No. 09-494

In The
Supreme Court of the United States

JERRY CRAWFORD, CHARLES ANNABEL, DARRYL BALLARD, MATTHEW BURDO, DON HOSKINS, ROY LANNING, PETER POWELL, WANDA SIMPSON, DANIEL SLANE,
Petitioners,

v.

TRW AUTOMOTIVE U.S. LLC,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review its holding in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry*, 520 U.S. 515 (1997) where Petitioners prevailed on their argument that ERISA § 510 of the Employee Retirement Income Security Act (ERISA) applies to plant closing cases and where both courts followed *Inter-Modal Rail.*

2. Whether this Court should address Petitioners' request to apply a mixed motive analysis to ERISA § 510, claims where Petitioners never argued before the lower courts that such an analysis should be applied and where the facts of this case do not suggest a mixed motive.

3. Whether this Court should address whether alter-ego concepts should be applied to ERISA § 510 cases to impose collectively bargained obligations negotiated for a single site of an employer to other non-unionized sites of the same employer.

4. Whether this Court should address remedies for ERISA § 510 violations where the lower courts found no ERISA § 510 liability and where the lower courts did not reach the issue of remedies.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Petitioners do not include the class[1] certified by the district court.

Respondent TRW Automotive U.S. LLC is an indirect subsidiary of TRW Automotive Holdings Corp which is publicly traded. (NYSE: TRW)

[1] On March 31, 2007, the district court certified a class action, with the Petitioners as the class representatives. After summary judgment was entered against the class by the district court, the class unsuccessfully appealed to the court of appeals. The class, however, has not been designated as a party to Petitioners' petition.

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STATEMENT OF THE CASE

The named Petitioners are nine former employees of Defendant TRW Automotive U.S. LLC's ("TRW") Van Dyke Road manufacturing plant in Sterling Heights, Michigan ("Van Dyke Plant"). Production employees employed at this plant were represented by the United Autoworkers Union (UAW). TRW and UAW Local 247 were parties to a collective bargaining agreement ("CBA") that covered the terms and conditions of employment of bargaining unit members employed at the Van Dyke Plant. The UAW and TRW also negotiated a defined benefit pension plan for the benefit of Van Dyke Plant bargaining unit employees (TRW Automotive Sterling Plant Pension Plan) (the "pension plan"). (R.34 Exhibits to MSJ, Ex. 1 – relevant portions of pension plan, Sealed ROA pp. 563-572)

Under the Van Dyke Plant pension plan, employees who retired from active service with 30 or more years of benefit service at the Van Dyke Plant were entitled to an early retirement benefit as defined by the plan. (R.34 Exhibits to MSJ, Ex. 1 - 5.2(b) of plan, Sealed ROA p. 567) Employees retiring with 30 or more years of benefit service received a pension supplement and retiree medical coverage. (R.34 Exhibits to MSJ, Ex. 1 - Pension Plan Section 6.2(c), Sealed ROA pp. 569-570, and Ex. 2 – CBA section 32.1.4, Sealed ROA p. 576). There was also an early retirement benefit under the pension plan for employees who retire from active service on or after age 55 and with 10 or more years of service. (R.34 Exhibits to MSJ, Ex. 1 - 5.2(a) of plan, Sealed ROA p. 567) Employees age 55 with 10 or more years of benefit service received retiree medical coverage. (R.34 Exhibits to MSJ, Ex. 2 - CBA 32.1.4,

Sealed ROA p. 576) Under the terms of the pension plan and CBA, benefit service may only be earned at the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 1 – 1.1(j), Sealed ROA pp. 564-565) Generally, benefit service is earned for each year in which the employee is paid for services performed and during certain periods of leaves of absence.

The Van Dyke Plant

By 2004, TRW was faced with significant overcapacity within the suspension division of its North American Braking & Suspension group, which included the Van Dyke Plant. TRW was unable to generate sufficient business, caused in part by the loss of market share by the Van Dyke Plant's largest customers (Ford and DaimlerChrysler) and increased international competition. (R.34 Exhibits to MSJ, Ex. 9 – Sterling (Van Dyke) Business Review - Bates No. 6854, 6857, Sealed ROA pp. 592-594) At the same time, TRW was experiencing the same overcapacity problem in other product lines within the North American Braking & Suspension group. As a result, TRW determined it needed to reduce the number of manufacturing facilities in North America. (R.34 Exhibits to MSJ, Ex. 10 - Bates No. 5081, Sealed ROA p. 596)

By 2004 the vast majority of the Van Dyke Plant manufacturing space was unused. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 90, ROA p. 607) Indeed, of the over 300,000 square feet of production capacity, the sales profile showed that only 30,000 square feet (10% of capacity) would be utilized. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 43, Sealed ROA p. 600; Ex. 9 - Bates 6857, Sealed ROA p. 594) As a result of the

overcapacity, the overhead costs of such a large plant were prohibitive. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 90, Sealed ROA p. 607) Due to the unused capacity, fixed costs of the Van Dyke Plant accounted for 26% of every sales dollar; an acceptable fixed cost percentage would have been between 10-15%. (R.34 Exhibits to MSJ, Ex. 9 - Bates No. 6857, Sealed ROA p. 594)

In approximately September 2004, TRW's North American Braking & Suspension group formulated a restructuring plan in which it analyzed the costs and benefits of shutting down several facilities in North America, including the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 10 - Bates No. 5082, Sealed ROA p. 597) The plan was studied and refined until August 2005 when TRW eventually announced its intention to close the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 14 - Bates No. 4457, Sealed ROA p. 619) Consistent with its obligations under federal labor law, TRW negotiated with UAW Local 247 regarding the decision to close the Van Dyke Plant and the effects of the closure. (R.34 Exhibits to MSJ, Ex. 15 - Osborne 9, Sealed ROA p. 620) The Van Dyke Plant was eventually closed on January 26, 2007.

The Mancini Drive Facility

Meanwhile, in late 2003, DaimlerChrysler contacted TRW and asked it to bid on module assembly work for four North American DaimlerChrysler plants – one in Ontario, one in Mexico, one in Missouri, and one in Sterling Heights, Michigan. The "module" work entailed TRW scheduling receipt of component parts from other manufacturers selected by DaimlerChrysler, assembling them into various

modules,[2] sequencing them for ready assembly into vehicles, and (in some cases) transporting the modules to the DaimlerChrysler assembly plant. (R.34 Exhibits to MSJ, Ex. 11 – Hoover 46-47, Sealed ROA p. 603-604; Ex. 17 - Bates No. 2951, Sealed ROA p. 657; Ex. 18 - Weiss 111, Sealed ROA p. 678) This business model was far different than the work previously performed at the Van Dyke Plant, which entailed the actual manufacture of components by TRW. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 46-47, Sealed ROA pp. 603-604) In the case of module work, TRW would merely acquire and assemble components manufactured by other suppliers chosen by its customer. (R.34 Exhibits to MSJ, Ex. 17 - Bates No. 2951, 2958, Sealed ROA p. 657, 664) The module work involved no manufacturing whatsoever by TRW. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 46-47, Sealed ROA pp. 603-604; Ex. 18 - Weiss 111, Sealed ROA p. 678)

DaimlerChrysler required the successful bidder to fully assemble each module to individual specifications and to sequence them in order so that they would be ready for assembly into a vehicle, within 60-90 minutes. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 46, Sealed ROA p. 603; Ex. 17 – Bates No. 2951, Sealed ROA p. 657) The module assembly facility would require approximately 70,000 square feet of floor space with at least 10 shipping bays adjacent to the assembly

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[2] Depending on the program being supported at the various module assembly plants, the modules included front suspension modules (including power steering components and brake components); rear suspension modules (including brake components); front strut modules; and rear shock modules. (R.34 Exhibits to MSJ, Ex. 16 - Launch Readiness Review – Bates Nos. 6797-6820, Sealed ROA pp. 625-648; Ex. 17 Launch Readiness Review – Bates Nos. 2943 – 2968, Sealed ROA pp. 649-674)

lines. (R.34 Exhibits to MSJ, Ex. 16 - Bates No. 6798, Sealed ROA p. 626; Ex. 11 - Hoover 43, Sealed ROA p. 600; Ex. 20 - Muckley 196, Sealed ROA p. 684) Moreover, the module work was to be done at a very low profit margin. (R.34 Exhibits to MSJ, Ex. 21 - Bates No. 6408, Sealed ROA p. 685)

With respect to supplying the Sterling Heights, Michigan facility, DaimlerChrysler initially suggested that TRW prepare its bid using the existing Van Dyke Plant as the location for performing the module work.[3] (R.34 Exhibits to MSJ, Ex. 11 - Hoover 39, Sealed ROA p. 599) However, TRW ultimately determined the Van Dyke Plant was not suitable for the module assembly work for several reasons, including insufficient ingress and egress, excess size resulting in burdensome overhead costs, excessive labor costs under the Van Dyke CBA especially in view of the unskilled nature of the module work, and the limited duration of the contract with DaimlerChrysler. (R.34 Exhibits to MSJ, Ex. 20 - Muckley 182 -183, 196, Sealed ROA pp.682-683, 684; Ex. 11 - Hoover 43-44, Sealed ROA pp. 600-604)

DaimlerChrysler ultimately awarded the module work for all four facilities to TRW Automotive Holdings Corp.'s Kelsey-Hayes Company subsidiary. DaimlerChrysler issued its first purchase order in February 2005 to supply module assemblies for a five-year period. (R.34 Exhibits to MSJ, Ex. 20 - Muckley

[3] Contrary to the unsupported arguments in Petitioners' brief, TRW never originally planned to place the module work at the Van Dyke Plant.

156, Sealed ROA p. 681) Kelsey-Hayes Company,[4] in turn, leased a new 70,000 square foot assembly facility at 42315 Mancini Drive in Sterling Heights, Michigan (Mancini Drive facility). (R.34 Exhibits to MSJ, Ex. 11 - Hoover 44-45, Sealed ROA pp. 601-602) In August 2006, Kelsey-Hayes Company began regular production of module assemblies at its Mancini Drive facility. Regular, full time employees at the Mancini Drive Plant are employed by Kelsey-Hayes Company, rather than Defendant. Employees at the Mancini Drive Plant are not represented by a union, and they do not have a defined-benefit pension plan or retiree medical benefits. (R.34 Exhibits to MSJ, Ex. 23 - Bates No. 6784, Sealed ROA pp. 688-689).

Notably, the manufacturing work performed by the named Petitioners was not transferred to or performed at the Mancini Drive Plant. (R.34 Exhibits to MSJ, Ex. 22 - Bates 6874, Sealed ROA pp. 686-687) Further, the vast majority of the salaried workforce at the Van Dyke Plant was not transferred to Mancini Drive. Only five salaried personnel from the Van Dyke Plant worked at the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 18 – Weiss 57, Sealed ROA p. 676)

Negotiations With The UAW

The uncontradicted deposition testimony establishes that the decision to close the Van Dyke Plant and the decision to place the module work at the Mancini Drive facility were completely independent decisions. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 55,

[4] TRW Automotive U.S. LLC and Kelsey-Hayes Company are both indirect subsidiaries of TRW Automotive Holdings Corp., which is not a party to this litigation.

Sealed ROA p. 605) It is further uncontradicted that – even though the decisions were separate -- TRW negotiated with UAW Local 247 regarding potential preferential hiring rights for Van Dyke Plant employees at the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 13 - Stuglin 18, 19, Sealed ROA pp. 615-616; Ex. 15 - Osborne 21, Sealed ROA p. 621). During closure negotiations, TRW also negotiated over the union's request to grant additional pension credits to Van Dyke Plant employees. (R.34 Exhibits to MSJ, Ex. 13 – Stuglin 22–23, Sealed ROA pp. 617-618)

The union committee was unwilling, however, to compromise on items TRW requested in exchange for the additional benefits the union sought. (R.34 Exhibits to MSJ, Ex. 15 - Osborne 43, Sealed ROA p. 622) With no concessions from the union, TRW calculated that closing the Van Dyke Plant would cost it in excess of $15 million. This included $9.7 million in "curtailment costs" – the net additional pension and retiree medical costs TRW would have to immediately recognize under the accounting rules due to the closure. (R.34 Exhibits to MSJ, Ex. 24 - Kiwicz 33, Sealed ROA 690; Ex. 25 - Bates Nos. 7743-7744, Sealed ROA pp. 691-693)

Meanwhile, TRW continued to perform the remaining work at the Van Dyke Plant consistent with the terms of the CBA. As was the practice since at least the 1980s, TRW employees worked overtime. (R.34 Exhibits to MSJ, Ex. 4 - Burdo 28, Sealed ROA p. 580; Ex. 11 - Hoover 94-95, Sealed ROA p. 608-609) Petitioners have produced no evidence that TRW scheduled any more overtime during the last months of production as compared with any prior periods. Indeed, Petitioner Burdo testified that TRW worked

extensive overtime as far back as the 1980s. (R.34 Exhibits to MSJ, Ex. 4 - Burdo 63, Sealed ROA p. 581) Further, it is undisputed that, under the terms of the Van Dyke Plant CBA, all overtime was voluntary. TRW therefore had no authority to require anyone to work overtime. (R.34 Exhibits to MSJ, Ex. 15 - Osborne 50-51, Sealed ROA pp. 623-624)

TRW maintained its planned employee headcount and costs throughout the plant closing process. (R.34 Exhibits to MSJ, Ex. 11 - Hoover 94-95, Sealed ROA pp. 608-609) Depending on each worker's job category, some worked more overtime between 2003 and the announced plant closing date and some worked less: Petitioner Hoskin testified that between 2003 and 2005, the amount of overtime he worked decreased. (R.34 Exhibits to MSJ, Ex. 7 - Hoskin 20, Sealed ROA p. 590) As needs arose, TRW recalled Van Dyke Plant employees from layoff by order of seniority under the CBA to complete final work before the plant closing. (R.34 Exhibits to MSJ, Ex. 18 - Weiss 91, Sealed ROA p. 677) Indeed, after it announced its intent to close the Van Dyke Plant, TRW recalled Joseph Horton and Heidi Blankenship from layoff and, because of their return to work, the two employees accrued 30 years of pension credit. (R.34 Exhibits to MSJ, Ex. 12 - Hughes 157, Sealed ROA p. 612; Ex. 26 - service credit chart, Sealed ROA pp. 694-701)

At the time TRW announced its intention to close the Van Dyke Plant in August 2005, there were approximately 77 bargaining unit members who were eligible to retire with 30 years of credited service. (R.34 Exhibits to MSJ, Ex. 27 - Bates No. 4268, Sealed ROA p. 702) An additional 20 bargaining unit members were eligible to retire at age 55 with ten

years of service. *Id.* Meanwhile, between the end of 2003 and the closing of the Van Dyke Plant, 13 more bargaining unit members earned sufficient additional pension service credit to achieve 30 years of pension service credit. *Id.* During that same time period, 97 bargaining unit members retired with 30 years of pension service credit. (R.34 Exhibits to MSJ, Ex. 26 – Service credit chart, Sealed ROA pp. 694-701).

By the time of the actual closing of the Van Dyke Plant, only three bargaining unit members missed a 30 year retirement by less than one year of benefit service and an additional four bargaining unit members (for a total of 7) missed a 30 year retirement benefit by fewer than two years of benefit service. *Id.* Of the 102 individuals encompassed by the class certified by the district court, only 11 workers needed less than five additional years of benefit service in order to achieve 30 years of benefit service. *Id.* All other potential class members – 91 in total -- needed to work at least an additional five years in order to achieve 30 years of credited service. *Id.* Indeed, the Class certified by the district court includes *39* bargaining unit members who needed more than 20 years of additional benefit service to achieve 30 years of benefit service. *Id.*

Petitioners' Claims

Petitioners' Amended Complaint alleges that Defendant violated ERISA § 510 of the Employee Retirement Income Security Act, 29 U.S.C. §1140, ("ERISA") by: (1) failing to "recall the Plaintiffs to work following a layoff for the specific purpose of preventing them from establishing eligibility for their 30 year service pension and obtaining their company paid for medical and health insurance;" and (2) "intentionally

clos[ing] the Van Dyke Plant for the purpose of preventing employees from maintaining and continuing to qualify for their pension and health benefits." On March 31, 2007, the district court certified a class on the basis of "whether TRW closed the Van Dyke Plant and refused to transfer employees to the Mancini Drive facility in order to interfere with the employees' ERISA benefits; and (2) whether such conduct constitutes a violation of Section 510 of ERISA." (R.33 SJ Motion, Ex. A – Order granting class certification, ROA pp. 82-95) Thus, Petitioners' claims before the district court consisted of a class claim that TRW unlawfully closed its Van Dyke Plant and refused to transfer Van Dyke Plant employees to the Mancini Drive facility and individual claims that TRW unlawfully failed to recall Van Dyke Plant employees from layoff. Petitioners are not seeking certiorari on behalf of the class certified by the district court. Rather, they seek certiorari on behalf of the named Petitioners only.

District court Proceedings

On October 24, 2007 the district court issued its Opinion and Order granting Summary Judgment (R.51, SJ Order, ROA pp. 198-216) and issued a separate Judgment. The Court held that although Petitioners presented a *prima facie* case under ERISA § 510 based on the closing of the Van Dyke Plant, TRW demonstrated legitimate non-discriminatory reasons for closing the Van Dyke Plant because the closure was part of an overall effort to consolidate facilities operations within the North American Braking & Suspension group. (R.51, SJ Order, p. 17, ROA p. 214) The district court held that while the cost of ERISA benefits was one factor that rendered the wage

structures within certain facilities uncompetitive, those were not the only costs. *Id.*

Addressing Petitioners' allegations that TRW failed to recall workers from layoff or transfer them to the Mancini Drive facility, the district court held that Petitioners failed to present any case where the statute was applied to such employment decisions. (R.51, SJ Order, p. 11, ROA p. 208) The district court held that Petitioners presented no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting whom to recall from layoff. *Id.* Likewise, the district court held that Petitioners could not pursue their ERISA § 510 claim based on a failure to transfer employees to the Mancini Drive facility because the CBA between TRW and the UAW provided that employees accrued benefit service hours only for work performed at the Van Dyke Plant. (R.51, SJ Order, p. 12, ROA p. 209) The district court rejected Petitioners' argument that the Mancini Drive facility was an "alter-ego" of the Van Dyke plant because the "alter-ego" theory had no application to the case. (R.51, SJ Order, p. 12, ROA p. 209)

Finally, the district court held that Petitioners failed to show that TRW's articulated reasons for closing the Van Dyke Plant were a pretext for intentional discrimination. (R.51, SJ Order, p. 12, ROA p. 209) The district court held that TRW established a legitimate non-discriminatory reason for its actions. (R.51, SJ Order, pp. 17-18, ROA pp. 214-215) The district court rejected Petitioners' arguments that TRW's decisions were more likely motivated by the desire to interfere with ERISA benefits and that TRW's proffered reasons were unworthy of credence. (R.51, SJ Order, pp. 17-18, ROA

pp. 214-215) The district court held that "[a]t most, Plaintiffs' proofs [regarding TRW's consideration of costs] demonstrate that TRW considered legacy costs as one, among several, factors in deciding to reduce the number of facilities in its North American Suspension group and in selecting which facilities to close." (R.51 SJ Order p. 18, ROA p. 215) The Court also rejected Petitioners' arguments that "overcapacity" was an explanation unworthy of credence.

Petitioners moved for reconsideration of the district court's Order pursuant to E.D. Mich. LR 7.1(g), which the district court denied. (R.61, Order denying reconsideration, ROA pp. 278-284) The district court reiterated its prior holding that Petitioners presented no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting whom to recall from layoff. (R.61, Order denying reconsideration, p.3, ROA p. 280) The district court also enumerated four separate reasons as to why Petitioners' "alter-ego" theory is inapplicable to this case. (R.61, Order denying reconsideration, p.4, ROA p. 281) Finally, the district court rejected Petitioners' argument that they need only show that the cost of retiree benefits was *a* factor, rather than a motivating factor in the employer's decision. (R.61, Order denying reconsideration, p.4, ROA p. 281)

On March 5, 2008, Petitioners filed a "Motion for Relief from Judgment Based on Newly Discovered Evidence Pursuant to Federal Rule of Civil Procedure 60(b)(2)," asking the Court to grant their motion so they could seek remand from the court of appeals so as to re-open discovery into whether former Van Dyke Plant work was being performed at the Mancini Drive facility. (R.67, Motion for Relief from Judgment, p. 4,

ROA p. 290) Petitioners' motion was based on (1) an affidavit of Petitioner Burdo who stated that he talked with an unidentified man eating a sandwich in the parking lot of the Mancini Drive facility and (2) documents showing that a building permit was issued in June 2007 to expand the Mancini Drive facility. (R.67, Motion for Relief from Judgment, p. 3, ROA p. 289; R.68, Exhibit 2, ROA pp. 313-315) The district court denied Petitioners' motion.

On May 14, 2008, Petitioners filed a motion for reconsideration of the district court's Order denying relief from judgment, reiterating the same arguments in its original motion for relief from judgment. (R.81, Motion for Reconsideration, ROA p. 500) Petitioners also submitted an additional affidavit from Petitioner Burdo which recounted more hearsay and Burdo's opinion that the equipment in the Mancini Drive facility was similar to the equipment in the Van Dyke Plant. (R.82, Burdo Affidavit, ROA p. 515-516) The district court denied Petitioners' motion for reconsideration on June 10, 2008, holding that there was no error in the prior ruling. (R.85, Order denying reconsideration, ROA p. 521). Petitioners did not appeal the district court's denial of the motion for reconsideration of the denial of their motion for relief from judgment.

Court of appeals proceedings

The court of appeals, applying the *McDonnel Douglas* burden shift paradigm, found that the Petitioner stated a *prima facie* case under ERISA § 510 on Petitioners' theory that TRW unlawfully closed the Van Dyke Plant. The court, however, found that Petitioners could not proceed on their theories of

liability based on a failure to recall Petitioners from layoff or transfer them to the Mancini Drive facility. The court found that the decisions to recall some employees and not others were not discriminatory because those decisions were based on seniority in accordance with the requirements of the CBA and at least two employees accrued enough pension credits to retire with benefits after being recalled. With regard to the failure to transfer Petitioners, the court found that the CBA under which their entitlement to benefits was to be determined provided no such rights.

The court of appeals found that TRW stated a legitimate non-discriminatory reason for closing its Van Dyke Plant: overcapacity. Further, the court found that Petitioners were unable to show that TRW's articulated reason for closing the Plant was a pretext for unlawful discrimination. Petitioners failed to present evidence that TRW targeted certain employee benefits or rights for interference.

The court of appeals also affirmed the district court's denial of Petitioners' motion for relief from judgment. Petitioners are not seeking certiorari on this ruling.

REASONS FOR DENYING THE WRIT

The Court should deny the petition for a writ of certiorari because this case does not present any of the circumstances upon which the Court grants certiorari. Under ordinary circumstances, the Supreme Court does not grant a petition for certiorari unless (1) there is conflict among the circuits, (2) the case is one of general importance, or (3) the lower courts' decisions are wrong in light of Supreme Court precedent. *See*

Hubbard v. U.S., 514 U.S. 695, 699 (1995) (granting the petition for certiorari when there was a split in the federal circuits); *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 672 (1998) (granting the petition for certiorari when considering the "manifest importance of the case"); *Spears v. U.S.*, 129 S. Ct. 840, 842 (2009) (granting the petition for certiorari where the Eighth Circuit's decision on remand conflicted with a recent Supreme Court decision on issue).

In this case there is no split among the circuits regarding any issue that was actually decided in this case; Petitioners cannot show any issue of general importance that was actually decided in this case; and Petitioners do not even contend that any decision of the lower courts was wrong in light of Supreme Court precedent. Moreover, Petitioners prevailed on one of the issues upon which they seek certiorari; one of the issues upon which they seek certiorari was never argued in the lower courts; and one of the issues upon which Petitioners seek certiorari was never reached by the lower courts. There is simply no basis on which the Supreme Court should grant the petition for certiorari.

I. This court has already held that ERISA § 510 protections apply to plant closing and adverse employment actions

Petitioners argue that this Court should reaffirm its unanimous decision in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry*, 520 U.S. 515 (1997). In this case, both the district court and the court of appeals followed *Inter-Modal* and rejected any attempt by Defendant to narrow its application. The court of appeals held that while "employers or

other plan sponsors are generally free under ERISA to adopt, modify or terminate pension benefit plans, . . . this discretion does not permit them to discharge employees or alter their plan rights to circumvent the provision of promised benefits." (court of appeals decision, p. 4)

Simply put, Petitioners are attempting to appeal an issue upon which they have already prevailed. As recognized by Justice Scalia, this Court has a "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below. *Bunting v. Mellen*, 541 U.S. 1019, 1022 (Scalia, J., dissenting).

To the extent Petitioners argue that this Court should hold that ERISA § 510 applies to recalls and transfers, Petitioners misrepresent the holding of the district court and mischaracterize the court of appeals holding. Both courts found that the facts of this case would not support such liability. The district court expressly held that ERISA § 510 reaches "an employer's policy of using layoffs to avoid employees' accrual of ERISA benefits." (R.61, Order denying reconsideration, p.3, ROA p. 280) The district court went on to hold, however, that "Plaintiffs presented no evidence to suggest that TRW considered employees' eligibility for ERISA benefits when selecting who to recall from layoff." *Id.*

While the court of appeals holding was less direct than that of the district court, any implication that transfers or recalls may not be actionable was negated by the court's holding that the facts in this case did not show discrimination. The court of appeals held that "TRW's decision to recall some employees and not others was not discriminatory because those decisions

under the CBA were seniority based, and at least two employees accrued enough pension credits to retire with benefits *after* being recalled. Finally, the employees' CBA provided that benefits accrued only at the Van Dyke plant, so plaintiffs also lacked plan rights to be recalled" to the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 1 – 1.1(j), Sealed ROA pp. 564-565) Thus, neither court held that the failure to recall or transfer is never actionable under ERISA § 510, and both courts held that the facts of this case showed no discrimination. Petitioners' argument in favor of certiorari does not present the circumstances upon which this Court grants certiorari. Their petition should therefore be denied.

II. Petitioners' argument that a mixed motive analysis should apply was not argued below and is not supported by the facts of this case

Petitioners argue at length that the lower courts erroneously evaluated the evidence in this case and allocated the burdens of proof through the *McDonnell Douglas / Burdine* prism because, according to Petitioners, an illegal factor played a part in the decision. Petitioners, however, have never made this argument before. Indeed, every brief submitted by the Petitioners both at the district court and the court of appeals argued the application of *McDonnell Douglas* burden shifting to the facts of this case. Petitioners never argued that a different paradigm should apply.

It is well established that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). While appellate courts are given the discretion to decide when to deviate from this general rule of waiver, *see*

Singleton, 428 U.S. at 121, "prudential considerations" articulated by the Supreme Court counsel against hearing new arguments for the first time on appeal absent limited circumstances. For example, in *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *See also, United States v. Ortiz*, 422 U.S. 891 (1975) (declining to address scope of search and seizure case where the issue was raised for the first time in the petition for certiorari.)

These "prudential considerations" are particularly applicable here because, contrary to Petitioners' arguments, this case is not – nor have Petitioners previously argued that it is – a mixed motive case. Petitioners now argue that a TRW Vice President's testimony that the "cost" of pensions was "one reason among several" for closing the Van Dyke Plant[5] is tantamount to evidence that an *illegal* factor was one reason among several for TRW's actions. (R.46 Exhibits to Plaintiffs' Response to MSJ, Ex. 28

[5] In asserting this argument, Petitioners also misrepresent the testimony of Bruce Hoover by arguing that he "admitted he considered the curtailment gains and losses" "in determining where to place the module business." Plaintiffs' appeal brief, p. 14. Hoover never testified as such. Rather, Hoover testified he did not see the curtailment presentation referenced at his deposition until "after the fact," and that he did not recall if he knew the curtailment costs when he was creating a business case for the module work. (R.46, Exhibits to Plaintiffs' Response to MSJ, Ex. 37, p. 47-48, Sealed ROA 533)

Muckley 152-153, Sealed ROA pp. 220-221) Actually, the evidence showed TRW had to recognize approximately $9.7 million in additional costs to close the Van Dyke Plant. (R.34 Exhibits to MSJ, Ex. 24 - Kiwicz 33, Sealed ROA 690; Ex. 25 - Bates Nos. 7743-7744, Sealed ROA pp. 691-693)

Petitioners' argument also fails to recognize that ERISA § 510 does not prohibit employers from considering the *cost* of ERISA benefits in making business decisions. In order for a plaintiff "to establish a *prima facie* case under ERISA § 510, however, he must demonstrate not only that he lost the opportunity to accrue new benefits, but also that [the defendant] had the specific intent of avoiding ERISA liability when it discharged him." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1113 (6th Cir. 2001); *Smith v. Ameritech,* 129 F.3d 857, 865 (6th Cir. 1997). *See also, Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) (affirming summary judgment on § 510 claim arising out of plant closing and holding that "measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent. Instead, the employee must introduce evidence suggesting that the employer's decision was directed at ERISA rights in particular.") "Otherwise, every employee discharged by a company with an ERISA plan would have a claim under § 510." *Majewski*, 274 F.3d at 1113.

In the absence of direct evidence of such discriminatory intent, a "plaintiff can state a *prima facie* case by showing the existence of (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to

which the employee may become entitled." *Id.* A plaintiff also must show "a causal link between [ERISA] benefits and the adverse employment decision." *Smith,* 129 F.3d at 865. "In order to survive defendant's motion for summary judgment, plaintiff must come forward with evidence from which a reasonable [fact finder] could find that the defendant's desire to avoid [benefits] liability was a determining factor in plaintiff's discharge." *Id.*; *see also Majewski*, 274 F.3d at 1113.

The Sixth Circuit has expressly held that the fact that an employer considers the *cost* of ERISA benefits is insufficient to show intent or pretext.[6] *Humphreys v. Bellaire Corp.,* 966 F.2d 1037, 1044 (6th Cir. 1992); *Morabito v. Master Builders, Inc.*, No. 96-3898, 1997

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[6] Indeed, the Accounting Standards set forth by the Financial Accounting Standards Board required TRW to consider these costs. *See,* Statement of Financial Accounting Standards No. 88 (any curtailment loss shall be recognized in earnings when it is probable that a curtailment will occur and the amount is reasonably estimable. If the amount is a curtailment gain, it shall be recognized in earnings when the related employees terminate or the plans amendment is adopted).

Petitioners' arguments regarding "curtailment" costs actually militates against any inference of discriminatory intent. It is undisputed that TRW incurred $9.7 million in "curtailment *costs*" – the net additional pension and retiree medical costs TRW would have to immediately recognize under the accounting rules – because of the closing of the Van Dyke Plant. TRW would not have incurred those costs had the plant remained open. Likewise, Petitioners' arguments that TRW planned to offset the curtailment costs by curtailment gains at other plants does not show discriminatory intent. Under Petitioners' argument, TRW would have incurred an overall curtailment gain had the Van Dyke Plant not closed. TRW is in business to make gains, not losses. Thus, Petitioners' arguments not only defy the accounting standards, they defy logic.

WL 668955 at 3 (6th Cir. Oct. 27, 1997). As the court held in *Humphreys,* 966 F.2d at 1044, "it is obvious that benefit costs make up a large amount of the costs of an employee to a company, and the pension rights are a substantial component of benefit costs, but these undeniable propositions are not sufficient standing alone to prove the requisite intent by the path of pretext."

Petitioners do not argue and provide no authority for the proposition that costs of benefits equates to the accrual of ERISA benefits. The consideration of "costs" is hardly evidence that "[a] desire to avoid [benefits] liability was a determining factor." *Smith,* 129 F.3d at 865; *see also Majewski*, 274 F.3d at 1114. A mixed motive analysis is therefore inapplicable here, and the lower courts properly applied *McDonnell Douglas* burdens of proof to the facts of this case. The petition should therefore be denied.

III. Alter-ego concepts are inapplicable to this case

Petitioners argue that the district court erroneously found that the facts of this case did not support alter-ego liability and that the court of appeals found that application of the alter-ego theory would be irrelevant. "Alter-ego" is a National Labor Relations Act concept and, as such, it is "most commonly used in labor cases to bind a new employer that continues the operations of an old employer where the new employer is merely a disguised continuance of the old employer." *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006). The alter-ego theory is typically at issue when a *union* is attempting to enforce the terms of a CBA against a separate employer who it claims is really the

employer with whom it has a contract. In some limited contexts, courts have permitted beneficiaries of a plan to proceed in an ERISA claim *against a successor employer* under an alter-ego theory where the successor employer claims no affiliation with the beneficiaries' employer. Courts have not, as Petitioners suggest, given wholesale license to plaintiffs to use the alter-ego theory to manufacture liability under ERISA.

In this case, Petitioners are seeking to apply the alter-ego theory *between different facilities of the same employer*. Petitioners cite no case holding that the alter-ego theory is applicable in this context. Rather, the cases that Petitioners cite are either (1) National Labor Relations Board cases in which the Board seeks to enforce its orders against a company that is related to a company that went out of business or opened a new business, to avoid complying with a Board order, or (2) claims by beneficiaries where a company division was sold or "spun off" to another company. (*Ensley v. Ford Motor Co.*, No. 06-12845, 2007 WL 2029638 (E.D. Mich. July 10, 2007); *Yolton, at* 571)

The alter-ego concept clearly has no applicability here because there are not two purportedly independent employers involved. TRW has never attempted to avoid liability on the basis that the Mancini Drive facility is owned by a different subsidiary within TRW's controlled group. TRW and Kelsey-Hayes Company are wholly-owned subsidiaries of a common parent corporation that both operate facilities within the parent's North American Braking & Suspension group. These entities have never held themselves out or otherwise represented themselves as unrelated or unaffiliated companies. Also, an "alter-

ego" finding is *not* a finding of liability for anything in and of itself. Alter-ego is a means for a plaintiff to attach a finding of liability to another company that claims to be unrelated. Thus, the issue of alter-ego is not only moot, even if alter-ego principles were applicable here the facts of this case do not support liability based on an ERISA § 510 theory.

In evaluating alter-ego status, courts ask "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Yolton*, 435 F.3d at 587. Here, the Van Dyke Plant and Mancini Drive facilities do not have substantially identical business purpose, operation, or equipment. The Van Dyke Plant manufactured ball joints, steering linkages, tie rods and related components. (R.34 Exhibits to MSJ, Ex. 3 - Crawford 6-7, Sealed ROA pp. 577-578; Ex. 4 - Burdo 13, Sealed ROA p. 579; Ex. 5 - Annabel 10-12, Sealed ROA pp. 582-584; Ex. 6 - Ballard 7-8, Sealed ROA pp. 585-586; Ex. 7 - Hoskin 6, Sealed ROA p. 588) The Mancini Drive facility acquires components from suppliers dictated by DaimlerChrysler and assembles them. (R.34 Exhibits to MSJ, Ex. 17 - Bates No. 2951, 2958, Sealed ROA p. 657, 664) TRW did not "continue the operations" of the Van Dyke Plant at the Mancini Drive facility. (R.85 Opinion and Order Denying Plaintiffs' Motion for Reconsideration, p. 4, ROA p. 524) Further, it is undisputed that the module work performed at Mancini Drive was never performed at the Van Dyke Plant;[7] the work performed at the Van Dyke Plant was

[7] Contrary to the allegations in Petitioners' brief, module work was never performed at the Van Dyke Plant. Rather, Petitioner Hoskins testified that he never "put together a modular [sic] unit";

not transferred to or performed at the Mancini Drive facility. Indeed, only five of 20 salaried personnel at Mancini Drive worked at the Van Dyke Plant work at the Mancini Drive facility. (R.34 Exhibits to MSJ, Ex. 18 – Weiss 57, Sealed ROA p. 676) Equally important, as held by the district court, TRW did not "disguise" its operations at the Mancini Drive facility in order to avoid its obligations at the Van Dyke Plant. (R.85 Opinion and Order Denying Plaintiffs' Motion for Reconsideration, p. 4, ROA p. 524) *See Trustees of Resilient Floor Decorators Ins Fund v. A & M Installations*, 395 F.3d 244, 248 (6th Cir. 2005) (declining to apply the alter-ego doctrine because there was no evidence that the employer "concealed its close relationship with [a related company] and because there is no indication that the [benefits fund] has not received the full benefit of its collective bargaining agreement with A & M.") Thus, the facts of this case do not support the alter-ego theory.

Petitioners have not and cannot show that the issue of "alter-ego" liability in this case raises a conflict in the circuits, an issue of general importance, or that the lower courts' decisions are wrong in light of Supreme Court precedent. The petition should therefore be denied.

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the Van Dyke Plant made parts and then sent them out for assembly elsewhere. (R.46, Exhibits to Plaintiffs' Response to MSJ, Ex. 32, pp. 23-24, Sealed ROA 372)

IV. Petitioners' arguments regarding a ERISA § 510 remedy were not reached by the lower courts

Petitioners argue that this Court should hold that a remedy exists for claims like those that Petitioners failed to establish in this case. Neither of the lower courts reached the issue of remedies because both courts found no basis for liability. It is the practice of the Supreme Court to decide cases on the grounds raised and considered in the court of appeals and included in the question on which certiorari was granted. *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 431 (2002); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). Although it is not precluded from doing so,[8] the Supreme Court will not, as a rule, consider questions that were not considered or decided by the courts below. *See, e.g., N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 164 (1975); *Ramsey v. Mine Workers*, 401 U.S. 302, 311-12 (1971); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 n. 2 (1970). For example, in *Ramsey*, a case involving an action by coal mine operators against a union for antitrust violations, the coal miners urged the U.S. Supreme Court to construe the Protective Wage Clause in the CBA as being an illegal bargain for which the Union is not exempt under the antitrust laws. *Ramsey*, 401 U.S. at 311-12. The Court, however, found "no reference to this aspect of the case in the opinions in the district court and the court of appeals;" thus, the Court was "unsure whether it was presented below and whether,

[8] *See, e.g., Carlson v. Green*, 446 U.S. 14 (1980) (Although an issue had not been presented in either the district court or the Court of Appeals, the Supreme Court addressed it on its merits, where it was an important, recurring one that was properly raised in another petition for certiorari).

in any event, there is record support for it." *Id.* at 312. Accordingly, the Court deemed "it inappropriate to consider it in the first instance." *Id.*

Petitioners here cannot show exceptional circumstances to warrant this Court's review of an issue that neither of the lower courts in this case reached. Petitioners' request for a writ of certiorari on this issue never reached by the lower courts should therefore be denied.

CONCLUSION

For all of the forgoing reasons, TRW asks the Court to deny the writ.

Respectfully submitted,

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