Pilots Ass'n, Int'l v. United Air Lines Corp.*, 874 F.2d 439, 444 (7th Cir.

1989) (referring to "major disruption[s]" caused by airline strike).

Nor is it just the carriers that suffer from an interruption to service. The carriers' customers – as well as the general public – are victims as well. The railroads transport coal, ore, autos, steel chemicals, food stuffs, perishable produce, mail, fuel, medical equipment, military hardware, and a wide array of other commodities that are essential to the health and welfare of citizens across the United States and Canada.[3] As this Court recognized in *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 245 (1966):

> In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed.

The same is true of the airline industry. Every day, the airlines transport thousands of passengers, many of whom have no alternative to air transportation. In addition, a huge volume of mail and time-sensitive cargo is transported daily by air. Disruptions to these services as a result of labor unrest can have enormous costs for those who depend on timely delivery. *See, e.g., Delta Air Lines v. Air Line Pilots Ass'n*, 238 F.3d 1300 (11th Cir. 2001) (noting that a

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[3] In 2006 alone, the nation's major rail carriers transported 149 million tons of farm products, 61 million tons of ore, 852 million tons of coal, 141 million tons of minerals, 105 million tons of food, 43 million tons of lumber, and 167 million tons of chemicals. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2008 (127th ed. 2007) at 696.

total of 715,000 passengers were affected by cancelled flights due to job action); *American Airlines*, 53 F. Supp. 2d at 915 (finding that one-day work stoppage caused cancellation of 1200 flights).

In short, a strike inevitably threatens substantial and irreparable harm to hundreds of thousands of shippers, commuters, and other individuals across the country who depend – directly or indirectly – on air and rail transportation.[4]

Finally, a full or partial shutdown of a rail or air carrier can inflict substantial and irreparable injury on the employees of the carrier – and of connecting carriers – who were not parties to the strikers' grievance (such as the locomotive engineers in this case, who were deprived of the opportunity to crew the trains that could not run during the work stoppage).

The irreparable injury to a carrier and its employees and the severe economic consequences to the national and local economies that result from a strike were the principal reasons for enactment of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

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[4] Many companies served by the rail industry, such as automobile assembly plants, operate on a "just-in-time" basis for deliveries, meaning that they have no inventory on which to draw in the event of shipment delays. Thus, even brief disruptions in rail service could lead to interruption or shutdown of basic industries.

2. Carriers Rely on the RLA to Deter and Prevent Illegal Strikes.

The primary stated purpose of the RLA is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a; *see also Texas & New Orleans R.R. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 565 (1930) ("[T]he major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes."). The Act accomplishes that purpose by channeling different kinds of labor disputes into specialized forms of mandatory dispute resolution procedures. So-called "minor disputes" involve the interpretation or application of existing collective bargaining agreements. *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). These disputes are subject to mandatory conference and arbitration procedures. 45 U.S.C. §§ 152 Second, 153 First (i). Attempts to circumvent these procedures by striking are unlawful and may be enjoined, notwithstanding the Norris LaGuardia Act. *Brotherhood of R.R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30 (1957).

"Major" disputes are disputes over the formation or amendment of collective bargaining agreements, and are subject to negotiations, conferences, mediation, voluntary arbitration, and the possible creation of an emergency board by the President. These major dispute procedures are "purposely long and drawn out," *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), their exhaustion is "an almost interminable process," *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969), and until they are exhausted a carrier may

not implement changes and the employees may not strike. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Notwithstanding the mandatory nature of these dispute resolution procedures, unions – well aware of the carriers' sensitivity to work stoppages – sometimes use strikes (or threats of strikes) to increase their leverage in labor disputes. *See, e.g., Burlington Northern Santa Fe Ry. v. BMWE,* 286 F.3d 803 (5th Cir. 2005) (discussing one union's long history of launching illegal "surprise strikes" and work stoppages). To be sure, courts routinely enjoin such actions as violations of the RLA. *See, Chicago River*, 353 U.S. at 40-42.[5] But even if they know that the strike will be enjoined, unions have little to lose from attempting to bring economic pressure to bear upon a carrier, especially in light of lower court rulings that carriers may not recover damages caused by illegal strikes.[6] The result is that carriers and unions are often engaged in a high-stakes footrace, as the carrier tries to secure an emergency injunction before an impending job action takes

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[5] *See also, e.g., Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 304 (1989) (holding that courts may enjoin strikes arising from minor disputes); *BMWE v. Union Pacific R.R.*, 460 F.3d 1277 (10th Cir. 2006) (upholding strike injunction); *Amtrak v. TWU*, 373 F.3d 121 (D.C. Cir. 2004) (holding that threatened one-day strike is illegal and enjoinable); *BMWE v. Union Pacific R.R.*, 358 F.3d 453 (7th Cir. 2003) (upholding strike injunction); *BMWE v. Atchison T. & S.F. Ry.*, 138 F.3d 635 (7th Cir. 1997) (minor dispute strike is illegal and may be enjoined).

[6] *See, e.g., Norfolk Southern Ry. Co. v. Brotherhood of Locomotive Engineers*, 217 F.3d 181 (4th Cir. 2000) (citing cases).

place, while the union attempts to organize a walk-out before the carrier can get to court.

B. Carriers Must Be Able to Name John and Jane Does When Seeking an Emergency Injunction Against a Wildcat Strike.

Because they know that courts will usually put a stop to a strike as soon as a carrier can present a motion for a temporary restraining order, unions have, in recent years, become more sophisticated in their approach to the use of economic force. They have increasingly employed tactics such as slow-downs, sick-outs, and work-to-rule campaigns, which – as the case at bar demonstrates – are harder to identify and prove. *See, e.g., United Air Lines v. International Ass'n of Machinists & Aerospace Workers*, 243 F.3d 349 (7th Cir. 2001) (involving "work safe" slow-down); *Delta Air Lines*, 238 F.3d at 1302-03 (concerted "no-overtime" campaign by pilots).

Unions may also evade injunctions against illegal job actions that are undertaken – in truth or pretence – without their authorization. When a union disclaims responsibility for a so-called "wildcat" strike, a carrier may not be able to stop the action by the usual means of a temporary restraining order against the union. *See* 29 U.S.C. § 106 (requiring proof of participation, authorization or ratification of unlawful acts by union); *cf. also United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1966) (requiring clear and convincing proof of union involvement in illegal strike activities). In these circumstances, the carrier's only immediate alternative is to sue the employees themselves.

But doing so is difficult as a practical matter. Speed is a critical factor in stopping a strike or a slowdown. The effects of any sudden work stoppage spread like wildfire, rippling out from the point of origin to paralyze an ever-increasing segment of the nation's transportation system. Just as a blizzard at O'Hare Airport in Chicago quickly disrupts air travel across the nation, the impact of any work stoppage will rapidly be felt throughout the affected rail or air network. The longer such disruptions last, the more damage they do and the harder it becomes to put the system back on track. The effects of a stoppage lasting only a few hours can be felt for weeks thereafter. Hence there is enormous pressure to get to court as quickly as possible to obtain emergency relief. Yet, in the early hours of a job action for which the union disclaims responsibility, the carrier may be unable to identify which of its employees are engaged in unlawful conduct and which are absent from the workplace for legitimate reasons.

In these circumstances, the carriers *must* sue John and Jane Doe employees at the outset and obtain immediate injunctive relief against them – relief in the form of an order that the carrier can post at the workplace and/or otherwise distribute to its entire workforce.[7] *See, e.g., Delta Air Lines*, 238 F.3d at 1304 n.9 (noting that carrier named one hundred John and Jane Does as defendants). A typical

[7] It is no answer to suggest that the carrier might avoid its dilemma by naming as defendants every individual member of the involved union. Such a complaint would, by definition, be over-inclusive, covering at least some (unidentified) employees whom all agree are innocent of any wrong-doing.

emergency order will put all employees on notice that, if they are participating in illegal conduct, they must desist or else face contempt of court in addition to potential discipline (including termination) by the carrier. The ability to name John and Jane Doe defendants is the only way of rapidly obtaining a temporary halt to an illegal wildcat action where the union disclaims responsibility for the employees' actions. A quick halt to the work stoppage allows the carrier, the union, and other affected parties time to identify and address the underlying issues that gave rise to the strike.

C. The Eleventh Circuit's Rule Has Nothing to Recommend It.

The Eleventh Circuit's rule – forbidding a carrier to sue fictitious defendants on a temporary basis – will hamstring the carrier's legitimate interest in stopping an illegal work action and frustrate the RLA's policy of averting interruptions to commerce. What might be the justifications for such a costly rule? The decision below offered none, simply citing to *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997), and *Wiggins v. Risk Enter. Mgmt. Ltd.*, 14 F. Supp. 2d 1279, 1279 n.1 (M.D. Ala. 1998) (Pet. App. at 3a n.1), decisions that in turn offer no explanation why fictitious defendants may not be named temporarily in federal courts.

A few cases appear to frown on the use of fictitious John Doe defendants in circumstances where it destroys diversity jurisdiction. *Weeks v. Benton*, 649 F. Supp. 1297, 1298-99 (S.D. Ala. 1986) (citing cases from the Ninth Circuit). That is not a concern here, however, because carriers suing to enjoin strikes under the RLA do so using federal question

jurisdiction, not diversity jurisdiction. Another case from a court within the Eleventh Circuit suggested that naming fictitious defendants was improper because "[t]he only purpose [it] could possibly serve is to make it possible to later substitute specifically named and specifically identified defendants * * * after the statute of limitations has run," which Federal Rule of Civil Procedure 15(c) purportedly does not allow. *McAllister v. Henderson*, 698 F. Supp. 865, 869 (N.D. Ala. 1988). But rail and air carriers faced with illegal work stoppages are not concerned with evading the statute of limitations: they have an entirely different – and legitimate and pressing – reason for naming fictitious defendants when they seek a temporary restraining order.

Finally, it is worth noting that the John and Jane Does named as defendants by a carrier faced with a strike or work stoppage are not fictitious in the sense that they are figments of the carrier's imagination. They represent real people whose identities at the moment are unknown to the carrier and they must be named as defendants so that, when the union declines responsibility, the carrier can nevertheless get immediate injunctive relief. The real names are substituted at a later date, after the carrier is able to take discovery. The use of "fictitious" defendants in these circumstances is perfectly appropriate, as the many authorities cited by Petitioner recognize. Pet. at 12-14.

In short, at least in the context of a strike or work stoppage against a rail or air carrier, the Eleventh Circuit's rule against naming fictitious defendants has no basis in logic or public policy. To the contrary, it gravely impedes the carriers' ability to

put an immediate end to potentially crippling interruptions to commerce, while failing to serve any recognized interests of the unions, its members, the courts, or the public interest. This Court should therefore grant review and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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