C.A. NO. 20-1106

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LINDA RIZZO-RUPON, et al.,
Appellants

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141 LOCAL 914, et al.,
Appellees

ON APPEAL FROM THE ORDER DATED DECEMBER 16, 2019,
ENTERED BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,
CIVIL ACTION NO: 2:19-CV-00221, HON. WILLIAM J. MARTINI, U.S.D.J.

BRIEF OF APPELLANTS LINDA RIZZO-RUPON, SUSAN MARSHALL, AND NOEMIERO OLIVEIRA

WITH JOINT APPENDIX VOLUME 1 OF 2 (J.A. 1 – 8)

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STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs-Appellants respectfully request oral argument. This case presents important questions of a constitutional dimension and Plaintiffs-Appellants believe that this Court would be aided in its deliberations by the presentation of counsel to comment upon the issues and to respond to inquiries from the Court.

JURISDICTIONAL STATEMENT

Plaintiffs raise a constitutional challenge to federal statute, 45 U.S.C. § 152, Eleventh (J.A. 63). The District Court had jurisdiction over this issue at it presents a federal question pursuant to 28 U.S.C. § 1331. The District Court certified the existence of a constitutional issue and notification was provided to the United States Attorney General pursuant to Fed. R. Civ. P. 5.1 and L. Civ. R. 24.1. (J.A. 59-60).

This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. Plaintiffs-Appellants are appealing a final decision of the District Court disposing of all claims. That final order was entered on December 16, 2019. (J.A. 3). Plaintiffs-Appellants filed a timely appeal as of right on January 14, 2020, consistent with Fed. R. App. P. 3 and Fed. R. App. P. 4. (J.A. 1-2).

STATEMENT OF THE ISSUES

Is there state action where private employees governed by the Railway Labor Act ("RLA") challenge the imposition of an agency fee? Plaintiffs-Appellants assert

that there is state action. The District Court below found that there was no state action. (J.A. 6 (Opinion of William J. Martini, dated December 16, 2019)).

If there is state action, given the Supreme Court's recent decisions finding agency fees unconstitutional in a number of contexts, does imposition of agency fees upon private employees governed by the Railway Labor Act violate the First Amendment? Plaintiffs-Appellants assert that their rights are violated. The District Court found that there was no First Amendment violation. (J.A. 7)

STATEMENT OF RELATED CASES OR PROCEEDINGS

This matter has not previously been on appeal and has no related proceedings pending. There are no known Railway Labor Act cases pending before the Third Circuit. There are three other known cases challenging agency fees in the Railway Labor context: *Pegues v. International Association of Machinists and Aerospace Workers*, 2019 WL 6713618 (W.D. Tex., Dec. 10, 2019); *Baisley v. International Association of Machinists and Aerospace Workers,* Case No. 19-cv-531(W.D. Tex., Mar. 19, 2020), (J.A. 72), and *Popp v. Air Line Pilots Association, International*, Case No. 19-cv-61298 (S.D. Fla., Mar. 25, 2020) (J.A. 65).

STATEMENT OF THE CASE

On March 8, 2012, Defendant-Appellee International Association of

Machinists and Aerospace Workers[1] was certified to "represent for the purposes of the Railway Labor Act ("RLA"), as amended, the craft or class of Passenger Service Employees, employees of United Airlines/Continental Airlines, its successors and assigns." *In re Representation of Employees of United Airlines Passenger Service Employees*, 39 NMB 294 (Mar. 8, 2012). (J.A. 29-30). The bargaining unit is not limited to a particular state or states; it applies to all of the United employees in this classification throughout the entire United States.

Plaintiffs-Appellants Linda Rizzo-Rupon, Susan Marshall, and Noemieo Oliveira are all customer service representatives for United Airlines (which is not a party) and are in the passenger-service-employee bargaining unit. None are members of the union. The three Plaintiffs-Appellants work out of Newark International Airport in Newark, New Jersey. (J.A. 18). New Jersey does not have a right-to-work provision in its constitution or its statutes.

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[1] Plaintiffs-Appellants named what they believed were three separate legal entities as Defendants/Appellees: (1) the International Association of Machinists and Aerospace Workers, AFL-CIO; (2) the International Association of Machinists and Aerospace Workers, District Lodge 141; and (3) International Association of Machinists and Aerospace Workers, AFL-CIO District 141, Local 914. (J.A. 15-16). In the Motion to Dismiss filed at the District Court, Defendant/Appellee refers to itself in the singular and indicates that the Grand Lodge, IAM District Lodge 141, and IAM Local Lodge 914 are "three semi-autonomous levels of the IAM."

Plaintiffs/Appellants will refer to the three levels collectively as Defendant/Appellee IAM or Appellee IAM.

United Airlines' current collective bargaining agreement (CBA) with Defendant-Appellee IAM runs from 2016 to 2021. (J.A. 32-38). Union security is addressed in Article 8. Non-members, like the three Plaintiff-Appellants, are required to pay agency fees (called "Service Fees" in the CBA):

> As a condition of employment, all employees of the Company covered by this Agreement will . . . become and remain members in good standing of the Union or, in the alternative, render the Union a monthly sum equivalent to the standard monthly dues required of the Union members ("Service Fees.")

Id. (J.A. 33).

Plaintiffs-Appellants filed suit on January 8, 2019, alleging that under the color of federal law, the Railway Labor Act, the imposition of agency fees violates their First Amendment rights. They sought an order declaring that RLA's authorization of compulsory agency fees, 45 U.S.C. § 152 Eleventh is unconstitutional, and related relief. (J.A. 15-23).

Defendant/Appellee IAM filed a Motion to Dismiss on June 3, 2019. (J.A. 11). As Plaintiff-Appellants' claims involve the constitutionality of a federal statute, the United States Attorney General was granted an opportunity to intervene if it chose to. ((J.A. 59). The United States Attorney General did not intervene and on September 24, 2019, Plaintiffs/Appellants filed their brief and a cross-motion for judgment on the pleadings. (J.A. 13).

On December 16, 2019, the District Court dismissed this action. (J.A. 3).

First, it held that state action can only be found if the suit originates in a state with a right-to-work law: "The parties agree that New Jersey has no right-to-work law. Consequently, because no New Jersey Law is preempted by Section 2 Eleventh of the RLA, Plaintiffs possess no private rights implicated by the RLA." (Opinion, J.A. 6).

Second, the District Court held that *Janus* only applied to public employees:

> *Janus* stands for the limited proposition that when a government entity and labor organization agree to require government employees to pay agency fees, the First Amendment is implicated in ways dramatically distinct from when agency fees are agreed to in the private sector. Because Plaintiffs here all work for a private company – United Airlines – *Janus* has no application.

(Opinion, J.A. 7).

Plaintiffs/Appellants filed a timely appeal on January 14, 2020, challenging the District Court's holdings that there is no state action in the Railway Labor Act context, and as such, that there is no First Amendment violation. (J.A. 1-2).

SUMMARY OF THE ARGUMENT

This case concerns a First Amendment challenge to the agency-fee provision of the Railway Labor Act (RLA). 45 U.S.C. § 152 Eleventh.[2] The Supreme Court recently held that, at least as to public employees, agency fees were unconstitutional.

[2] In their Complaint, Plaintiffs/Appellants had also referenced the Fifth Amendment. The course of the litigation has made it clear that the Fifth Amendment is not necessary for Plaintiffs/Appellants to receive their requested relief.

Janus v. AFSCME, Council 31, ___ U.S. ___; 138 S.Ct. 2448 (2018); *see also Harris v. Quinn*, 573 U.S. 616 (2014) (holding agency fees charged to personal care providers unconstitutional). Plaintiffs-Appellants contend *Janus* and *Harris* should control here and lead to this Court holding that agency fees are also unconstitutional as to RLA employees, who can be either public or private employees.

In *Janus*, the Supreme Court overturned *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Janus*, 138 S.Ct. at 2460. In part, the *Janus* Court criticized *Abood* for misinterpreting two of the Court's RLA decisions and questioned when state action occurs:

> *Abood* went wrong at the start when it concluded that two prior decisions, [*Railway Employes v. Hanson*, 351 U.S. 225 (1956)], and *Machinists v. Street*, [367 U.S. 740 (1961)], "appear[ed] to require validation of the agency-shop agreement before [the Court]." [*Abood*, 431 U.S., at 226.] Properly understood, those decisions did no such thing. Both cases involved Congress's "bare authorization" of private-sector union shops under the Railway Labor Act. [*Street*, 367 U.S. at 749] (emphasis added).[24] *Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See [*Harris v. Quinn*, 573 U.S. 616, 636 (2014)].
>
> [24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See [*American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999)]; [*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974)]. Compare, *e.g.*, *White v. Communications Workers of Am., AFL–CIO, Local 1300*, 370 F.3d 346, 350 (C.A.3 2004) (no state action), and *Kolinske v. Lubbers*, [712 F.2d 471, 477–478] (C.A.D.C.1983) (same), with *Beck v. Communications Workers of Am.*,

> 776 F.2d 1187, 1207 (C.A.4 1985) (state action), and *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16, and n. 2 (C.A.1 1971) (same). We reserved decision on this question in *Communications Workers v. Beck*, [487 U.S. 735, 761 (1988)], and do not resolve it here.

Janus, 138 S.Ct. at 2479, n.24. (emphasis supplied)[3]

This case was brought to resolve that reserved question identified by the Supreme Court. The District Court's short opinion here dismissed the action for two reasons: (1) the suit did not originate in a district court located in a right to work state, which prevents finding state action; and (2) the case involves a private rather than government employer, which means *Janus* does not apply here and that *Hanson's* First Amendment holding allowing agency fees in the RLA context is still good law. (J.A. 4-8).

At its most basic, this case involves the District Court's misapplication of the Supreme Court's decision in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), as it relates to (1) whether state action exists when an agency fee claim is brought by private employees subject to the Railway Labor Act, and (2) whether the imposition of agency fees on such private employees violates the First Amendment. On the issue of state action, the District Court incorrectly held *Hanson* requires RLA agency-fee challenges to arise in states with right-to-work laws, unlike in New

[3] The text and footnote 24 address state action under the RLA, but all of the cases cited by the Supreme Court concern state action and the National Labor Relations Act ("NLRA"). The importance of this distinction will be discussed below.

Jersey, where no right-to-work laws exist. Such a holding ignores several Supreme Court cases where the Court reached the merits of constitutional challenges in the RLA context in cases brought by private employees, including a case, *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), which was brought by private employees in a state without right-to-work laws. If *Hanson* stood for the proposition that First Amendment Claims could only be brought in right-to-work states, the Supreme Court could not have reached the merits in *Ellis*.

Secondly, on the merits, the District Court incorrectly held that *Hanson* controlled the issue of First Amendment claims in the RLA agency fee context and that its holding was binding on the District Court.

When read in context, the Supreme Court case law makes it apparent that (a) state action is present in an RLA case brought by private employees, and that such a finding does not turn on whether the case is brought by plaintiffs in a right-to-work state, and that (b) *Hanson's* "single sentence" analysis of the First Amendment issues are no longer controlling in light many recent Supreme Court cases on agency fees and such agency fees are unconstitutional.

ARGUMENT

I. THE SUPREME COURT HAS HELD AGENCY FEE CHALLENGES UNDER THE RAILWAY LABOR ACT TRIGGER STATE ACTION AND HAS HELD IN TWO SEPARATE CASES THAT AGENCY FEES ARE UNCONSTITUTIONAL

A. Standard of Review

This Court reviews constitutional matters de novo. *Free Speech Coalition, Inc. v. Attorney General United States*, 825 F.3d 149, 159 (3d Cir. 2016).

B. Supreme Court and Agency Fees

1. Introduction

The history of agency fees at the United States is long and complex. That history has involved constitutional claims by private parties – like the Plaintiffs-Appellants here – and public sectors employees as well. By 1984, the Supreme Court had essentially ended any controversy regarding state action in the RLA context when it allowed private airline employees to bring First Amendment claims related to agency in a state lacking a right-to-work law. As will be shown below, the Supreme Court has repeatedly stated that private-sector employees under the RLA can satisfy state action when challenging agency fees.

In the last eight years, the Supreme Court has reexamined much of the case law surrounding the merits of First Amendment agency fees claims. The end result of this reexamination is that agency fees are not compatible with the First Amendment.

This brief will start by discussing the three areas of labor law that agency fee jurisprudence arises under. The cases related to them are often intertwined, but some key differences will be pertinent here. For that reason, the relevant Supreme Court cases will be set out chronologically within categories as opposed to chronologically en masse. Given the fact that these cases so often refer to each other and build off prior analysis, a rather thorough discussion of them is necessary.

At the end of the Supreme Court analysis it will be apparent that Plaintiffs-Appellants should prevail. However, as noted above, the state action holding relies on some older cases. Therefore, an examination of recent Supreme Court jurisprudence, Circuit case law, and miscellaneous persuasive authorities is prudent to show the state action holdings remain valid. The Supreme Court cases on the merits are much more recent, but a few quite recent persuasive authorities will also be reviewed. Again, this review will show that Supreme Court case law is controlling. Essentially, the entirety of this matter is controlled by Supreme Court precedent.

2. Labor Law Basics

There are three main bodies of labor law where the questions of agency fees have been litigated: (1) the RLA, which was originally enacted in 1926 and did not permit agency fees until a 1951 amendment added 45 U.S.C. § 152 Eleventh (challenged here); (2) the NLRA, which was originally enacted in 1935 and allowed

closed shops until 1947 and agency fees thereafter; and (3) various state laws regarding public employees that permit mandatory bargaining and permitted agency fees – many of these state laws began proliferating after the late 1950s. Each body of labor law has had at least one Supreme Court case discussing the legality of agency fees. These cases will be discussed after some general features of the three main bodies of labor law are set out.

These cases will show that the Supreme Court has repeatedly indicated that under the RLA, private employees' constitutional claims about agency fees are sufficient to show state action. On the merits, *Harris* and *Janus* show that there is not a state interest to justify imposition of an agency fee and this Court should reverse the District Court.

3. Key Features of Three Main Areas of Labor Law

a. Railway Labor Act

The RLA was enacted in 1926 and, as to agency fees, had noteworthy amendments in 1934 and 1951.[4] The 1934 amendment made the concept of voluntary unionism explicit, while the 1951 amendment was the addition of 45 U.S.C. § 152 Eleventh. The RLA does not allow a state to exempt its residents from

[4] A 1936 amendment brought airlines under the ambit of the RLA. *IAM v. Central Airlines*, 372 U.S. 682, 685-86 (1963).

having to pay an agency fee. As we will see, the RLA is different from the NLRA in this regard.

The RLA is unique in that it covers both private and public employees and employers. In 1953, the Supreme Court held that the State Belt Railroad, which was owned by the State of California and engaged in interstate commerce, was governed by the RLA. *California v. Taylor*, 353 U.S. 553 (1957). A similar holding occurred in *United Transportation Union v. Long Island Railroad Company*, 455 U.S. 687 (1982), where the Supreme Court held that the Long Island Rail Road, which was owned by the "State of New York through the Metropolitan Transportation Authority," *id.* at 680, was covered by the RLA. *Id.* at 682. Thus, state and local governments can be employers under the RLA.[5] As to constitutional matters, like that presented here, the Supreme Court has held that Amtrak is the federal government. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). Thus, the federal government is an employer for constitutional challenges to Amtrak activity.

[5] *See also* 45 U.S.C. § 159a, which concerns the Presidential Emergency Board process for "a publicly funded and publicly operated carrier providing commuter rail service (including the Amtrak Commuter Services Corporation) and its employees."

b. National Labor Relations Act

According to the Supreme Court, 29 U.S.C. § 158(a)(3) "permits an employer and an exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues . . . as a condition of employment, whether or not the employees wish to become union members." *Communications Workers of Am. v. Beck*, 487 U.S. 735, 738 (1988).[6] The NLRA allows states to outlaw agency-fee agreements. 29 U.S.C. § 164(b) ("Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is

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[6] Reading the statutory provision in isolation would not make this clear. The *Beck* Court further explained:

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the "membership" that may be so required has been "whittled down to its financial core." *NLRB v. General Motors Corp.*, [373 U.S. 734, 742 (1963)]. The statutory question presented in this case, then, is whether this "financial core" includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment.

Beck, 487 U.S. at 745, n.2.

prohibited by State or Territorial law.")[7] Federal, state, and local governments are exempt from the NLRA. 29 U.S.C. § 152(2). Thus, any NLRA agency suit concerns private-sector employees and private-sector employers.

c. State mandatory bargaining laws with agency fees

At the time of *Janus*, "more than 20 states" had statutory mandatory bargaining schemes for state and/or local employees wherein agency fees were permitted. *Janus*, 138 S.Ct. at 2487 (Kagan, J., dissenting). Obviously, no private employees or private employers were covered in the various laws. Further, as no federal statute controls, there is no federal preemptive effect.

4. RLA and Agency Fees at Supreme Court

We begin, where the Supreme Court began, with agency fees and the RLA – the exact question being presented here.

In the Railway Labor Act context and germane here, there are three main Supreme Court cases: (1) *Railway Employes' v. Hanson*, 351 U.S. 225 (1956); (2) *Machinists v. Street*, 367 U.S. 740 (1961); and (3) *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

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[7] A law that meets 29 U.S.C. § 164(b) is most often what is meant by the term "right-to-work law" although that term is sometimes also used in reference to provisions banning agency fees within state public-sector bargaining statutory schemes that allow mandatory bargaining (most states had allowed both mandatory fees and agency fees, but a minority allowed mandatory bargaining but prohibited agency fees).

In *Hanson*, private railroad employees who were not members of the union challenged "a union shop agreement." 351 U.S. at 227. That suit was originally filed in the Nebraska state court system. *Id.* The plaintiffs there relied on a right-to-work provision of the Nebraska Constitution. *Id.* at 228 (*citing* Neb. Const. art. XV, § 13).

The *Hanson* plaintiffs were concerned that if they did not join the union within 60 days that they would lose their jobs. *Id.* at 227. The Nebraska Supreme Court held "that the union shop agreement violates the First Amendment in that it deprives the employees of their freedom of association and violates the Fifth Amendment in that it requires the members to pay for many things besides the cost of collective bargaining." *Id.* at 230.

In beginning its analysis, the Supreme Court noted that under the RLA, employers and unions do not have to enter into union shop agreements. *Id.* at 231. Despite this, it held that, at least in right-to-work states, every union-shop agreement triggered First and Fifth Amendment analysis. *Id.* at 232. The Supreme Court noted: "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed" and the "enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." *Id.*

The constitutional analysis initially focused on whether Congress had the Commerce Clause power to overcome state right-to-work laws. *Id.* at 233. The court

noted that policy arguments could be made in favor and against a union shop. *Id.* at 234-35. It stated: "To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course." *Id.* at 235. This cost referred to "relates . . . to the work of the union in collective bargaining." *Id.*

The Supreme Court then addressed plaintiffs' First Amendment arguments:

> Wide-ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.
>
> On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.

Id. at 236-38.

In *Street*, the Supreme Court examined agency fees and the RLA. Private sector railroad employees alleged the use of their dues to finance candidates they disagreed with violated the First and Fifth Amendments. *Id.* at 743-45 and n.4. The Supreme Court began its analysis by denying that *Hanson* settled the question: "It is argued that our disposition of the First Amendment claims in *Hanson* disposes of appellees' constitutional claims in the case adversely to their contentions. We disagree." *Street*, 367 U.S. at 746. Further explaining *Hanson*, the *Street* Court stated: "[I]t becomes obvious that this Court passed merely on the constitutional validity of § 2, Eleventh . . . on its face, and not as applied to infringe the

particularized constitutional rights of any individual." *Id.* at 748. Concluding its discussion of the *Hanson* holding, the *Street* Court stated: "Thus all that was held in *Hanson* was that § 2 Eleventh was constitutional in its bare authorization of union-shop requirements requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." *Id.* at 749.

The *Street* Supreme Court then began to analyze the legal question presented – it did not hold that because there were private employees and a private union that there was no state action and dismiss the action. Rather, it noted that "the constitutional questions . . . are . . . of the utmost gravity." *Id.* at 749. The Supreme Court used the constitutional avoidance construction method to interpret § 2, Eleventh. *Id.*

Three general markers related to "union security in the railway industry" were noted: (1) a strong and long-standing tradition of voluntary unionism; (2) the 1934 Congressional declaration of "complete freedom of choice of employees to join or not join the union"[8]; and (3) the modification of the "legislative policy against compulsion" limited as a "specific response to the recognition of the expenses and

[8] *See generally*, 45 U.S.C. § 152, Fifth, which states in part: "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization." This language is unchanged since 1934. While unchanged, 45 U.S.C. § 152, Eleventh (d) explicitly trumps it.

burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act." *Street*, 367 U.S. at 750-51.

Union security under the RLA was "reopened in 1950." *Id.* at 755. The Supreme Court indicated that the unions' performance of their functions and duties under the RLA "entails the expenditure of considerable funds." *Id.* at 760. Eventually, Congress passed 45 U.S.C. § 152 Eleventh.

The Supreme Court held:

> We give § 2, Eleventh the construction which achieves both congressional purposes when we hold, as we do, that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes.
>
> . . . The appellant unions, in insisting that § 2, Eleventh contemplates their use of exacted funds to support political causes objected to by the employee, would have us hold that Congress sanctioned an expansion of historical practices in the political area by the rail unions. This we decline to do.

Id. at 768-70.

In *Ellis*, the Supreme Court considered whether certain costs should be included in the agency fee's computation. The case concerned Western Airlines employees who challenged the inclusion of six separate expenditures in the agency fee. *Ellis*, 466 U.S. at 440. The case was actually the consolidation of two actions – one by union members and another by union nonmembers. *Id.* at 439 n.2. Both suits were filed in the Southern District of California. *Id.* at 440.

The Supreme Court began its analysis by determining if any of the six expenditures were permitted by the language of the RLA. Three were found to be so: conventions; social activities; and publication of otherwise chargeable activity. The Supreme Court then analyzed whether those three categories violated the First Amendment. *Id.* at 455-57.

Thus, as of 1984, the Supreme Court allowed a constitutional challenge by employees covered by the RLA who worked for a private employer – Western Airlines – and whom filed the suit in a non-right-to-work state. At least implicitly, the Supreme Court believed that there was a sufficient showing of state action to analyze the individual expenditures under the First Amendment.

As recently as 2014, the Supreme Court noted that where private employees organized under the RLA seek to challenge agency fees under the First Amendment there is state action present. *Harris*, 573 U.S. at 629 n.4. The Supreme Court's recent case involving state-action and the First Amendment cited by the District Court below, *Manhattan Community Access Corp. v. Halleck*, ___ U.S. ___, 139 S.Ct. 1921 (2019), does not impact the analysis under the RLA.

Before discussing *Manhattan Community Access*, it bears noting that both the Supreme Court and this Court have indicated that the state-action jurisprudence is not crystal clear. *See Lebron* 513 U.S. at 378 ("our cases deciding when private action might be deemed that of the state have not been a model of consistency" and

further describing that jurisprudence as "difficult terrain."); and *Sprauve v. West Indian Co., Ltd.*, 799 F.3d 226, 229 (3d Cir. 2015) (*quoting Lebron* and further describing state-action question as "labyrinthine," "murky," and a "protean concept").

With that backdrop, in *Manhattan Community Access*, the specific question presented was whether a private entity that ran New York City's public access television channels was a state actor sufficient to trigger the First Amendment. *Id*. at 1926-27. Essentially, a couple of filmmakers contended they were being censored for making a short film alleging the private entity was not treating all neighborhoods in New York City equally.

While this case does discuss the First Amendment and state action, it does not cite or discuss, *Hanson* or *Ellis* or any of the other Supreme Court decisions that indicate agency-fee matters under the RLA constitute state action. There is nothing in *Manhattan Community Access* that indicates an intent to overturn those prior decisions.[9]

[9] *Manhattan Community Access* may be an eventual step in the tightening of what constitutes state action, but until the Supreme Court provides much more clarity (like provided here regarding *Hanson*'s First Amendment holding), this Court should follow *Hanson*'s and *Ellis*'s state action holding until such time as the Supreme Court takes specific action overturn prior cases. *Rodriquez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

5. NLRA and Agency Fees at the Supreme Court

In the NLRA context, the Supreme Court has never reached the issue of whether there is state action and therefore has decided all of the NLRA agency fee challenges on statutory grounds.

In *Beck*, the Supreme Court considered the legality of agency fees under the NLRA. The plaintiffs had alleged the use of any fees for other than "collective bargaining, contract administration, or grievance adjustment" was improper. *Id.* at 739. The plaintiffs brought claims for fair representation, 29 U.S.C. § 158(a)(3) ("§ 8(a)(3)"), and the First Amendment. *Beck*, 487 U.S. at 740.

The Fourth Circuit held that a constitutional claim was proper, but "preferring to rest its judgment on a ground other than the Constitution" instead relied on a construction of §8(a)(3). The Supreme Court reserved the question of whether state action was present. *Id.* at 761.

Instead of reaching the constitutional issue, the Supreme Court held that § 8(a)(3) needed to be read in harmony with 45 U.S.C. § 152 Eleventh. *Beck*, 487 U.S. at 745 ("Our decision in *Street*, however, is far more than instructive here: we believe it is controlling, for §8(a)(3) and § 2, Eleventh are in all material respects identical.")

In *Beck*, the unions argued that the history of voluntary unionism in the railroad had influenced the Supreme Court's *Ellis* decision and that the closed-shop unionism history of the NLRA was an entirely different context. *Beck*, 487 U.S. at

754. The argument was rejected. *Id.* at 756 ("[H]owever much union-security practices may have differed between the railway and NLRA-governed industries prior to 1951, it is abundantly clear that Congress itself understood its actions in 1947 and 1951 to have placed these respective industries on an equal footing insofar as compulsory unionism was concerned.").

The unions' final argument to distinguish the NLRA from the RLA affects the state-action question here. In *Beck*, the unions claimed that the constitutional-avoidance doctrine would not apply to the NLRA. The Supreme Court explained:

> [W]e ruled in *Railway Employees v. Hanson*, [351 U.S. 225 (1956)], that because the RLA pre-empts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves "governmental action" and is therefore subject to constitutional limitations. Accordingly, in *Street* we interpreted § 2, Eleventh to avoid the serious constitutional question that would otherwise be raised by a construction permitting unions to expend governmentally compelled fees on political causes that nonmembers find objectionable. *See* [367 U.S., at 749]. No such constitutional questions lurk here, petitioners contend, for § 14(b) of the NLRA expressly preserves the authority of States to outlaw union-security agreements. Thus, petitioners' argument runs, the federal pre-emption essential to *Hanson's* finding of governmental action is missing in the NLRA context, and we therefore need not strain to avoid the plain meaning of § 8(a)(3) as we did with § 2, Eleventh.

Id. at 761 (emphasis added). The Supreme Court rejected this argument. *Id.* at 762 ("Congress enacted the two provisions for the same purpose, eliminating 'free riders,' and that purpose dictates our construction of § 8(a)(3) no less than it did that

of § 2, Eleventh, regardless of whether the negotiation of union-security agreements under the NLRA partakes of governmental action.").

So, in essence, for our matters here, the NLRA case law merely shows where the fault line on state action is and highlights that even with private plaintiffs, under the RLA, state action is present when challenging agency fees. The NLRA case law has no direct impact on the substantive analysis of the First Amendment claims, since that case law was all statutory as opposed to constitutional.

6. State Mandatory Bargaining Laws with Agency Fees at the Supreme Court

No one seriously contends that there is any state-action controversy regarding agency fees and state and local employees. Turning to the merits, whether it is a state bargaining law or a private party RLA case – the First Amendment governs and therefore the state bargaining law and RLA case law on substantive First Amendment claims apply to both. Most of the recent developments on substantive matters have occurred in the state-bargaining law context. These cases make it clear that no state interest is sufficient to meet the exacting scrutiny applicable to the First Amendment.

Abood was the first case to discuss the merits of allowing agency fees at length. Understanding *Abood* is important to understanding the recent cases rejecting its rationale and rejecting its holding that agency fees are constitutional. The cases challenging and rejecting *Abood* will also receive a thorough review.

a. The Supreme Court's Decision in *Abood*

In *Abood*, the Supreme Court held that agency fees allowed by state law and bargained for by a government entity and a public-sector union were constitutional.

The *Abood* Court began its analysis of the constitutional questions with *Hanson* and *Street*. It noted that in *Hanson* "justiciable questions under the First and Fifth Amendments were presented." *Abood*, 431 U.S. at 218 (*citing Hanson*, 351 U.S. at 231). The *Abood* Court explained:

> Unlike s 14(b) of the National Labor Relations Act, 29 U.S.C. s 164(b), the Railway Labor Act pre-empts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law. The *Hanson* Court accordingly reasoned that government action was present: "(T)he federal statute is the source of the power and authority by which any private rights are lost or sacrificed. . . . The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates . . . ." [*Hanson*, 351 U.S., at 232].

Abood, 431 U.S. at 218 n.12.

The *Abood* Court contended that *Hanson* properly had applied something akin to rational-basis review in allowing agency fees:

> Acknowledging that "(m)uch might be said pro and con" about the union shop as a policy matter, the Court noted that it is Congress that is charged with identifying "(t)he ingredients of industrial peace and stabilized labor-management relations . . . ." [*Hanson*, 351 U.S. at 233-234]. Congress determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost, and that legislative judgment was surely an allowable one. [*Id.*, at 235].

Abood, 431 U.S. at 219. While recognizing that the *Hanson* Court did not have any evidence before it, the *Abood* Court noted *Hanson* ruled on the agency-fee question: "But the Court squarely held that 'the requirement for financial support of the collective bargaining agency by all who receive the benefit of its work . . . does not violate . . . the First . . . Amendmen(t)." *Abood*, 431 U.S. at 219.

The rationales identified in support of this were: (1) the designation of a single representative (i.e. exclusive representation) avoids confusion "that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment . . . [p]revents inter-union rivalries from creating dissension at the work place . . . [and] frees the employer from the possibility of conflicting demands"; and (2) agency fees have "been thought to distribute fairly the cost [of union activity] among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 221-22.

The Supreme Court recognized that forcing individuals "to support their collective bargaining representative has an impact on their First Amendment interests." *Id.* at 222. As an example, it was noted an individual's views on abortion might not compart with the negotiated medical benefits plan. *Id.* The *Abood* Court continued:

> To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Id.

The *Abood* plaintiffs tried to distinguish *Hanson* by noting that *Abood* involved government employment, while *Hanson* involved private employment. The *Abood* Court rejected this argument:

> But, while the actions of public employers surely constitute "state action," the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*. The plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation.

Abood, 431 U.S. at 226. It continued:

> We compare the agency-shop agreement in this case to those executed under the Railway Labor Act simply because the existence of governmental action in both contexts requires analysis of the free expression question . . . . *Hanson* nowhere suggested that the constitutional scrutiny of the union-shop agreement was watered down because the governmental action operated less directly that is true in a case such as the present one.

Id. at n.23.

Nor was the *Abood* Court moved by the fact that public-sector bargaining was inherently more political. After discussing the differences between public and private bargaining, *id.* at 227-29, the conclusion was:

> [Michigan] has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. As already stated, there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act.

Id. at 229. Further, the *Abood* Court noted that public and private employees are essentially the same as to skills, needs, and the advantages they seek. *Id.* The Court emphasized that the ideas and beliefs of public employees are not on a "higher plane" than their private sector counterparts. *Id.* at 231.

As a matter of constitutional law, the *Abood* Court then held that nonmembers could "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as collective bargaining representative." *Id.* at 234.

b. Supreme Court Cases Analyzing *Abood* and Changing First Amendment Analysis Where *Abood* is not Directly Controlling

Abood's rationale was challenged in two cases, but *Abood's* holding was not overturned. In those two cases, however, the Supreme Court announced general First Amendment principles that apply when *Abood* was not directly controlling. These principles do not support the imposition of agency fees.

In *Knox v. Service Employees*, 567 U.S. 298 (2012), the Supreme Court considered "whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's

political and ideological activities." *Id.* at 302. In deciding this case, the Supreme Court reviewed First Amendment and agency fee caselaw.

The *Knox* Court began its analysis by discussing *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). *United Foods* concerned whether a particular mushroom grower could be forced to subsidize a group of mushroom growers. The Supreme Court noted that the "subject matter of the speech may be of interest to but a small segment of the population" yet the First Amendment applies. *United Foods*, 533 U.S. at 411. Further, it was held that "speech need not be characterized as political before it receives First Amendment protection." *Id.* at 413. The Supreme Court explained: "First Amendment values are at serious risk if the government can compel a citizen or group of citizens to subsidize speech on the side that it favors; and there is no apparent principle distinguishing out of hand minor debates…." *Id.* at 411.

Returning to *Knox*, the Supreme Court indicated that its *United Foods* decision: "made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met." *Knox*, 567 U.S. at 310. These two criteria were: (1) there must be comprehensive regulatory scheme requiring mandatory association of those forced to pay; and (2) the fees can only be imposed "insofar as they are a 'necessary

incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* at 310 (*quoting United Foods*, 533 U.S. at 414).

The Supreme Court stated the rationale of "permitting unions to collect fees from nonmembers . . . is 'to prevent nonmembers from free-riding on the union's efforts'…." *Knox*, 567 U.S. at 311 (citation omitted). It was noted: "Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections." *Id.* The acceptance of the "free-rider argument as a justification for compelling nonmembers to pay a portion of union dues" was described by the Supreme Court as "something of an anomaly." *Id.* It held when faced with a "new situation . . . . The general rule – individuals should not be compelled to subsidize private groups or private speech – should prevail." *Id.* at 321.

In *Harris*, the Supreme Court addressed whether Illinois' personal care providers could be compelled to pay agency fees. It held that such agency fees were not permitted under the First Amendment.

Personal care providers help individuals by providing services that allow the individuals to live at home rather than in an institution. The person receiving the care (the customer) is the employer of the provider. *Harris*, 573 U.S. at 621-22. While customers "exercise predominant control over their employment relationship with their personal assistants" the State – subsidized by the federal government – pays the assistant's salaries. *Id.* at 622-23. Illinois – like almost states that unionized

personal care providers – made them state employees only for the purposes of collective bargaining and thereby allow the imposition of agency fees. *Id.* at 627.

The Supreme Court addressed the question of whether it should "sanction what amounts to a very significant expansion of *Abood*" to allow it to apply "not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization of the collection of an agency fee." *Id.* at 627-28.

In *Harris*, the Supreme Court traced the history of *Abood* and it began by looking at *Hanson*. The *Harris* Supreme Court noted the "primary issue" in *Hanson* was whether 45 U.S.C. § 152 Eleventh's allowance of a union ship was permissible under the Commerce Clause. *Harris*, 573 U.S. at 629.

The *Harris* Court then described the second claim in *Hanson* and in the accompanying note indicated that state action was present:

> The employees also raised what amounted to a facial constitutional challenge to the same provision of the RLA. The employees claimed that a "union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights." But because the lawsuit had been filed shortly after the collective-bargaining agreement was approved, the record contained no evidence that the union had actually engaged in political or ideological activities.[4]

> [4] The employees' First Amendment claim necessarily raised the question of governmental action, since the First Amendment does not restrict private conduct, and the *Hanson* Court, in a brief passage, concluded that governmental action was present. This was so, the Court reasoned, because the union-shop provision of the RLA took away a

> right that employees had previously enjoyed under state law. [351 U.S., at 232–233].

Harris, 573 U.S. at 629, n.4.

The *Harris* Court noted the First Amendment analysis in *Hanson* was a single sentence: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required by state law to be a member of an integrated bar." *Harris*, 573 U.S. at 630 (*citing Hanson*, 351 U.S. at 238). Two things were noted about this sentence: (1) the Supreme Court had not made a holding on an integrated bar at that point "and the constitutionality of such a requirement was hardly a foregone conclusion"; and (2) the author of *Hanson* – Justice Douglas – authored a dissent in *Lathrop v. Donohue*, 367 U.S. 820 (1961), the first constitutional state bar case and one that generated a plurality opinion and four separate writings. *Harris*, 573 U.S. at 630. The *Harris* argument was that by opining that lawyers had a First Amendment claim in *Lathrop*, Justice Douglas undermined the decision he wrote in *Hanson*.

The *Harris* Court quoted Justice Douglas' *Lathrop* opinion two times: (1) "Once we approve this measure . . . we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose,"; and (2) "I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades. Those

brigades are not compatible with the First Amendment." *Harris*, 573 U.S. at 630 (citations to quotations omitted).

The *Harris* Court summarized *Hanson's* First Amendment holding:

> The First Amendment analysis in *Hanson* was thin, and the Court's resulting First Amendment holding was narrow. As the Court later noted, "all that was held in *Hanson* was that [the RLA] was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents." *Street*, [367 U.S., at 749] (emphasis added). The Court did not suggest that "industrial peace" could justify a law that "forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought," or a law that forces a person to "conform to [a union's] ideology." *Hanson, supra*, [at 236–237]. The RLA did not compel such results, and the record in *Hanson* did not show that this had occurred.

Harris, 573 U.S. at 631.

Regarding *Street*, the *Harris* Court noted that it was a statutory decision. *Id.* at 631-32. Then *Harris* cited two *Street* dissents. First was Justice Black's:

> Unions composed of a voluntary membership, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they favor. But to the extent that Government steps in to force people to help espouse the particular causes of a group, that group—whether composed of railroad workers or lawyers—loses its status as a voluntary group.

Harris, 573 U.S. at 632 (internal citation omitted). The second dissent was Justice Frankfurter's in which he indicated that "labor's participation in urging legislation and candidacies is a major one" and that given "the detailed list of national and

international problems" on which unions speak "it seems rather naïve" to think "that economic and political concerns are separable." *Harris*, 573 at 633 (all quotations are from *Street* and the citations are omitted).

The *Harris* Court then turned to *Abood*, which was criticized for considering *Hanson* and *Street* dispositive as to the questions of the propriety of agency fees being imposed on public employees. *Harris*, 573 U.S. at 635-36. In particular, the *Harris* Court noted: "*Hanson* disposed of the critical question in a single, unsupported sentence that its author essentially abandoned a few years later." *Harris*, 573 U.S. at 635-36.

Further, *Abood* did not pay attention to the fact that government employment matters are more political than private sector ones since in public sector both wage and benefit matters and general politics are aimed at political entities, while in the private sector, it is easier to separate politics (aimed at the government) from wages and benefits (aimed at the employer). *Id.* at 636-37.

Another criticism of *Abood* was that it "does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' (in *Abood's* terms, expenditures for 'collective bargaining, contract administration, and grievance-adjustment purposes') or nonchargeable (i.e., expenditures for political or ideological purposes). *Harris*, 573 U.S. at 637 (internal citations omitted). But

included in the four cases listed to prove this point was *Ellis*, which is a RLA case with a private sector airline employer. *Harris*, 573 U.S. at 637.[10]

The next flaw identified by the *Harris* Court was that employees who seek to challenge chargeability determinations have a hard time doing so: "Employees who suspect that a union has improperly put certain expenses in the 'germane' category must bear a heavy burden if they wish to challenge the union's actions." *Id.* Litigating such matters was described as "expensive." *Id.* Also, although a union's books have to be audited, the "auditors do not themselves review the correctness of a union's categorization." *Id.* Two of the cases about the auditing process were state mandatory bargaining laws with agency fees and the remaining three were NLRA cases. *Harris*, 573 U.S. at 638.[11]

The last issue regarding *Abood's* applicability was that it concerned full-fledged public employees as opposed to the personal assistants who were state

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[10] As noted above, the RLA covers both some private and some public sector employers. The remaining three decisions cited by *Harris* are all public-sector labor cases based on state mandatory bargaining laws that permitted agency fees. *Teachers v. Hudson*, 475 U.S. 292 (1984); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); and *Locke v. Karass*, 555 U.S. 207 (2009).

[11] The state bargaining law cases are *Knox* and *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987). The NLRA cases are *American Federation of Television and Recording Artists, Portland Local*, 327 N.L.R.B. 474 (1999), *California Saw and Knife Works*, 320 N.L.R.B. 224 (1995), and *Price v. UAW*, 927 F.2d 88 (2d Cir. 1991).

employees only for collective bargaining. The subject matters that the union for personal assistants could bargain for were quite limited. *Id.* at 642-43. The Supreme Court held this lack of power made *Abood* inapplicable since *Abood* "is based on the assumption that the union possesses the full scope of powers and duties generally available under American labor law." *Harris*, 573 U.S. at 643. The *Harris* Court explained: "What justifies the agency fee, the argument goes, is the fact the State compels the union to promote and protect the interests of nonmembers." *Id.*[12] Thus, a union cannot negotiate better wages for its members. But, in *Harris*, by law the personal assistants were paid a uniform amount and had protections from other laws that made the protection of nonmembers a nonissue.

Because of its concerns about *Abood's* reasoning and the difference between personal assistants and "full-fledged public employees," the *Harris* court refused to extend *Abood. Harris*, 573 at 645-46. It stated:

> *Abood* itself has clear boundaries; it applies to public employees. Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems. Consider a continuum, ranging, on the one hand, from full-fledged state employees to, on the other hand, individuals who follow a common calling and benefit from advocacy or lobbying conducted by a group to which they do not belong and pay no dues. A State may not force every person who benefits from this group's efforts to make payments to the group. *See Lehnert*, [500 U.S., at 556] (opinion of SCALIA, J.). But what if regulation of this group is increased? What if the Federal Government or a State begins to provide or increases

[12] This is known as the duty of fair representation.

> subsidies in this area? At what point, short of the point at which the individuals in question become full-fledged state employees, should *Abood* apply?

Harris, 573 U.S. at 645-46.

Having determined that *Abood* was not controlling, the *Harris* Court indicated that any agency-fee provision is a serious impingement on the nonmember employee's First Amendment rights and must pass "exacting First Amendment scrutiny." *Id.* at 647-48.

The Supreme Court rejected the idea that "labor peace" allowed agency fees. It noted that the personal attendants were not trying to make a rival union or to deny the power of exclusive representation; rather, they sought "the right not to be forced to contribute to the union…." *Id.* at 649. The Supreme Court explained: "A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or pay any union fee." *Id.*

The Supreme Court concluded:

> For all these reasons, we refuse to extend *Abood* in the manner that Illinois seeks. If we accepted Illinois' argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.

Id. at 656 (emphasis added).

c. The Supreme Court Overturns *Abood* in *Janus*

The Supreme Court directly overturned *Abood* in *Janus*. *Janus* directly controls this action on the substantive First Amendment issues (*Ellis* controls as to state action). But, even if *Janus* does not control the merits, then *Knox* and *Harris* would control and agency fees will still not be permitted.

In *Janus*, an Illinois public employee challenged an Illinois law that allowed his union to bargain for an agency fee. The Supreme Court began by discussing general First Amendment principles and quoted Thomas Jefferson's statement that: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus*, 138 S.Ct. at 2464. It then noted that "compelled subsidization of private speech seriously impinges on First Amendment rights" and therefore "cannot be casually allowed." *Id.*

In discussing the proper standard of review, the Supreme Court noted that in both *Knox* and *Harris* it has used exacting scrutiny to disallow a charge and an agency fee respectively. *Janus*, 138 S.Ct. at 2465-66. The Supreme Court considered whether strict scrutiny would be proper instead, but ultimately did not decide the issue since agency fees failed even the lower exacting scrutiny standard.

It began by applying this review standard to the analysis from *Abood*. The first item reviewed was the proffered state interest of "labor peace," which the Supreme

Court defined as the "conflict and disruption" that might occur if "the employees in a unit were represented by more than one union." *Janus*, 138 S.Ct. at 2465. The *Janus* Supreme Court assumed that labor peace so defined was "a compelling state interest." *Id.* But it did not agree that labor peace (in effect exclusive representation) required an agency fee. *Id.*

The Supreme Court noted that federal employees engage in mandatory bargaining without agency fees, as do postal employees, and employees in many states that allow exclusive representation, but disallow agency fees. *Id.* at 2466.

A second purported state interest was the prevention of free riders. But the Supreme Court noted that free-rider arguments generally cannot overcome First Amendment objections. *Id.* The Supreme Court explained: "To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?" *Id.* The Supreme Court continued: "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Id.* at 2467.

The *Janus* Court rejected the idea that a union's responsibilities under the duty of fair representation justified an agency fee. First, practical experience had shown

that many unions were willing to act as an exclusive bargaining agent without agency fees. *Id.* Second, the requirements of that duty were not onerous – specifically, it is an "obligation not to 'act solely in the interests of [the union's] own members.'" *Id.* at 2467 (citation to quote omitted). The Supreme Court further explained:

> Nor can such [agency] fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 2460 – 2461. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were not subject to the duty to represent all employees fairly. [*Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198].

Id. at 2469.

The *Janus* Supreme Court concluded: "In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context." *Id.* (emphasis added). Later, it stated: "[W]e conclude that public-sector agency-shop arrangements violate, the First Amendment, and *Abood* erred in concluding otherwise." *Id.* at 2478.

Believing *Abood* to be in error, the Supreme Court then examined whether it might nonetheless control under *stare decisis*. As noted above, the *Janus* Court indicated *Abood* erred by relying on *Hanson* and *Street*. It was noted that neither

Hanson nor *Street* "gave careful consideration to the First Amendment." *Janus*, 138 S.Ct. at 2479. As in *Harris*, the Supreme Court indicated the primary question in *Hanson* was whether under the Commerce Clause Congress had the power to implement union shops. *Janus*, 138 S.Ct. at 2479.

Abood's reliance on *Hanson* and *Street* led it to apply the wrong standard of review to the First Amendment issue. *Abood* indicated that *Hanson* and *Street* had deferred to the legislative finding related to the importance of union shops. The *Janus* Court explained the error: "But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues." *Janus*, 138 S.Ct. at 2480.

The Supreme Court stated:

> If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive representative and the imposition of agency fees are not inextricably linked.

Id.

Another analytical flaw from *Abood* was that it "did not sufficiently take into account the difference between the effects of agency fees in public- and private-

sector collective bargaining." *Janus*, 138 S.Ct. at 2480. It was noted *Abood* admitted that "decisionmaking by a public employer is above all a political process" in which policy concerns often trumps economic ones. *Id.*

The *Janus* Court explained the significance:

> But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. [*Abood*, 431 U.S. at 229]. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector."

Janus, 138 S.Ct. at 2480 (internal citations omitted).[13] This distinction matters because it makes it harder in the public sector to distinguish chargeable from nonchargeable expenses. *Id.* The Supreme Court then discussed its public-sector

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[13] On the question of First Amendment application to private sector agency agreements, the *Janus* Court did not discuss *Ellis* directly. Rather, *Ellis* was cited for the following:

> We have therefore recognized that a "'significant impingement on First Amendment rights'" occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, [567 U.S. at 310–311], (quoting [*Ellis v. Railway Clerks*, 466 U.S. 435, 455].

Janus, 138 S.Ct. at 2464. *Knox* did discuss this in the context of public-sector bargaining, but *Ellis* was a RLA case where private employees and a private employer were involved.

chargeability jurisprudence and noted that: "*Abood's* line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision…." *Janus*, 138 S.Ct. at 2481.

The Supreme Court ended its *stare decisis* analysis by stating: "All these reasons—that *Abood's* proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the "'special justification[s]'" for overruling *Abood*." *Janus*, 138 S.Ct. at 2486.

The *Janus* Court concluded its opinion:

> For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. No form of employee consent is required.
>
> This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.
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> * * *
>
> *Abood* was wrongly decided and is now overruled.

Janus, 138 S.Ct. at 2486.

7. Application of United States Supreme Court Agency-Fee Jurisprudence

This case is controlled by the above Supreme Court precedent both as to state action and as to the constitutionality of agency fees.

a. State Action

Starting with state action, numerous different Supreme Court cases have indicated that private employees covered by the RLA may challenge agency fees under the First Amendment: *Hanson, Street, Ellis, Beck, Abood*, and *Harris*. *See also Lehnert*, 500 U.S. at 515-16. It is true that in *Janus*, that the Supreme Court cast some doubt on the future of this via footnote 24. But, the cases cited in that *Janus* footnote all concern whether there is state action under NLRA, since there has been no controversy on this subject under the RLA since *Hanson*.

In dismissing the instant action for lack of state action based on the lack of a New Jersey right-to-work law, the District Court failed to account for *Ellis*, which came from California, a state that does not have (and never has had) a right-to-work law.[14] There, the Supreme Court examined the constitutionality of three charges and did not dismiss the claim on the basis that there was no state action.

[14] *See also*, *Lancaster v. Air Line Pilot's Ass'n*, 76 F.3d 1509 (10th Cir. 1996) (case arising from Colorado, which is not a right to work state); *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123 (10th Cir. 1991) (also Colorado).

The state action discussed in the cases above is the act of precluding any state (not just those states that had right-to-work statutes or other right-to-work provisions at the time) from prohibiting agency fees. The Constitution does not vary state by state. Further, the RLA has large interstate bargaining units under the recognition that covered employees often engage in interstate travel.[15] It is difficult to imagine how a state-by-state rule, if seriously applied, would affect an agency-fee challenge by a pilot or flight attendant. If that person is in Florida for a day, then New York then Texas and then Illinois (or perhaps all four the same day) what percentage of the agency fee can be challenged? Can a challenge only originate from the state of domicile? Some pilots and flight attendants live in one state and "jumpseat" to their workstation: where can they file suit?

More important than the practical considerations, the Supreme Court has repeatedly indicated that under the First Amendment individuals should not have to subsidize a private entity's speech. In *Knox*, it said the general rule is that "individuals should not be compelled to subsidize private groups or private speech." *Knox*, 567 U.S. at 321. In *Harris*, the Supreme Court cited the evocative "goose-stepping brigades" language. *Harris*, 573 U.S. at 630. Further, in *Lebron*, the

[15] The National Mediation Board has long held that "craft or class certifications are applicable to a Carrier's entire system." *N. Ill. Reg'l Commuter R.R.*, 16 N.M.B. 175, 179 (1989).

Supreme Court warned: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Lebron*, 513 U.S. at 397.

Here, Congress allowed private employers and unions (and in some cases government employers and unions) to demand financial support of nonmembers through use of an agency-fee clause. Congress also prevented any state or locality from being able to exempt its citizens from this. The financial impact of this was significantly more money in union coffers and much of it from people who did not want to associate with the union. If this cannot be challenged, then much of the sweeping language surrounding the interests protected by the First Amendment is really meaningless.

b. Merits of First Amendment Challenges

On the merits of the First Amendment claim, the District Court disputed that *Hanson's* First Amendment holding has been overruled and indicated that *Janus* was not controlling.

But, in *Harris*, the Supreme Court held that it would not extend *Abood's* approval of agency fees to "partial-public employees, quasi-public employees, or simply private employees." *Harris*, 573 U.S. at 646. In *Knox*, the Supreme Court announced "the general rule" that "individuals should not be compelled to subsidize private groups or private speech." In *Harris*, the Supreme Court held because

"*Abood* is not controlling, we must analyze the constitutionality of the payments compelled by Illinois law under generally applicable First Amendment standards." *Harris*, 573 U.S. at 647. In holding that the imposition of an agency fee violated the First Amendment, the *Harris* Court rejected the purported state interest of labor peace. *Id.* at 649. The Supreme Court clarified: "The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by the personal assistants who chose to join. No such showing has been made." *Id.* at 651. Thus, assuming the District Court is correct that *Janus* does not control, then the proper test is from *Harris*, and in that case agency fees were held to be improper. *See generally, Road-Con, Inc. v. City of Philadelphia*, 2020 WL 1491333 (Mar. 27, 2020).

Further indicating that *Hanson* is not controlling, in *Knox, Harris*, and *Janus*, the Supreme Court applied exacting scrutiny (while noting in *Janus* that strict scrutiny might be the right standard) as opposed to the legislative deference shown in *Hanson*. In *Harris* and in *Janus*, the Supreme Court rejected the concept that payment of agency fees was inextricably linked to exclusive representation. In *Harris*, *Hanson's* First Amendment holding was disparaged as "a single sentence," *Harris*, 573 U.S. at 630, and in both *Harris* and *Janus* Court the claimed the First

Amendment "deserved better treatment." *Janus*, 138 S.Ct. at 2479 (*quoting Harris*, 573 U.S. at 636).

Hanson's "single sentence" has not survived *Knox, Harris*, and *Janus*.

II. THE THIRD CIRCUIT AND DISTRICT COURT CASES ON STATE ACTION AND FIRST AMENDMENT CHALLENGES

A. Standard of Review

This Court reviews constitutional matters *de novo*. *Free Speech Coalition, supra.*

B. Third Circuit on State Action and Agency Fees

As noted above, this Court has recognized the difficulty in analyzing state-action matters. Be that as it may, this Court tried to set some general parameters in *Kach v. Hose*, 589 F.3d 626 (3d Cir. 2009), wherein three "broad tests were identified." *Id*. at 646; *see also Borrell v. Bloomsburg Univ.*, 870 F.3d 154, 160 (3d Cir. 2017).[16] But, this Court has directly considered the question of state action related to agency fees in *White v. Communication Workers of America*, 370 F.3d 346 (2004), and that case should control.

In *White*, a nonmember of a union covered by the NLRA brought a First Amendment challenge to the process by which he had to use to opt-out of paying full union dues. The question presented was whether there was state action. This

[16] In *P.R.B.A. Corp. v. HMS Host Toll Roads, Inc.*, 808 F.3d 221, 224 (3d Cir. 2015), this Court also discussed the entwinement test.

Court examined the NLRA cases where other circuits had held (or denied) that state action was present. This Court sided with those not finding state action. *White*, 370 F.3d at 350.

In doing so, however, it had to distinguish *Hanson*. This Court recognized that in *Hanson*, "The Supreme Court found that the union's implementation of the union-shop provision amounted to state action." *White*, 370 F.3d at 352. This Court explained:

> The Court based this conclusion on the fact that the RLA, which governs collective bargaining by railway employees, permits the use of union-shop clauses "notwithstanding any law 'of any state.'" *Hanson*, [351 U.S. at 232]. Since state law could not supersede union-shop clauses governed by the RLA, the Court concluded, such clauses bore "the imprimatur of federal law," and their implementation constituted state action. *Id.*

Id. Further, this Court noted the NLRA does not have a blanket superseding provision like 45 U.S.C. § 152 Eleventh due to 29 U.S.C. § 164(b), which allows state right-to-work laws to prevent union shops (for NLRA covered unions) within a state with such a law. *Id*. at 353. That led to this conclusion from this Court: "Thus, the rationale for finding that an act done pursuant to a collective bargaining agreement governed by the RLA is state action is not applicable to an act authorized by an agreement controlled by the NLRA." *White*, 370 F.3d at 353. Therefore, this Circuit has clearly recognized that challenges to agency fees under the RLA constitutes state action.

C. Post-*Janus*: Unions and State Action

In the wake of *Janus*, there have been a number of lawsuits filed attempting to get individuals who were members of unions transitioned to nonmember status so that they no longer have to provide support to the unions. Some of these cases against the public-sector unions (which are private actors) have been dismissed due to a holding that there is not state action present. Typically, in these cases, the plaintiffs had signed a dues authorization before *Janus* that limit the time period to a couple of weeks a year when the employee can end financial support, and if the employee misses that period he or she must wait another year.

In *Quirarte v. United Domestic Workers AFSCME Local 3930*, ___ F.Supp.3d ____, 2020 WL 619574 (S.D. Cal., Feb. 10, 2020), appeal docketed No. 20-55266 (9th Cir. Mar. 11, 2020), the court held a union was not a state actor for its role in the withholding of dues. *See also Hendrickson v. AFSCME Council 18*, ___ F.Supp.3d ___, 2020 WL 365041 (D.N.M., Jan. 22, 2020) (same), appeal docketed No. 20-2018 (10th Cir. Feb. 21, 2020); *Mendez v. California Teachers Ass'n*, ___ F.Supp.3d ___, 2020 WL 256124 (N.D. Cal., Jan. 16, 2020) (same), appeal filed No. 20-15394 (9th Cir. Mar. 6, 2020); *Smith v. Teamsters Local 2010*, 2019 WL 6647935 (C.D. Cal., Dec. 3, 2019) (same), appeal docketed No. 19-56503 (9th Cir. Dec. 26, 2019); *Oliver v. SEUI Local 668*, 415 F.Supp.3d 602 (E.D. Pa. 2019) (same), appeal docketed No. 19-3876 (3d Cir. Dec. 17, 2019); *Cooley v. California State Law*

Enforcement Ass'n, 385 F.Supp.3d 1077 (E.D. Cal. 2019) (same), appeal docketed No. 19-16498 (9th Cir. July 31, 2019); and *Belgau v. Inslee*, 359 F.Supp.3d 1000 (W.D. Wash. 2019) (same), appeal docketed No. 19-35137 (9th Cir. Feb. 20, 2019).

Other courts have held there is state action in these situations. *Grossman v. Haw. Gov't Emps. Ass'n/AFSCME Local 152*, 2020 WL 515816 (D. Haw., Jan. 31, 2020) (mooting case, but noting union was probable state actor), appeal docketed No. 20-15356 (9th Cir. Mar. 3, 2020); *Hernandez v. AFSCME California*, ___ F.Supp.3d ___, 2019 WL 7038389 (E.D. Cal, Dec. 20, 2019) (same), appeal docketed No. 20-15076 (9th Cir. Jan. 16, 2020); *LaSpina v. SEIU Pennsylvania State Council*, 2019 WL 4750423 (M.D. Pa., Sept. 30, 2019) (same), appeal docketed No. 19-3484 (3d Cir. Nov. 4, 2019); and *O'Callaghan v. Regents of Univ. of California*, 2019 WL 6330686, (C.D. Cal., Sept. 30, 2019) (same), appeal docketed No. 19-56271 (9th Cir. Nov. 1, 2019).

While on the surface level all of these cases appear interesting as they concern unions, *Janus*, and state action, in reality they address a different factual predicate: these cases cover members who signed a dues authorization/contract, while this case involves nonmembers' challenge to agency fees permitted by the RLA.[17] Nothing in

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[17] State action was also discussed in *Janus*'s remnant. *Janus v. AFSCME*, 942 F.3d 352 (7th Cir. 2019). There, the parties were disputing the remedy, and the Seventh Circuit held there was state action. It is difficult to imagine any other ruling

(Note continued on next page.)

these cases is sufficient to overcome the Supreme Court precedent indicating that there is state action when private employees covered by the RLA bring suit to challenge agency fees. *Hanson* and *Ellis* control on this point.

D. Post-*Janus*: RLA and Agency Fees

Aside of the instance case, there are three cases that post-date *Janus* and concern the RLA and agency fees. The first is *Pegues v. International Association of Machinists and Aerospace Workers*, 2019 WL 6713618 (W.D. Tex., Dec. 10, 2019). In *Pegues*, the plaintiff was fired for failing to pay his agency fee and, relying on *Janus*, filed a suit in state court claiming the agency was unenforceable. The case was removed to federal court and the trial court distinguished *Janus*: "*Janus* did not overrule *Hanson*, but rather distinguished it on the basis that it addressed private sector collective bargaining agreements, not the public sector agreements at issue in *Janus*." *Id*. at * 3. The second is *Baisley v. International Association of Machinists and Aerospace Workers,* Case No. 19-cv-531(W.D. Tex., Mar. 19, 2020) (J.A. 72). In *Baisley*, the District Court also held *Janus* was limited to public employees and applied *Hanson*. The final case is *Popp v. Air Line Pilots Association, International*, Case No. 19-cv-61298 (S.D. Fla., Mar. 25, 2020) (J.A. 65). *Popp* largely relies on the instant case and therefore suffers the same flaws.

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given the number of First Amendment cases the Supreme Court has heard in the public sector agency-fee arena.

As the above review of the Supreme Court's agency-fee jurisprudence shows, none of these post-*Janus* RLA cases are sufficient to overcome *Knox, Harris*, and *Janus*.

RELIEF REQUESTED

For the reasons stated above, Plaintiffs/Appellants request that the judgment of the District Court be overturned and judgment in their favor entered.

Respectfully Submitted,

Dated: April 16, 2020

By: /s/ Matthew C. Moench

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to Local Rule 46.1 that the attorney whose name appears on the Brief of Appellants, Linda Rizzo-Rupon, Susan Marshall and Noemiero Oliveira, was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit on July 29, 2010 and is presently a member in good standing at the Bar of said Court.

April 16, 2020

/s/ Matthew M. Moench
Matthew M. Moench

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), I certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,768 words and 1,178 lines.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman font.

Pursuant to Local Rule 31.1(c), I certify the following:

1. This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Windows Defender (Antimalware Client Version 4.18.2001.10) virus detection program has been run on the file containing the electronic version of this brief and no viruses have been detected.

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April 16, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2020, I electronically filed the Brief of Appellants, Linda Rizzo-Rupon, Susan Marshall and Noemieo Oliveira and the Joint Appendix (Volumes I and II) with the Clerk of the Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that the service will be accomplished by the CM/ECF system with hardcopies to follow via United Parcel Service, Second Day Air.

KING, MOENCH HIRNIAK & MEHTA, LLP

April 16, 2020

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C.A. NO. 20-1106

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LINDA RIZZO-RUPON, et al.,
Appellants

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141 LOCAL 914, et al.,
Appellees

ON APPEAL FROM THE ORDER DATED DECEMBER 16, 2019,
ENTERED BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,
CIVIL ACTION NO: 2:19-CV-00221, HON. WILLIAM J. MARTINI, U.S.D.J.

JOINT APPENDIX VOLUME 1 OF 2 (J.A. 1 – 8)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LINDA RIZZO-RUPON, et al., Plaintiffs, vs. **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141 LOCAL 914, et al.,** Defendants.	**VIA ELECTRONIC FILING** **Case No.: 2:19-cv-00221-WJM-MF** Hon. William J. Martini, U.S.D.J. Hon. Mark Falk, U.S.M.J.

NOTICE OF APPEAL

Plaintiffs, Linda Rizzo-Rupon, Susan Marshall, and Noemieo Oliveira, appeal to the United States Court of Appeals for the Third Circuit from the order entered on December 16, 2019 (Dkt. No. 30).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LINDA RIZZO-RUPON, et al., Plaintiffs, vs. **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141 LOCAL 914, et al.,** Defendants.	**VIA ELECTRONIC FILING** **Case No.: 2:19-cv-00221-WJM-MF** Hon. William J. Martini, U.S.D.J. Hon. Mark Falk, U.S.M.J. **CERTIFICATION OF SERVICE**

I, Matthew C. Moench, an attorney in the State of New Jersey, and an attorney with the law firm of King Moench Hirniak & Mehta, LLP, hereby certify that I have, on the 14th day of January 2020, caused Plaintiffs' Notice of Appeal and Certification of Service to be served on all counsel via the ECF system, and sent via electronic mail to counsel for defendants.

Respectfully submitted,

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Dated January 14, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LINDA RIZZO-RUPON, *et al.*, **Plaintiffs,** **v.** **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,** **Defendants.**	Civ. No.: 2:19-cv-00221 **ORDER**

WILLIAM J. MARTINI, U.S.D.J.:

The matter comes before the Court on Defendants' Motion to Dismiss. ECF No. 9. For the reasons set forth in the accompanying opinion **IT IS** on this 16th day of December 2019, **ORDERED** that Defendant's motion to dismiss is **GRANTED**. Plaintiffs' Cross-Motion for Declaratory Judgment, ECF No. 26, is **DENIED**. Plaintiffs' Complaint, ECF No. 1, is **DISMISSED WITH PREJUDICE**.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LINDA RIZZO-RUPON, *et al.*, **Plaintiffs,** **v.** **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,** **Defendants.**	Civ. No.: 2:19-cv-00221 **OPINION**

WILLIAM J. MARTINI, U.S.D.J.:

In this action, Plaintiffs ask the Court to hold that Section 2 Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 Eleventh, which preempts state law prohibiting covered unions from entering into agreements providing for agency fees, is unconstitutional under the First and Fifth Amendments. For the reasons set forth below, the Court declines to do so. Consequently, Plaintiffs fail to state a claim upon which relief can be granted. Defendants' Motion to Dismiss, ECF No. 9, is **GRANTED**.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs Linda Rizzo-Rupon, Susan Marshall, and Noemieo Oliveira work as passenger service employees for United Airlines at Newark Liberty International Airport. Compl., ECF. No. 1 ¶¶ 1, 8-10. Defendants are the International Association of Machinists and Aerospace Workers, AFL CIO, IAM District Lodge 141, and IAM Local Lodge 914 ("the Union Defendants"). *Id.* at ¶¶ 11-13. Although not members of the Union Defendants, Plaintiffs are covered by the collective bargaining agreement between United Airlines and IAM Local Lodge 914 entitled Passenger Service Employees 2016-2021 ("the Agreement"). *Id.* at ¶¶ 8-10, 20, Compl. Exs. 2, 3, 5. The collective bargaining relationship between United and the Union Defendant is governed by the Railway Labor Act, 45 U.S.C. § 151, *et. Seq.* Compl. ¶ 11.

Pursuant to Article 8(B)(1) of the Agreement, employees are not required to become members of the Union, but they are required to pay "service fees," also know as agency fees, to the Union equal to monthly membership dues. *See* Compl. Exs. 3, 5. Additionally, nonmember agency fee payers may become "dues objectors" and pay a reduced fee rate

for expenses only directly related to collective bargaining matters. Compl. Ex. 5, pp. 3, 5. The parties agree that New Jersey has not enacted a "right-to-work" law—that is, a prohibition on unions from negotiating contracts with employers that require all members who benefit from the union contract to contribute to the costs of union representation. *See* Def.'s Mot. 7; Pls'. Resp. 2.

Plaintiffs filed suit on January 8, 2019. ECF No. 1. Defendants filed their Motion to Dismiss on June 3, 2019. ECF No. 9. Plaintiffs' response deadline was delayed to allow the United States Attorney General to intervene if he chose to do so. ECF No. 16. The Attorney General did not do so. ECF No. 17. Plaintiffs filed their opposition on September 24, 2019. ECF No. 26. Defendants filed their reply on October 8, 2019. ECF No. 28.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). In deciding a motion to dismiss under Rule 12(b)(6), a court must take all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). "A Rule 12(b)(6) dismissal is appropriate if, as a matter of law, it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Wilson v. Rackmill*, 878 F.2d 772, 774 (3d Cir. 1989).

III. DISCUSSION

Defendants move to dismiss under Rule 12(b)(6) for failure to state a claim. Plaintiffs bring a First Amendment free speech challenge to the agency-fee provisions of the Railway Labor Act, 45 U.S.C. § 152 Eleventh, and argue that the Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) requires that this Court find agency fees are unconstitutional as to employs covered by the Railway Labor Act. Plaintiffs ask for an injunction restraining the Union Defendants from forcing Plaintiffs to financially support the Union Defendants as a condition of employment and to award damages. Compl. 8-9. Defendants argue, in essence, that (1) Plaintiffs' First Amendment claims must fail because Defendants are not state actors and (2) even if Defendants were state actors, the Supreme Court's decision in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), upholding Section 2 Eleventh against an identical constitutional challenge, is binding on this Court. The Court addresses each argument.

A. **State Action Doctrine**

The first issue is whether the Union Defendants, by entering into the Agreement providing for agency fees under Section 2 Eleventh of the RLA, have engaged in state

action sufficient to raise a free speech claim. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging freedom of speech." U.S. Const. amend. I. The Free Speech Clause prohibits only governmental abridgement of speech, not private abridgment of speech. *See Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) ("By enforcing [the] constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty."). "[A] private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function . . . (ii) when the government compels the private entity to take a particular action . . . or (iii) when the government acts jointly with the private entity." *Id.* (internal citations omitted).

Plaintiffs do not contend that the Union Defendants fall into any of these categories. Rather, they argue that the Supreme Court's conclusion in *Hanson* that state action was present sufficient to reach the merits of employee-plaintiffs' free speech challenge to Section 2 Eleventh of the RLA, also follows from the facts of this case. The Supreme Court in *Hanson* found that state action was present because, although Section 2 Eleventh did not require private sector unions and employers to enter agreements providing for agency fees, it preempted Nebraska's right-to-work law. *See* 351 U.S. at 231-32. The *Hanson* Court explained that "[i]f private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Id.* at 233. This was sufficient for state action.

The parties agree that New Jersey has no right-to-work law. Consequently, because no New Jersey law is preempted by Section 2 Eleventh of the RLA, Plaintiffs possess no private rights implicated by the RLA. *Id.* at 232. The Third Circuit in *White v. Communication Workers of America* recognized that preemption of a contrary state law by federal law was central to the *Hanson* Court's finding of state action in the RLA context. 370 F.3d 346, 353 (2004). The Supreme Court's decision in *Janus* concerned only public sector unions and did not alter this logic. 138 S. Ct. 2448, 2479 (noting that "*Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)] failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees."). Plaintiffs appear to argue that state action arises because the RLA preempts other states' right-to-work laws. Pls' Resp. 14. This argument is without merit. Plaintiffs in this matter, unlike in *Hanson*, do not argue that they possess a right-to-work consistent with any states' law, let alone the one wherein they are employed.

The agency fee provision at issue in this case is solely the result of a negotiated agreement between private parties—the Union Defendants and United Airlines. Section 2 Eleventh of the RLA permits, but does not compel, private parties to engage in negotiation for contracts that include an agency fee provision. New Jersey does not prohibit such negotiations. There is no state action upon which to premise a First Amendment free speech claim.

B. ***Railway Employees' Department v. Hanson* is Binding on This Court**

The Supreme Court in *Hanson* upheld the constitutionality of Section 2 Eleventh of the RLA, stating explicitly "that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." 351 U.S. at 238. Plaintiffs claim that the Supreme Court's decision in *Janus* overruled the Court's holding in *Hanson* and requires a finding that "agency fees are unconstitutional in the Railway Labor Act context." Compl. ¶ 32.

Janus did not overrule *Hanson*. *Janus* applies to public sector employees, not private sector employees. *See Janus*, 138 S. Ct. at 2476, 2473 (public-sector fees involve "the government . . . compel[ling] a person to pay for another party's speech," on matters involving "the budget of the government" and "the performance of government services"). The Court in *Janus* specifically differentiated between *Hanson*, which "involved Congress's '*bare authorization*' of *private-sector* union shops under the Railway Labor Act," and *Abood*, "which failed to appreciate that a very different First Amendment question arises when a State requires its employees to pay agency fees." *Id.* at 2479. With respect to a non-consenting employee, the Court held, "this arrangement [in the public sector] violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* at 2460. In short, *Janus* stands for the limited proposition that when a government entity and labor organization agree to require government employees to pay agency fees, the First Amendment is implicated in ways dramatically distinct from when agency fees are agreed to in the private sector. Because Plaintiffs here all work for a private company—United Airlines—*Janus* has no application.

Even if it could be argued that the legal reasoning behind binding precedent has been called into doubt by another line of cases, dismissal is still required. *See Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). The parties agree that "it may be . . . that the Supreme Court will eventually overturn its prior holding . . . but the Supreme Court is the only body that can make that determination." Pls.' Resp. 15; Defs.' Reply 10. Because this Court is bound by the Supreme Court's decision in *Hanson* and its recent decision in *Janus* did not overrule *Hanson*, this Court declines to hold that Section 2 Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 Eleventh, is unconstitutional under the First and Fifth Amendments.[1]

[1] Plaintiffs' failure to mention their Fifth Amendment claim in their Response to Defendants' Motion to Dismiss constitutes abandonment and provides an alternative

IV. CONCLUSION

Because Plaintiffs' First Amendment claims fail as a matter of law, they fail to state a claim upon which relief can be granted under Rule 12(b)(6). Defendants' Motion to Dismiss is **GRANTED**. Plaintiffs' Cross-Motion for Declaratory Judgment, ECF No. 26, is **DENIED**. Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.

Dated: December 16, 2019

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

ground for dismissal of that claim. *See Reynolds v. Wagner*, 128 F.3d 166, 178 (3d Cir. 1997) (holding that a single conclusory statement in a brief without more results in waiver of the argument); *see also Batchelor v. Procter & Gamble Co.*, No. 14–2424, 2014 WL 6065823, at *6 (D.N.J. Nov. 13, 2014) (Court dismissed an ambiguous claim for breach on express warranty where plaintiff failed to address the "ambiguity in their Opposition Brief, despite Defendant's contention in support of the motion").

C.A. NO. 20-1106

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LINDA RIZZO-RUPON, et al.,
Appellants

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141 LOCAL 914, et al.,
Appellees

ON APPEAL FROM THE ORDER DATED DECEMBER 16, 2019,
ENTERED BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,
CIVIL ACTION NO: 2:19-CV-00221, HON. WILLIAM J. MARTINI, U.S.D.J.

JOINT APPENDIX VOLUME 2 OF 2 (J.A. 9 – 79)

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Joint Appendix Volume 2 of 2 Pursuant to LAR 30.3(a) and LAR 32.2(c):

APPEAL,CLOSED

U.S. District Court
District of New Jersey [LIVE] (Newark)
CIVIL DOCKET FOR CASE #: 2:19-cv-00221-WJM-MF

RIZZO-RUPON et al v. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141, LOCAL 914 et al
Assigned to: Judge William J. Martini
Referred to: Magistrate Judge Mark Falk
Case in other court: Third Circuit, 20-01106
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 01/08/2019
Date Terminated: 12/16/2019
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

LINDA RIZZO-RUPON represented by **MATTHEW CHRISTOPHER MOENCH**
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ATTORNEY TO BE NOTICED

Plaintiff

SUSAN MARSHALL represented by **MATTHEW CHRISTOPHER MOENCH**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

NOEMIEO OLIVEIRA represented by **MATTHEW CHRISTOPHER MOENCH**
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V.

Defendant

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141, LOCAL 914 represented by **JOHN JOSEPH GRUNERT , JR.**
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Suite 700

WASHINGTON, DC 20036
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 141

represented by **JOHN JOSEPH GRUNERT , JR.**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

represented by **JOHN JOSEPH GRUNERT , JR.**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/08/2019	1	COMPLAINT against INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 141, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141, LOCAL 914 (Filing and Admin fee $ 400 receipt number 0312-9288496), filed by LINDA RIZZO-RUPON, NOEMIEO OLIVEIRA, SUSAN MARSHALL. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Civil Cover Sheet)(MOENCH, MATTHEW) (Entered: 01/08/2019)
01/08/2019		Case Assigned to Judge William J. Martini and Magistrate Judge Mark Falk. (ak,) (Entered: 01/09/2019)
01/10/2019	2	SUMMONS ISSUED as to INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 141, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141, LOCAL 914. Attached is the official court Summons, please fill out Defendant and Plaintiffs attorney information and serve. (sms) (Entered: 01/10/2019)
04/09/2019	3	WAIVER OF SERVICE Returned Executed by LINDA RIZZO-RUPON, NOEMIEO OLIVEIRA, SUSAN MARSHALL. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO waiver sent on 4/4/2019, answer due 6/3/2019. (MOENCH, MATTHEW) (Entered: 04/09/2019)
04/09/2019	4	WAIVER OF SERVICE Returned Executed by LINDA RIZZO-RUPON, NOEMIEO OLIVEIRA, SUSAN MARSHALL. INTERNATIONAL

		ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 141 waiver sent on 4/4/2019, answer due 6/3/2019. (MOENCH, MATTHEW) (Entered: 04/09/2019)
04/09/2019	5	WAIVER OF SERVICE Returned Executed by LINDA RIZZO-RUPON, NOEMIEO OLIVEIRA, SUSAN MARSHALL. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141, LOCAL 914 waiver sent on 4/4/2019, answer due 6/3/2019. (MOENCH, MATTHEW) (Entered: 04/09/2019)
06/03/2019	6	NOTICE of Appearance by JOHN JOSEPH GRUNERT, JR on behalf of All Defendants (GRUNERT, JOHN) (Entered: 06/03/2019)
06/03/2019	7	MOTION for Leave to Appear Pro Hac Vice *Jeffrey A. Bartos* by All Defendants. (Attachments: # 1 Motion for Admission Pro Hac Vice of Jeffrey A. Bartos, # 2 Certification Certification of John J. Grunert, # 3 Certification Certification of Jeffrey A. Bartos, # 4 Text of Proposed Order, # 5 Certificate of Service)(GRUNERT, JOHN) (Entered: 06/03/2019)
06/03/2019	8	MOTION for Leave to Appear Pro Hac Vice *Elizabeth A. Roma* by All Defendants. (Attachments: # 1 Motion for Admission Pro Hac Vice of Elizabeth A. Roma, # 2 Certification Certification of John J. Grunert, # 3 Certification Certification of Elizabeth A. Roma, # 4 Text of Proposed Order, # 5 Certificate of Service)(GRUNERT, JOHN) (Entered: 06/03/2019)
06/03/2019	9	MOTION to Dismiss by All Defendants. Responses due by 6/17/2019 (Attachments: # 1 Notice of Motion to Dismiss, # 2 Declaration Declaration of Alexander Gerulis, # 3 Exhibit Attachment A to Declaration of Alexander Gerulis, # 4 Brief Memorandum in Support of Motion to Dismiss, # 5 Text of Proposed Order, # 6 Certificate of Service)(GRUNERT, JOHN) Modified on 9/18/2019 (gh). (Entered: 06/03/2019)
06/03/2019	10	Corporate Disclosure Statement by INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 141, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141, LOCAL 914. (GRUNERT, JOHN) (Entered: 06/03/2019)
06/04/2019		Set Deadlines as to 8 MOTION for Leave to Appear Pro Hac Vice *Elizabeth A. Roma*, 9 MOTION to Dismiss , 7 MOTION for Leave to Appear Pro Hac Vice *Jeffrey A. Bartos*. Motion set for 7/1/2019 before Judge William J. Martini. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk`s Office and does not supersede any previous or subsequent orders from the Court. (sms) (Entered: 06/04/2019)
06/17/2019	11	Rule 7.1(d)(5) Letter for an automatic extension of the return date of a dispositive motion re 9 MOTION to Dismiss . (MOENCH, MATTHEW) (Entered: 06/17/2019)
06/18/2019	12	ORDER granting 8 Motion for Elizabeth A. Roma to Appear Pro Hac Vice. Signed by Judge William J. Martini on 6/18/19. (gh,) (Entered: 06/18/2019)

06/18/2019	13	ORDER granting 7 Motion of Jeffrey A. Bartos for Leave to Appear Pro Hac Vice. Signed by Judge William J. Martini on 6/18/19. (gh,) (Entered: 06/18/2019)
06/18/2019		Set/Reset Deadlines as to 9 MOTION to Dismiss . Responses due by 7/1/2019 Replies due by 7/8/2019. Motion set for 7/15/2019 before Judge William J. Martini. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. (gh,) (Entered: 06/18/2019)
06/24/2019		Pro Hac Vice fee as to Elizabeth A. Roma and Jeffrey A. Bartos: $ 300, receipt number NEW039871 (sm) (Entered: 06/27/2019)
06/28/2019	14	Letter from Defendant re Erratum. (GRUNERT, JOHN) (Entered: 06/28/2019)
06/28/2019	15	Letter from Matthew C. Moench, Esq., providing Notice of Constitutional Challenge and seeking adjournment of motion briefing schedule. (Attachments: # 1 Exhibit Complaint filed by Plaintiffs raising Constitutional Challenge, # 2 Text of Proposed Order)(MOENCH, MATTHEW) (Entered: 06/28/2019)
07/02/2019	16	TEXT ORDER: At Plaintiff's request and on consent of Defense counsel, Plaintiff's response to the Motion to Dismiss is stayed pending and opportunity of the Attorney General to intervene, if it so chooses. So Ordered by Judge William J. Martini on 7/2/19. (gh,) (Entered: 07/02/2019)
07/11/2019	17	ORDER Certifying Notice of Constitutional Challenge; the U.S. Attorney General has until 8/27/19 to intervene in this action, etc. Signed by Judge William J. Martini on 7/11/19. (gh,) (Entered: 07/11/2019)
07/25/2019	18	Letter from Matthew C. Moench, Esq., counsel for Plaintiffs, to the Honorable William J. Martini, U.S.D.J.. (MOENCH, MATTHEW) (Entered: 07/25/2019)
08/05/2019	19	TEXT ORDER: This matter comes before the Court upon sua sponte review of the record. On July 11, 2019, this Court entered an order certifying a notice of constitutional challenge, providing the United States Attorney General under August 27, 2019 to intervene, and staying the action. ECF No. 17 . Given this stay, the pending motion to dismiss, ECF No. 9 , is administratively terminated. As set forth in this Courts prior order, within seven days from either the Attorney General intervening or expiration of the stay, the parties shall jointly submit a proposed briefing schedule with regard to the previously filed motion to dismiss. So Ordered by Judge William J. Martini on 8/5/19. (gh,) (Entered: 08/05/2019)
08/05/2019	20	Letter from the Court re: Helen Rizzo. (gh,) (Entered: 08/05/2019)
08/05/2019	21	MOTION for Leave to Appear Pro Hac Vice *for Patrick J. Wright, Esq.* by SUSAN MARSHALL, NOEMIEO OLIVEIRA, LINDA RIZZO-RUPON. (Attachments: # 1 Certification of Matthew C. Moench, Esq. in support of Motion to admit Patrick J. Wright, Esq. pro hac vice, # 2 Certification of Patrick J. Wright, Esq. in support of motion, # 3 Exhibit A to the Certification of Patrick J. Wright, Esq., # 4 Text of Proposed Order, # 5 Certificate of Service) (MOENCH, MATTHEW) (Entered: 08/05/2019)
08/06/2019		

		Set Deadlines as to 21 MOTION for Leave to Appear Pro Hac Vice *for Patrick J. Wright, Esq.*. Motion set for 9/3/2019 before Judge William J. Martini. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk`s Office and does not supersede any previous or subsequent orders from the Court. (sms) (Entered: 08/06/2019)
09/03/2019	22	STATUS REPORT *Joint Proposed Briefing Schedule* by INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 141, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141, LOCAL 914. (Attachments: # 1 Text of Proposed Order)(GRUNERT, JOHN) (Entered: 09/03/2019)
09/04/2019	23	ORDER granting the parties Joint Briefing Schedule: Plaintiff's Opposition to Defendant's Motion to Dismiss shall be filed by 9/24/19; Reply filed by 10/8/19; ret'able on 10/21/19; the motion will be decided pursuant to Rule 78. Signed by Judge William J. Martini on 9/4/19. (gh,) (Entered: 09/04/2019)
09/05/2019	24	ORDER granting 21 Motion for Leave for Patrick J. Wright to Appear Pro Hac Vice, etc. Signed by Chief Mag. Judge Mark Falk on 9/5/2019. (byl) (Entered: 09/11/2019)
09/24/2019	25	Cross MOTION for Declaratory Judgment by SUSAN MARSHALL, NOEMIEO OLIVEIRA, LINDA RIZZO-RUPON. Responses due by 10/10/2019 (MOENCH, MATTHEW) (Entered: 09/24/2019)
09/24/2019	26	MEMORANDUM in Opposition filed by SUSAN MARSHALL, NOEMIEO OLIVEIRA, LINDA RIZZO-RUPON re 25 Cross MOTION for Declaratory Judgment , 9 MOTION to Dismiss (Attachments: # 1 Declaration of Matthew C. Moench, Esq., # 2 Exhibit 1 to Moench Declaration, # 3 Exhibit 2 to Moench Declaration, # 4 Exhibit 3 to Moench Declaration, # 5 Exhibit 4 to Moench Declaration, # 6 Exhibit 5 to Moench Declaration, # 7 Text of Proposed Order, # 8 Certificate of Service)(MOENCH, MATTHEW) (Entered: 09/24/2019)
09/25/2019		Set/Reset Deadlines as to 25 Cross MOTION for Declaratory Judgment. Motion set for 10/21/2019 before Judge William J. Martini. Unless otherwise directed by the Court, this motion will be decided on the papers and no appearances are required. Note that this is an automatically generated message from the Clerk`s Office and does not supersede any previous or subsequent orders from the Court. (jc,) (Entered: 09/25/2019)
10/08/2019	27	Notice of Request by Pro Hac Vice Patrick J. Wright to receive Notices of Electronic Filings. (Pro Hac Vice fee $ 150 receipt number 0312-10021017.) (MOENCH, MATTHEW) (Entered: 10/08/2019)
10/08/2019	28	MEMORANDUM in Support filed by INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 141, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141,

		LOCAL 914 re 9 MOTION to Dismiss (GRUNERT, JOHN) (Entered: 10/08/2019)
10/08/2019		Pro Hac Vice counsel, Patrick J. Wright, has been added to receive Notices of Electronic Filing. Pursuant to L.Civ.R. 101.1, only local counsel are entitled to sign and file papers, enter appearances and receive payments on judgments, decrees or orders. (jc,) (Entered: 10/08/2019)
12/16/2019	29	OPINION. Signed by Judge William J. Martini on 12/16/19. (gh,) (Entered: 12/16/2019)
12/16/2019	30	ORDER granting 9 Motion to Dismiss; Complaint dismissed with prejudice***CIVIL CASE TERMINATED. Signed by Judge William J. Martini on 12/16/19. (gh,) (Entered: 12/16/2019)
01/14/2020	31	NOTICE OF APPEAL as to 29 Opinion, and 30 Order on Motion to Dismiss by SUSAN MARSHALL, NOEMIEO OLIVEIRA, LINDA RIZZO-RUPON. Filing fee $ 505, receipt number 0312-10249394. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. Appeal Record due by 1/28/2020. (Attachments: # 1 Certificate of Service) (MOENCH, MATTHEW) Modified on 1/14/2020 (dam,). (Entered: 01/14/2020)
01/14/2020		Notice to Court of Appeals re 29 Opinion (dam,) (Entered: 01/14/2020)
01/16/2020	32	USCA Case Number 20-1106 for 31 Notice of Appeal (USCA),, filed by LINDA RIZZO-RUPON, SUSAN MARSHALL, NOEMIEO OLIVEIRA. USCA Case Manager Pamela (Document Restricted - Court Only) (ca3pdb,) (Entered: 01/16/2020)

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Billable Pages:	5	**Cost:**	0.50

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LINDA RIZZO-RUPON, **SUSAN MARSHALL,** **NOEMIEO OLIVEIRA,** Plaintiffs, vs. **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141 LOCAL 914,** **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 141,** **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,** Defendants.	**Case No.:** **COMPLAINT**

Plaintiffs, Linda Rizzo-Rupon, residing at 126 Main Street, Whitehouse Station, New Jersey 08889, Susan Marshall, residing at 156 Plainfield Road, Metuchen, New Jersey 08840, and

Noemieo Oliveira, residing at 2275 Biddle Lane Easton, Pennsylvania 18040 (collectively, "Plaintiffs"), by and through undersigned counsel, by way of Complaint against defendants International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM"), with offices at 9000 Machinists Place, Upper Marlboro, Maryland 20772-2687, International Association of Machinists and Aerospace Workers, District Lodge 141 ("IAM District Lodge 141"), with offices at 1771 Commerce Drive, Suite 103, Elk Grove Village, Illinois 60007-2139, and International Association of Machinists and Aerospace Workers District Lodge 141, Local Lodge 914 ("IAM Local Lodge 914"), with offices at 160 Spring Street, Elizabeth, New Jersey, 07201 (collectively, the "Union Defendants"), allege as follows:

BACKGROUND AND NATURE OF THE ACTION

1. Plaintiffs are employees of United Airlines and work out of the Newark, New Jersey airport.

2. In Janus v. AFSCME Council 31, 585 U.S. ___ (2018), the Supreme Court held:

> States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. §315/6(e). No form of employee consent is required. This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed.

Janus, slip opinion at 48.

3. In Janus, the Supreme Court discussed two of its Railway Labor Act ("RLA") cases wherein agency fees had been permitted:

Railway Employes v. Hanson, 351 U.S. 225 (1956), and Machinists v. Street, 367

> U.S. 740 (1961), "appear[ed] to require validation of the agency shop agreement before [the Court]." 431 U.S., at 226. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization*" of private-sector union shops under the Railway Labor Act. Street, supra, at 749 (emphasis added).[24]
>
> [24] No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when Abood was decided, and is even more questionable today. See American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 53 (1999); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). Compare, e.g., White v. Communications Workers of Am., AFL–CIO, Local 13000, 370 F. 3d 346, 350 (CA3 2004) (no state action), and Kolinske v. Lubbers, 712 F. 2d 471, 477–478 (CADC 1983) (same), with Beck v. Communications Workers of Am., 776 F. 2d 1187, 1207 (CA4 1985) (state action), and Linscott v. Millers Falls Co., 440 F. 2d 14, 16,and n. 2 (CA1 1971) (same). We reserved decision on this question in Communications Workers v. Beck, 487 U. S. 735, 761 (1988), and do not resolve it here.

Janus, slip opinion at 35 and n. 24.

4. Agency fees are authorized under 45 U.S.C. § 152 Eleventh. Plaintiffs' claims arise under the First and Fifth Amendments to the United States Constitution. They seek to have agency fees declared unconstitutional in the RLA context.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction under 28 U.S.C. § 1331, and 28 U.S.C. § 1343.

6. Venue is appropriate in this jurisdiction because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district. 28 U.S.C. § 1391(b)(2).

7. Newark would appear to be the most appropriate Vicinage because the events arose out of Plaintiffs' employment, which occurred in Newark, New Jersey. See generally, Local Civil Rule 40.1(a).

PARTIES

8. Plaintiff Linda Rizzo-Rupon is an "employee" under 45 U.S.C. § 151 Fifth and 45 U.S.C. § 181. She works at Newark International Airport as a customer service representative. She is covered by a collective bargaining agreement between United Airlines (not a party) and Defendant IAM, District Lodge 141; but, she is not a member of the Union Defendants. She has not signed a dues authorization card.

9. Plaintiff Susan Marshall is an "employee" under 45 U.S.C. § 151 Fifth and 45 U.S.C. § 181. She works at Newark International Airport as a customer service representative. She is covered by a collective bargaining agreement between United Airlines (not a party) and Defendant IAM, District Lodge 141; but, she is not a member of the Union Defendants. She has not signed a dues authorization card.

10. Plaintiff Noemieo Oliveira is an "employee" under 45 U.S.C. § 151 Fifth and 45 U.S.C. § 181. He works at Newark International Airport as a customer service representative. He is covered by a collective bargaining agreement between United Airlines (not a party) and Defendant IAM, District Lodge 141; but, he is not a member of the Union Defendants. He has not signed a dues authorization card.

11. Defendant IAM is a "representative" under 45 U.S.C. § 151 Sixth and 45 U.S.C. § 181. Upon information and belief, its main office is located at 9000 Machinists Place, Upper Marlboro, Maryland 20772-2687.

12. Upon information and belief, Defendant IAM District Lodge 141 is a "representative" under 45 U.S.C. § 151 Sixth and 45 U.S.C. § 181. Upon further information and belief, its main office is located at 1771 Commerce Drive, Suite 103, Elk Grove Village, Illinois 60007-2139.

13. Upon information and belief, Defendant IAM Local Lodge 914 is a "representative" under 45 U.S.C. § 151 Sixth and 45 U.S.C. 181. Upon further information and belief, its main office is 160 Spring Street, Elizabeth, New Jersey, 07201.

FACTS

14. United Airlines and Continental Airlines Merger Agreement became effective on October 1, 2010.

15. United Airlines and Continental Airlines were issued a single operating certificate by the Federal Aviation Administration on November 30, 2011.

16. Pre-merger, the United Passenger Service Employees were represented by Defendant IAM and Defendant IAM District Lodge 141.

17. Pre-merger, the Continental Passenger Service Employees were not represented by a union.

18. Post-merger, the National Mediation Board conducted a "single-carrier proceeding," wherein the Board works out union representation issues where there are mergers. See generally, National Mediation Board Manual § 19.5 (June 12, 2018), a selection of which is attached hereto as **Exhibit 1**.

19. The single-carrier proceeding led to an election whereby the employees could choose between Defendant IAM or no union. Defendant IAM prevailed. United Airlines, 39 NMB 294 (March 8, 2012) (NMB Case No. R-7313), attached hereto as **Exhibit 2**.

20. Currently, all Plaintiffs are in a bargaining unit covered by a collective bargaining agreement titled "Passenger Service Employees 2016-2021 Agreement." ("PSE Agreement"). A copy of the relevant portions is attached hereto as **Exhibit 3**.

21. As authorized by 45 U.S.C. § 152 Eleventh, Article 8, Part B. 1. of the PSE

Agreement requires nonmembers of Union Defendants to pay an agency fee:

> As a condition of employment, all employees of the Company covered by this Agreement will, on the effective Date of this Agreement, become and remain members in good standing of the Union or, in the alternative, render the Union a monthly sum equivalent to the standard monthly dues required of the Union members ("Service Fees.") Employees covered by this Agreement and hired on or after the Agreement's effective date will comply with these requirements on or before the 60th day following their initial seniority date.

Id.

22. Article 8, Part B. 8. of the PSE Agreement discusses delinquency of service fees:

> If an employee covered by this Agreement becomes delinquent in the payment of monthly dues or Service Fees, the Union will take steps necessary in accordance with its established procedures to notify the employee in writing that he is delinquent in the payment of monthly membership dues or Service Fees as specified herein and accordingly will be subject to discharge as an employee of the Company. If such employee still remains delinquent in the payment of dues or service fees after the Union has completed all steps in its established procedure, the Union will certify in writing to the Company that the employee has failed to remit payment of dues or Service Fees within the grace period allowed under the Union's procedure and is, therefore, to be discharged. The Company will then promptly notify the employee involved that he is to be discharged from the services of the Company and will promptly take proper steps to so discharge the employee.

Id.

23. Upon information and belief, agency fees are generally collected by Defendant IAM Local Lodge 914 and remitted to Defendant IAM District Lodge 141. See, International Association of Machinists and Aerospace Workers Constitution (January 1, 2017) at Article XXII § 4 pp. 83-84, attached hereto as **Exhibit 4**.

24. Upon information and belief, Defendant IAM District Lodge 141 pays a per capita tax to Defendant IAM on behalf of itself and Defendant IAM Local Lodge 914. See, International Association of Machinists and Aerospace Workers Constitution (January 1, 2017) at Article VII § 4 pp. 41-43. *Id*.

25. Each Plaintiff received a September 8, 2017 letter from Alexander Gerulis,

Secretary Treasurer of Defendant IAM District Lodge 141 (attached hereto as **Exhibit 5**). Plaintiffs were offered an opportunity to join the union. The letters also noted certain fee-payer requirements and a potential penalty for failing to keep up with payments:

> According to IAM's records, you are recognized as a fee objector. Therefore, your fee will be reduced per the letter you received. The reduced initiation fee is $77.87 and the reduced non-member fee is $43.26/month. You should have already received notice of the obligation to pay initiation and monthly dues or fees when you joined the bargaining unit, but whether or not you did, you now have thirty (30) days from the date of this letter to make your initial payments of the initiation/reinstatement fee and the first month's dues. If you fall two months in arrears in making the required payments you will be terminated from employment under the terms of the collective bargaining agreement.
>
> After making these payments, you must continue to be in compliance with your financial obligations by making monthly payments to the union. The easiest way to meet your obligation going forward is to sign the attached check-off authorization, so that your monthly fees are automatically deducted from your paycheck. If you do not authorize check-off, you are responsible to make monthly payments by check to the union. Even if you agree to check-off, you still should send your first payment for initiation/reinstatement fee and one month's dues or fees to this office by check.
>
> Please fill out and return the application with your payment of $1221.13 to I.A.M.A.W District Lodge 141 at the address indicated on the letterhead. If you have any questions about these materials or have some explanation for nonpayment, please do not hesitate to contact us.

Exhibit 5.[1]

26. Perhaps contrary to the Union Defendants' preferred procedure, Plaintiff Rizzo-Rupon has been sending her agency-fee checks to Defendant IAM District Lodge 141 as opposed to Defendant IAM Local Lodge 914. For reasons that are not entirely clear, Plaintiff Rizzo-Rupon's March 2018 and April 2018 checks were returned to her by Defendant IAM District Lodge 141 and requested to be sent to Defendant IAM Local Lodge 914 despite the January 2018,

[1] The handwritten material on Plaintiff Rizzo-Rupon's letter are her own notes.

February 2018, May 2018, June 2018, and July 2018 checks being accepted by Defendant IAM District Lodge 141. A letter from Defendant District Lodge 141 is attached hereto as **Exhibit 6**.

27. Plaintiff Rizzo-Rupon sent replacement checks for the March 2018 and April 2018 checks to Defendant IAM District Lodge 141 on December 27, 2018. Plaintiff Rizzo-Rupon's letter is attached hereto as **Exhibit 7**.

28. Upon information and belief, all Plaintiffs are current in their agency-fee payments.

CAUSES OF ACTION

COUNT I – Agency fee

29. Plaintiffs incorporate paragraph 1 through 28 as though fully set forth herein.

30. Union Defendants, under color of federal law, force employees to financially support the Union Defendants or suffer discharge from their jobs.

31. The Union Defendants' actions are authorized by 45 U.S.C. § 152 Eleventh, yet the federal government lacks a compelling governmental interest to require nonmembers to financially support a union.

32. Plaintiffs are suing the Union Defendants under the First and Fifth Amendments and under 28 U.S.C. § 2201, the Declaratory Judgment Act. More specifically, Plaintiffs seek a declaration that, under Janus and/or any other relevant case law, agency fees are unconstitutional in the Railway Labor Act context.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs hereby request that this court:

a. Declare that the RLA's authorization of compulsory agency fees, 45 U.S.C. § 152 Eleventh is unconstitutional.

b. Enjoin the Union Defendants from attempting to force Plaintiffs to financially support the Union Defendants as a condition of employment.

c. Award appropriate compensatory and/or nominal damages.

d. Award Plaintiffs their attorney fees along with costs; and

e. Grant all other relief that the Court deems just, proper, and equitable.

By: /s/ Matthew C. Moench

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Counsel for Plaintiffs,
Linda Rizzo-Rupon,
Susan Marshall,
and Noemio Oliveira

January 8, 2019

Exhibit 1

NATIONAL MEDIATION BOARD
REPRESENTATION MANUAL

Revised Text Effective June 12, 2018

NOTICE

This Manual provides general procedural guidance to the National Mediation Board's staff with respect to the processing of representation cases before the NMB. Such procedural guidance is not required by or subject to the Administrative Procedure Act. The provisions of this Manual are neither obligatory upon the Members of the Board nor do they constitute the exclusive procedure for the NMB's investigation of representation matters pursuant to the Railway Labor Act.

Mary L. Johnson
General Counsel

(Revised text is effective June 12, 2018, and replaces all previous versions of the Manual as of that date.)

business days after the date of the tally. Participants may respond to such allegations by 4 p.m., Eastern Time, seven (7) business days after the General Counsel's receipt of the interference allegations. All submissions must comply with the simultaneous service requirements in Manual Section 1.2.

Allegations of election interference must state a prima facie case that the laboratory conditions were tainted and must be supported by substantive evidence. Allegations of election interference not sufficiently supported by substantive evidence will be dismissed.

If the NMB finds a prima facie case of election interference, the General Counsel will notify the participants in writing or electronically.

18.0 BARS TO REPRESENTATION APPLICATIONS

The NMB's representation bar procedures are set forth in the NMB Rule §1206.4 (29 CFR §1206.4).

19.0 MERGER PROCEDURES

19.1 Merger

Merger is a consolidation, merger, purchase, lease, operating contract, acquisition of control, or similar transaction of two or more business entities.

19.2 Authority

Pursuant to Section 2, Ninth, the NMB, upon an Application, has the authority to resolve representation disputes arising from a merger involving a Carrier or Carriers covered by the RLA. The NMB will consider these representation issues on a case-by-case basis.

19.3 Notice to NMB

A Carrier should notify the NMB electronically at OLA-efile@nmb.gov when any of the transactions described in Section 19.1 occur, or of:

1) an intent to merge, at the same time it files with the Surface Transportation Board (STB) or the Department of Transportation (DOT); and

2) a completed merger including the date of the merger and the Carriers (or business entities) involved.

Notices must comply with the service requirements of Section 1.2.

19.4 Initiation of Procedure for Determination of a Single Transportation System

Any organization or individual may file an application, supported by evidence of representation or a showing of interest (See Section 19.601), seeking a NMB determination that a single transportation system exists.

19.5 Merger Investigations

After an application is filed, the NMB will conduct a pre-docket investigation to determine whether a single transportation system exists. The investigation may take any form appropriate to the determination.

19.501 Factors Indicating a Single Transportation System

The following are some indicia of a single transportation system:

(1) published combined schedules or combined routes;

(2) standardized uniforms;

(3) common marketing, markings or insignia;

(4) integrated essential operations such as scheduling or dispatching;

(5) centralized labor and personnel operations;

(6) combined or common management, corporate officers, and board of directors;

(7) combined workforce; and,

(8) common or overlapping ownership.

19.6 Procedure After Finding Single Transportation System

If the NMB determines that a single transportation system exists, the investigation will proceed to address the representation of the proper craft or class. The bar rules in NMB Rule §1206.4 (29 CFR § 1206.4) do not apply to applications filed under this section.

Exhibit 2

39 NMB 294 (N.M.B.), 39 NMB No. 30, 2012 WL 786234

National Mediation Board (NMB)

IN THE MATTER OF THE REPRESENTATION OF EMPLOYEES
OF UNITED AIRLINES PASSENGER SERVICE EMPLOYEES

Case No.

[redacted]

March 8, 2012

*294 CERTIFICATION

**1 The services of the National Mediation Board (Board) were invoked by the International Association of Machinists and Aerospace Workers (IAM) on September 20, 2011, to investigate and determine who may represent for the purposes of the Railway Labor Act (RLA), as provided by Section 2, Ninth, thereof, personnel described as "Passenger Service Employees," employees of United Air Lines (Carrier).

At the time this application was received, these employees were represented in part by the IAM and in part by the International Brotherhood of Teamsters.

The Board assigned Investigators Maria-Kate Dowling and Angela I. Heverling to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the craft or class of Passenger Service Employees, and by direction of the Board, the Investigators were instructed to conduct an election to determine the employees' representation choice.

The following is the result of the election as reported by Investigators Dowling and Heverling.

Election Results for Passenger Service Employees

Eligible Employees	16,720
Total Valid Votes	14,170
IAM	8,240
Other	65
Void	13
"No" Votes	5,865

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*295 The Board further finds that: the Carrier and employees in this case are, respectively, a Carrier and employees within the meaning of the RLA, as amended; this Board has jurisdiction over the dispute involved herein; and the interested parties, as well as the Carrier, were given due notice of the Board's investigation.

CERTIFICATION

NOW, THEREFORE, in accordance with Section 2, Ninth, of the RLA, as amended, and based upon its investigation pursuant thereto, the Board certifies that the International Association of Machinists and Aerospace Workers has been duly designated and authorized to represent for the purposes of the RLA, as amended, the craft or class of Passenger Service Employees, employees of United Air Lines/Continental Airlines, its successors and assigns.

By direction of the NATIONAL MEDIATION BOARD.

Mary L. Johnson

General Counsel

39 NMB 294 (N.M.B.), 39 NMB No. 30, 2012 WL 786234

End of Document

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Exhibit 3

UNITED

Passenger Service Employees
2016 – 2021 Agreement

Between United Airlines and
The International Association of Machinists
And Aerospace Workers (IAMAW)

ARTICLE 8: UNION REPRESENTATION

A. Recognition The Company recognizes the Union as the exclusive representative and sole collective bargaining agent with respect to rates of pay, rules and working conditions for all employees employed by the Company composing the craft or class of Passenger Service Employees for purposes of the Railway Labor Act, pursuant to the certification issued by the National Mediation Board on March 8, 2012, in Case No. R-7313.

B. Union Security

1. As a condition of employment, all employees of the Company covered by this Agreement will, on the Effective Date of this Agreement, become and remain members in good standing of the Union or, in the alternative, render the Union a monthly sum equivalent to the standard monthly dues required of the Union members ("Service Fees.") Employees covered by this Agreement and hired on or after the Agreement's effective date will comply with these requirements on or before the 60th day following their initial seniority date.

2. During the life of this Agreement the Company agrees to deduct from the pay of each member of the Union and remit to the Union standard initiation (or reinstatement) fee, Service Fees, and monthly membership dues uniformly levied in accordance with the constitution and by-laws of the Union as prescribed by the Railway Labor Act, as amended, provided such member of the Union voluntarily executes form(s), to be known as a check-off form. Such authorization form will be provided by the Union, and will provide such information as the Company may require to make the deductions. The Company will pay over to the District Lodge 141 the wages withheld for such fees and/or dues. The amount so withheld will be deducted from the appropriate paycheck, reported and paid to the Union monthly. The employee's employee number, last name, first name, middle initial, dues or fees deducted, dues rate, rate of pay, station code, department, job, and status of employment will be transmitted with the monthly fees/dues.

a. The Company will advise the Union of the name, employee number, hire date, home address, station code, department, job of any new hires and the names, employee numbers and dates of all other employees covered by the Agreement who have been terminated, laid off, retired, transferred, changed status, or recalled at the time the Company turns over the monies to the Union per above.

3. It will be the responsibility of any employee who is not on a dues deduction program to keep their membership current by direct payments of monthly dues or Service Fees to the Union.

4. No employee covered by this Agreement or an employee whose employment is terminated pursuant to the provisions of this Section B, nor the Union, will have any claim for loss of time, wages or any other damages against the Company because of the Company's agreeing to this Section B of this Agreement or because of any alleged violation, misapplication, compliance or non-compliance with any of the provisions of this Section B. The Union will indemnify the Company and hold the Company harmless from any and all such claims and any and

all legal fees incurred by the Company in connection therewith, except to the extent that such claims or fees are finally determined by a court of competent jurisdiction to have resulted from the gross negligence, fraud or willful misconduct of the Company. If the Company is named as a defendant or charged party in any action by an individual discharged pursuant to the provisions of this Article, the Company will promptly notify the Union and the Union will undertake the defense of the case. Subject to the Company's right to elect to undertake its own defense, the Union will maintain the exclusive right to defend, settle, mitigate damages, litigate, and/or take whatever action it deems necessary and proper through attorneys of the Union's choosing and at the Union's cost. If the Company decides to retain its own counsel, it will do so at its own cost, and not at the cost of the Union, and if the Company elects to undertake its own defense the Union will be relieved of its obligation in this Section to indemnify the Company and hold the Company harmless. Nothing in this Section will prohibit the Union from filing a claim against the Company for non-compliance with this Section B or obligate the Union to indemnify the Company for, hold the Company harmless from, or defend the Company in the event the Union files such a claim against the Company.

5. Any employee maintaining, or maintaining and accruing, seniority under this Agreement but not employed in a classification covered by this Agreement will not be required to maintain Union membership during such employment but may do so at his option. Should such employee return to a classification covered by this Agreement, he will be required to become a member of the Union within 15 days after the date he returns to such classification, and will, as a condition of employment in classifications covered by this Agreement, become a member of the Union and maintain membership in the Union so long as this Section B remains in effect, to the extent of paying an initiation (or reinstatement) fee and/or monthly membership dues or Service Fees.

6. The payment of membership dues or Service Fees will not be required as a condition of employment during leave of absence without pay.

7. The provisions of this Section B will not apply to any employee covered by this Agreement to whom membership in the Union is not available by tender of initiation (or reinstatement) fee, if applicable, and monthly dues or Service Fees, upon the same terms and conditions as are generally applicable to any other employee of his classification at his point on the Company's system or in the local lodge on the Company's system to which assigned by the Union, or to any employee to whom membership in the Union is denied or terminated for any reason other than the failure of the employee to tender initiation (or reinstatement) fee, if applicable, and monthly dues.

8. If an employee covered by this Agreement becomes delinquent in the payment of monthly dues or Service Fees, the Union will take steps necessary in accordance with its established procedures to notify the employee in writing that he is delinquent in the payment of monthly membership dues or Service Fees as specified herein and accordingly will be subject to discharge as an employee of the Company. If such employee still remains delinquent in the payment of dues or service fees after the Union has completed all steps in its established procedure, the

Union will certify in writing to the Company that the employee has failed to remit payment of dues or Service Fees within the grace period allowed under the Union's procedure and is, therefore, to be discharged. The Company will then promptly notify the employee involved that he is to be discharged from the services of the Company and will promptly take proper steps to so discharge the employee.

9. When a member of the Union properly executes a dues or fees authorization check off form the President and Directing General Chairman of the Union will forward the necessary information to a Payroll Representative designated by the Company. A check off form must be completed in a legible manner acceptable to the Company or it will be returned to the President and Directing General Chairman of the Union for correction.

10. Any notice of revocation of checkoff authorization as provided for in this Article or the Railway Labor Act, as amended, must be in writing, signed by the employee and 2 hard copies delivered by first class mail or other mode of delivery accepted in the ordinary course of business, addressed to the President and Directing General Chairman of the Union. Dues or Service Fee deductions will be continued until 1 copy of such notice of revocation is received by the appropriate Payroll Representative from the President and Directing General Chairman of the Union.

11. An employee who has executed a check off form and who (1) has been promoted to a job which is not covered by the Agreement and in which the employee does not pay a monthly administrative fee to retain seniority pursuant to Article 7.G.3, (2) resigns from the Company, (3) is laid off and accepts employment in classifications not covered by any IAM Agreement, or (4) is otherwise terminated from the employ of the Company, will be deemed to have automatically revoked his assignment as of the date of such action. If such an employee (1) transfers back or returns to a job covered by the Agreement, (2) is rehired, (3) is recalled, or (4) is re-employed, further deductions of Union dues will be made only upon execution and receipt of another check off form. An employee who has executed a check-off form who enters layoff status directly from a position covered by this Agreement will have his dues or Service Fees deductions automatically reinstated upon direct recall to a classification covered under this Agreement.

12. The Union will be responsible to collect (1) back dues or Service Fees owed at the time of starting deductions for any employee, (2) dues or Service Fees missed because the employee was delinquent in dues or fees at the time of going on leave of absence, and (3) initiation (or reinstatement) fees or dues or Service Fees missed because of accidental errors in the Union's accounting procedure.

13. Dues or Service Fee deductions are to be withheld from the first pay date of the month. Should a deduction be missed, or in the event an insufficient amount is deducted the proper adjustment will be made from the next pay check(s) until collected.

14. Check off forms submitted to the Company at least 12 days or more before the first pay date of the month will commence deductions on that date. When a check off form is submitted to the Company that indicates an initiation (or reinstatement) fee is to be withheld that fee will be withheld equally from the first 2

pay dates of the month and dues or Service Fee deductions will commence the following month.

15. In the event of termination of employment, there will be no obligation of the Company to collect initiation (or reinstatement) fee or dues or Service Fees until all other deductions have been made, and such obligation to collect dues or Service Fees will not extend beyond the pay period to which the employee's last day of work occurs.

16. The seniority status and rights of employees granted leaves of absence to serve in the Armed Forces will not be terminated by reason of any of the provisions of this Section B, but such employees will upon resumption of employment in classifications covered by this Agreement be governed by the provisions of Section B.2 above.

17. When an employee is to be discharged by the Company under the provisions of this Section B, the discharge will be deemed to be for cause within the meaning of the terms of this Agreement. A grievance by an employee who is to be discharged as the result of an interpretation or application of the provisions of this Section B will be subject to the following procedure:

a. Such employee who believes that the provisions of this Section B pertaining to him have been improperly interpreted or applied and who desires a review must submit his request for review in writing within 5 days from the date he receives notification of the discharge. The request will be submitted to the Vice President of Labor Relations with a copy to the President and Directing General Chairman of the Union. The Vice President of Labor Relations or his designee will review the grievance and render a written decision, to the employee, with a copy to the President and Directing General Chairman of the Union not later than 10 days following receipt of the grievance.

b. If the decision is not satisfactory to either the employee or the Union, then either may appeal the grievance directly to the System Board of Adjustment within 15 days from the date of the decision. The terms governing the Board of Adjustment will be applicable, except as otherwise specified herein.

c. During the period a grievance is pending under the provisions of this Section and until a decision is rendered by the Vice President of Labor Relations or his designee, or by the Board of Adjustment if appeal is made to that Board, the employee will not be discharged from the Company because of non-compliance with the terms of this Section A.

d. Saturdays, Sundays, and holidays will be excluded only from the time limits specified in this Section B.17.

C. Union Officials

1. The Union will notify the Company in writing of the election, appointment, or removal of Union shop steward(s). The District Lodge will notify

the Company in writing of the Committee members at that location.

2. Effective upon the Date of Signing of this Agreement, the Company will assume the cost of a total of 150,000 hours of straight-time pay per year, to be used by shop stewards and other employees authorized by the Union for the purpose of administration of this Agreement and all other collective bargaining agreements between the Union and the Company.

a. Shop Stewards and other employees authorized by District Lodge 141 must give prior notice and report all time spent on Union business to the designated management representative.

b. The Union will apportion the total annual allotment of 150,000 hours among the Company collective bargaining agreements it administers. In the event of an increase or reduction in the number of such agreements, the parties will meet to discuss and agree upon a proportionate adjustment in the hours allotment.

3. The parties will work with each other in good faith to ensure both that: (1) employees are reasonably represented in grievances and (2) the Company's operation continues without undue delay.

4. The Union will provide the Company with the names, addresses, and phone numbers of its official Union Representatives.

5. The Company will provide the Union a reasonable amount of time as needed (not to exceed 2 hours) to participate in new-hire orientation for employees covered under this Agreement.

6. If requested by the Union and agreed to by the Company, Local Committeemen may be assigned to the Day Shift and to Saturday and Sunday as regular days off. In the event a significant dispute arises and remains unresolved it may be escalated to the level of AGC and HR at that station/location and, if not resolved, to the VP of Labor Relations and the President and Directing General Chairman.

D. Union Travel and Access to Company Facilities

1. Union Travel Employees of the Union will be furnished positive space transportation over the lines of the Company for the purpose of administering this Agreement at the level and to the extent such passes are provided to officials of other unions representing other Company work groups.

2. Bulletin Boards

a. The Company will provide bulletins boards (maximum dimension 3' x 5') acceptable to the Company for the Union's exclusive use at each station/location where employees covered by this Agreement are located. The Company and the Union will determine the placement of bulletins boards by mutual agreement.

b. No political, inflammatory, controversial, or derogatory material will be permitted on Union bulletin boards. Union bulletin boards will be used exclusively for Union notices or materials regarding the following:

- Union recreational and social affairs
- Union elections
- Union appointments and results of Union elections
- Union meetings
- Educational materials relating to contract administration
- Excerpts from official Union publications

There will be no other general distribution or posting by employees on the Company's property.

3. Union Access. The Company will sponsor the officially designated representative(s) of the Union in obtaining appropriate credentials (S.I.D.A. Badge). The Company agrees to admit to its bases the officially designated representative of the Union to transact business as is necessary for the administration of the Contract. Such business will not interfere with the operations of the Company.

Exhibit 4

International Association of Machinists and Aerospace Workers

CONSTITUTION

January 1, 2017

ARTICLE VII

GENERAL SECRETARY-TREASURER

Duties

SEC. 1. The G.S.T. shall be the secretary and keep correct records of all meetings of the E.C. and of all conventions of the G.L. He/She shall cause the proceedings of all meetings of the E.C. to be printed in pamphlet form and mail a copy thereof to each L.L. within 90 days from the date the minutes of the meeting are approved. He/She shall conduct all correspondence in the name of the G.L., excepting correspondence dealing with the duties and responsibilities of the office of the I.P., and be subject to the directions of the E.C. Whenever necessary he/she may visit any L.L. or D.L. for the purpose of instructing the officers in the performance of their duties. He/She shall assume responsibility regarding the issuance of Veteran Badges. He/She shall have the general supervision of the business of his/her office and, upon request, shall submit his/her books of account together with all papers, files, documents, etc., in his/her possession for the inspection of the E.C. and the certified public accountant. He/She shall also codify and index the various articles and sections of this Constitution.

Receipt of Funds

SEC. 2. The G.S.T. shall receive all funds paid to the G.L. from all sources and distribute same to the credit of the accounts for which they are intended. District lodges, local lodges not affiliated with a full service district lodge, and unaffiliated local lodges, at

their option, may elect to have all monthly membership dues and fees collected by the G.S.T. Initiation and reinstatement fees will be reconciled with the D.L. and/or L.L. The G.S.T. shall distribute the appropriate amounts from the monthly dues and fees collected to the D.L.s and LLs. He/She shall keep a systematically arranged book account between the G.L. and each L.L. He/She shall, upon request of any L.L., furnish a copy of the expense account of any paid representative of the G.L. for the period specified by such L.L., provided such request does not include a period prior to the next preceding G.L. audit.

Deposit of Funds

SEC. 3. All monies received by the G.S.T. shall be deposited daily by him/her in a bank of sound financial standing in the name of the G.L., which deposit shall be subject to withdrawal check signed by the G.S.T. and countersigned by the I.P. He/She shall invest, in conformity with the provisions as contained in SEC. 3, Art. V., the accumulated G.L. funds in excess of $100,000 as directed by the E.C.

Per Capita Tax and Fees

SEC. 4. The G.S.T. shall collect per capita tax in proportion to the business transacted as shown by the regular monthly report of each L.L., in accordance with the following rates, which include subscriptions to the I.A.M.'s magazine, THE JOURNAL, which will be published periodically, and the premium of L.L. and D.L. officers' and employees' bonds as required by law or G.L. policy, up to a maximum of $10,000 as prescribed in SEC. 6 of this Art.

Monthly per capita tax for all members:

Effective January 1, 2009, the monthly per capita tax due G.L. shall be equal to the per capita tax in effect for 2008 plus $4.00 plus the percentage increase in the weighted average on a union-wide basis of one hour's earnings of each L.L. member in effect on the 31st day of August 2008. Notwithstanding any contrary language in Article XXII, Section 9, district lodges which are over the minimum D.L. per capita may not add any part of this $4.00 to their per capita tax without specific authorization from the membership and in accordance with D.L. bylaws.

Effective January 1, 2011, the monthly per capita tax due G.L. shall be increased by $2.00 plus the average of the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) as published by the U.S. Department of Labor's Bureau of Labor Statistics and the Canadian Consumer Price Index as published by Statistics Canada. The "not seasonally adjusted" indices will be used. Notwithstanding any contrary language in Article XXII, Section 9, district lodges which are over the minimum D.L. per capita may not add any part of this $2.00 to their per capita tax without specific authorization from the membership and in accordance with D.L. bylaws.

Effective January 1, 2012, and each January 1 thereafter, the monthly per capita tax due G.L. shall be increased by the percentage increase in the CPI indices as described above.

Ninety percent (90%) of the regular G.L. per capita tax or the reduced G.L. per capita tax, whichever is the lower, shall be allocated to the General Fund. Ten per-

cent (10%) of the regular G.L. per capita tax or the reduced G.L. per capita tax, whichever is the lower, shall be allocated to the Strike Fund.

Benefits from the Strike Fund shall be paid in accordance with SEC. 6, Art. XVI.

Monthly dues for
G.L. affiliation.....determined by the E.C.

Unemployment stamp..... $ 1.00

Permanent retirement card
for all members $15.00

Initiation or reinstatement per
capita tax $15.00

Reinstatement per capita tax when dues books
or dues cards are issued by G.S.T.
(Secs. 5, 15, and 19, Art. I)..... $15.00

G.L. initiation or
reinstatement fee.....determined by the E.C.

Upon receipt of per capita tax, accompanied by the report of any L.L., the G.S.T. shall furnish stamps as receipts, in proportion to the number of initiations, reinstatements and number of months' dues paid. He/She shall also keep a record of all members affiliated with G.L.

The G.S.T. shall furnish a uniform dues book or dues card at cost to L.Ls. in which stamps may be affixed and cancelled. Dues books shall contain spaces for the entering therein of transfers, assessments and the designation of the amount of dues charged by each L.L., and for the registering of votes in G.L. elections. Space shall also be provided for the insertion of the Congressional or Assembly District, Legislative Assembly or Parliamentary Constituency of the member.

ARTICLE XXII

DISTRICT LODGES

Definition

SEC. 1. A D.L. is a delegate body made up of representatives duly elected from the L.Ls. within the railroad or air transport system, industry, or locality in which the D.L. is established.

Purpose

SEC. 2. D.Ls. shall be established and chartered by the G.L. upon railroads and airlines, in industries where mutual shop interests require it, and in localities where 2 or more L.Ls. exist, provided the total membership is sufficient to meet all the requirements of this Art., for the purpose of securing mutual protection, harmonious action, and close cooperation in all matters relating to the trade.

Jurisdiction

SEC. 3. The jurisdiction of all D.Ls. shall be determined and defined by the E.C.

Each L.L. within such jurisdiction shall become affiliated with the D.L. unless specially exempted by said D.L. upon the approval of the E.C.

Authority

SEC. 4. D.Ls. shall have authority over and control of all L.Ls. within their jurisdiction, subject to the approval, however, of the G.L. Effective January 1,

2006, all dues and assessments of the affiliated L.Ls. shall be remitted monthly to the D.L. S.T. in a manner, and on forms, determined by the D.L. S.T. The D.L. shall remit to the G.L. the Monthly Membership and Per Capita Tax Report for each affiliated L.L. The D.L. shall remit to the L.L. the balance equal to the L.L. dues minus G.L. and D.L. per capita taxes and required affiliation fees. A detailed explanation shall accompany the remittance. The bylaws of the D.Ls., and the proposed amendments thereto, shall be submitted to the I.P. for his/her examination, correction, and approval before final adoption. The provisions of this Constitution shall, insofar as they are practical and adaptable, apply to and control all D.Ls.

Minimum Wage Scales

SEC. 5. D.Ls. shall establish a minimum scale of wages in their respective localities for members employed as machinery erectors, and no member of any L.L. shall accept work as a machinery erector under the minimum wage established for the locality where employed.

D.Ls. may also establish minimum wage rates in their respective localities wherever they are in a position to enforce such rates, subject to the approval of the E.C.

Qualifications for Office

SEC. 6. Any member in good standing who is not barred from holding union office by applicable civil law, or ineligible therefore under applicable provisions of this Constitution, is qualified for election as a D.L.

Exhibit 5

141

COPY

9414 7118 9956 4033 6847 43
CERTIFIED MAIL
TRACKING NUMBER

September 8, 2017

Susan D. Marshall
u241161
156 Plainfield Road
Metuchen, NJ 08840

ARTICLE ADDRESSED TO:
Susan D. Marshall
156 Plainfield Road
Metuchen NJ 08840-1059

Dear Susan D. Marshall,

We want to take this opportunity, once again, to welcome you to employment at United Airlines and to give you some information about the Union that represents you in the workplace. District Lodge 141 of the International Association of Machinists and Aerospace Workers (the IAM or the Machinists Union) is the collective bargaining representative for the workers at this facility, and your membership is with Local Lodge 914. You should already have received information about your rights and obligations under the contract between the IAM and the Company and the many important benefits that come with IAM membership.

We want to reiterate that the wages, health insurance, retirement benefits, and other protections provided by this collective bargaining agreement were not provided by the Company as an act of generosity. Rather, they are the result of the collective bargaining process. Without the legal protection of the collective bargaining agreement, your employer would be free to change or even eliminate health insurance, vacations and holidays, retirement, and many other benefits you will enjoy. And, without a strong union supported by the employees, the Union's ability to protect and improve your wages and benefits in the future may suffer.

We encourage you to join your union. The Union's Membership Application, Check-Off Authorization, Notice of Rights under your collective bargaining agreement, and the contract's union security clause are enclosed. The complete bargaining agreement can be found on our website at www.iam141.org.

Please note that your fellow employees voted to include in the collective bargaining agreement a provision requiring all employees to pay monthly dues or fees to the Union. We think this is only fair because every employee of this Company benefits from the hard won collective bargaining agreement. But more importantly, it was the democratically reached decision of your co-workers.

As explained in the enclosure, while monthly fees or dues payments are required, formal membership in the Union is not required. You should understand, however, that if you decline membership you will be giving up the right to vote for Union officers, attend meetings to determine bargaining demands, or participate in the ratification of collective bargaining agreements and strike votes; the right to serve on negotiating committees; the right to serve as delegates to the International Union's Convention; as well as the right to enjoy the benefits provided by the Union Privilege Program, including low-interest credit cards, prescription drug cards, life insurance, legal and travel services.

According to the IAM's records, you are recognized as a fee objector. Therefore, your fee will be reduced per the letter you received. The reduced union initiation fee is $77.87 and the reduced non-member fee is $43.26/month. You should have already received notice of the obligation to pay initiation and monthly dues or fees when you joined the bargaining unit, but whether or not you did, you now have thirty (30) days from the date of this letter to make your initial payments of the initiation/reinstatement fee and the first month's dues. If you fall two months in arrears in making the required payments you will be terminated from employment under the terms of the collective bargaining agreement. Also note the legal obligations set out in the material enclosed.

After making these payments, you must continue to be in compliance with your financial obligations by making monthly payments to the union. The easiest way to meet your obligation going forward is to sign the attached check-off authorization, so that your monthly fees are automatically deducted from your paycheck. If you do not authorize check-off, you are responsible to make monthly payments by check to the union. Even if you agree to check-off, you still should send your first payment for initiation/reinstatement fee and one month's dues or fees to this office by check.

Please fill out and return the application with your payment of $121.13 to I.A.M.A.W District Lodge 141 at the address indicated on the letterhead. If you have any questions about these materials or have some explanation for nonpayment, please do not hesitate to contact us.

The Union belongs to its members, and we want every bargaining unit employee we represent to be an active, involved union member. Anytime you wish to become a member, just seek out a union representative and we will help you accomplish that.

Feel free to call our toll-free number at 888-608-1411 for any questions.

In Solidarity,

Alexander Gerulis
Secretary Treasurer

Enclosure

cc: S. Pantoja – GVP, Transportation
J. Tiberi – COS, Transportation
O. Cabrera – L914 ST

141

COPY

September 8, 2017

Linda Rizzo-Rupon
u222104
126 Main St
Whitehouse Station, NJ 08889

Dear Linda Rizzo-Rupon,

We want to take this opportunity, once again, to welcome you to employment at United Airlines and to give you some information about the Union that represents you in the workplace. District Lodge 141 of the International Association of Machinists and Aerospace Workers (the IAM or the Machinists Union) is the collective bargaining representative for the workers at this facility, and your membership is with Local Lodge 914. You should already have received information about your rights and obligations under the contract between the IAM and the Company and the many important benefits that come with IAM membership.

We want to reiterate that the wages, health insurance, retirement benefits, and other protections provided by this collective bargaining agreement were not provided by the Company as an act of generosity. Rather, they are the result of the collective bargaining process. Without the legal protection of the collective bargaining agreement, your employer would be free to change or even eliminate health insurance, vacations and holidays, retirement, and many other benefits you will enjoy. And, without a strong union supported by the employees, the Union's ability to protect and improve your wages and benefits in the future may suffer.

We encourage you to join your union. The Union's Membership Application, Check-Off Authorization, Notice of Rights under your collective bargaining agreement, and the contract's union security clause are enclosed. The complete bargaining agreement can be found on our website at www.iam141.org.

Please note that your fellow employees voted to include in the collective bargaining agreement a provision requiring all employees to pay monthly dues or fees to the Union. We think this is only fair because every employee of this Company benefits from the hard won collective bargaining agreement. But more importantly, it was the democratically reached decision of your co-workers.

As explained in the enclosure, while monthly fees or dues payments are required, formal membership in the Union is not required. You should understand, however, that if you decline membership you will be giving up the right to vote for Union officers, attend meetings to determine bargaining demands, or participate in the ratification of collective bargaining agreements and strike votes; the right to serve on negotiating committees; the right to serve as delegates to the International Union's Convention; as well as the right to enjoy the benefits provided by the Union Privilege Program, including low-interest credit cards, prescription drug cards, life insurance, legal and travel services.

According to the IAM's records, you are recognized as a fee objector. Therefore, your fee will be reduced per the letter you received. The reduced union initiation fee is $77.87 and the reduced non-member fee is $43.26/month. You should have already received notice of the obligation to pay initiation and monthly dues or fees when you joined the bargaining unit, but whether or not you did, you now have thirty (30) days from the date of this letter to make your initial payments of the initiation/reinstatement fee and the first month's dues. If you fall two months in arrears in making the required payments you will be terminated from employment under the terms of the collective bargaining agreement. Also note the legal obligations set out in the material enclosed.

DONE

DONE

After making these payments, you must continue to be in compliance with your financial obligations by making monthly payments to the union. The easiest way to meet your obligation going forward is to sign the attached check-off authorization, so that your monthly fees are automatically deducted from your paycheck. If you do not authorize check-off, you are responsible to make monthly payments by check to the union. Even if you agree to check-off, you still should send your first payment for initiation/reinstatement fee and one month's dues or fees to this office by check.

Please fill out and return the application with your payment of $121.13 to I.A.M.A.W District Lodge 141 at the address indicated on the letterhead. If you have any questions about these materials or have some explanation for nonpayment, please do not hesitate to contact us.

AND DONE

The Union belongs to its members, and we want every bargaining unit employee we represent to be an active, involved union member. Anytime you wish to become a member, just seek out a union representative and we will help you accomplish that.

Feel free to call our toll-free number at 888-608-1411 for any questions.

In Solidarity,

Alexander Gerulis
Secretary Treasurer

Enclosure

cc: S. Pantoja – GVP, Transportation
J. Tiberi – COS, Transportation
O. Cabrera – L914 ST

141 COPY

9414 7118 9956 4033 6832 28
CERTIFIED MAIL
TRACKING NUMBER

ARTICLE ADDRESSED TO:
Noemio M. Oliveira
2275 Biddle Lane
Easton PA 18040-8084

September 8, 2017

Noemio M. Oliveira
u242113
2275 Biddle Lane
Easton, PA 18040

Dear Noemio M. Oliveira,

We want to take this opportunity, once again, to welcome you to employment at United Airlines and to give you some information about the Union that represents you in the workplace. District Lodge 141 of the International Association of Machinists and Aerospace Workers (the IAM or the Machinists Union) is the collective bargaining representative for the workers at this facility, and your membership is with Local Lodge 914. You should already have received information about your rights and obligations under the contract between the IAM and the Company and the many important benefits that come with IAM membership.

We want to reiterate that the wages, health insurance, retirement benefits, and other protections provided by this collective bargaining agreement were not provided by the Company as an act of generosity. Rather, they are the result of the collective bargaining process. Without the legal protection of the collective bargaining agreement, your employer would be free to change or even eliminate health insurance, vacations and holidays, retirement, and many other benefits you will enjoy. And, without a strong union supported by the employees, the Union's ability to protect and improve your wages and benefits in the future may suffer.

We encourage you to join your union. The Union's Membership Application, Check-Off Authorization, Notice of Rights under your collective bargaining agreement, and the contract's union security clause are enclosed. The complete bargaining agreement can be found on our website at www.iam141.org.

Please note that your fellow employees voted to include in the collective bargaining agreement a provision requiring all employees to pay monthly dues or fees to the Union. We think this is only fair because every employee of this Company benefits from the hard won collective bargaining agreement. But more importantly, it was the democratically reached decision of your co-workers.

As explained in the enclosure, while monthly fees or dues payments are required, formal membership in the Union is not required. You should understand, however, that if you decline membership you will be giving up the right to vote for Union officers, attend meetings to determine bargaining demands, or participate in the ratification of collective bargaining agreements and strike votes; the right to serve on negotiating committees; the right to serve as delegates to the International Union's Convention; as well as the right to enjoy the benefits provided by the Union Privilege Program, including low-interest credit cards, prescription drug cards, life insurance, legal and travel services.

The union initiation fee is $100.00 and the dues rate is $57.34/month. You should have already received notice of the obligation to pay initiation and monthly dues or fees when you joined the bargaining unit, but whether or not you did, you now have thirty (30) days from the date of this letter to make your initial payments of the initiation/reinstatement fee and the first month's dues. If you fall two months in arrears in making the required payments you will be terminated from employment under the terms of the collective bargaining agreement. Also note the legal obligations set out in the material enclosed.

After making these payments, you must continue to be in compliance with your financial obligations by making monthly payments to the union. The easiest way to meet your obligation going forward is to sign the attached check-off authorization, so that your monthly fees are automatically deducted from your paycheck. If you do not authorize check-off, you are responsible to make monthly payments by check to the union. Even if you agree to check-off, you still should send your first payment for initiation/reinstatement fee and one month's dues or fees to this office by check.

Please fill out and return the application with your payment of $157.34 to I.A.M.A.W District Lodge 141 at the address indicated on the letterhead. If you have any questions about these materials or have some explanation for nonpayment, please do not hesitate to contact us.

The Union belongs to its members, and we want every bargaining unit employee we represent to be an active, involved union member. Welcome to the IAM!

Feel free to call our toll-free number at 888-608-1411 for any questions.

In Solidarity,

Alexander Gerulis
Secretary Treasurer

Enclosure

cc: S. Pantoja – GVP, Transportation
J. Tiberi – COS, Transportation
O. Cabrera – L914 ST

Exhibit 6

141

7/17/2018

Linda Rizzo-Rupon
U222104
126 Main Street
Whitehouse Station, NJ 08889-3692

Re: Objector Fee Payments

Dear Ms. Linda Rizzo-Rupon,

Below is the status of your payments for 2018:

Jan-18, #1276, $43.26 deposited by DL141
Feb-18, #1279, $43.26, deposited by DL141
Mar-18, #1286, $43.26, returned to you, requested that it be sent to Local 914
Apr-18, #1300, $44.01, returned to you, requested that it be sent to Local 914
May-18, #1369, $44.01 forwarded it to Local 914 for deposit
Jun-18, #1316, $44.01, deposited by DL141
Jul-18, #1323, $44.01, deposited by DL141

As of today, Local 914 has not yet received your March and April payments. Please forward the payments to them as soon as possible. As you might be aware, when the payment falls two months behind, you could be charged a reinstatement fee which is equivalent to 3 times monthly fees.

Please kindly discard this notice if the payments have been sent recently. Feel free to call if you have any questions.

Payling Massingill
Assistant to Secretary Treasurer
IAMAW District Lodge 141
1771 Commerce Drive, Suite 103
Elk Grove Village, IL 60007
Office 847-640-2222 ext 152
Cell 650-759-0822

cc: A. Gerulis, ST
R. Creighton, AGC
T. Galante, ST

Exhibit 7

Lin Rizzo-Rupon
U222104

December 27, 2018

I.A.M. District Lodge 141
1765 Commerce Drive
Suite 101
Elk Grove Village, IL 60007-2139

Dear Sir or Madam,

Enclosed you will find copies of two checks that you returned to me because you "requested that it be sent to Local 914."

Since I was instructed in your letter dated September 8, 2017, to send all payments to the Illinois address, and since you have been accepting and cashing all prior and subsequent checks sent to that original address, I will again attempt to remit these payments reflecting my March 1 and April 1 payments.

Regards,

Lin Rizzo-Rupon

Encs. 3
Ck #1372
Ck # 1373
Copies of Returned Cks.

LINDA RIZZO-RUPON 11-06
120 MAIN STREET
WHITEHOUSE STATION, NJ 08889-3692

1372
55-136/312
312

Date: 27 Dec '18

Pay to the Order of: FAM District Lodge 141 $ 43 26/100

Forty Three and 26/100 Dollars

Bank
America's Most Convenient Bank®

For: Replaces chk # 1356 for 3/1/18 payment

1372

LINDA RIZZO-RUPON 11-06
120 MAIN STREET
WHITEHOUSE STATION, NJ 08889-3692

1373
55-136/312
312

Date: 27 Dec '18

Pay to the Order of: FAM District Lodge 141 $ 44 01

Forty Four and 01/100 Dollars

Bank
America's Most Convenient Bank®

For: Replaces chk # 130 for 4/1/18 payment.

1373

Case: 20-1106 Document: 12-2 Page: 54 Date Filed: 04/16/2020

MOENCH LAW, LLC
By: Matthew C. Moench, Esq., 031462007
1303 Roger Avenue,
Bridgewater, New Jersey 08807
T: (908) 208-1910
F: (908) 393-7103
moenchlawllc@gmail.com
Attorney for Plaintiffs,
Linda Rizzo-Rupon,
Susan Marshall, and
Noemieo Oliveira

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LINDA RIZZO-RUPON, et al., Plaintiffs, vs. **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT 141 LOCAL 914, et al.,** Defendants.	**VIA ELECTRONIC FILING** **Case No.: 2:19-cv-00221-WJM-MF** Hon. William J. Martini, U.S.D.J. Hon. Mark Falk, U.S.M.J. **ORDER CERTIFYING NOTICE OF CONSTITUTIONAL CHALLENGE**

On June 28, 2019, Plaintiffs Linda Rizzo-Rupon, Susan Marshall, and Noemieo Oliveira filed and served a notice of constitutional question ("Plaintiffs' Notice"). Pursuant to Fed. R. Civ. P. 5.1, the Court "must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned."

IT IS on this 11 day of July 2019,

CERTIFIED to the United States Attorney General that a constitutional question has been raised in this action, and it is further,

ORDERED that the Clerk of the Court shall provide a copy of this Order to the United States Attorney General; and it is further,

ORDERED that pursuant to Fed. R. Civ. P. 5.1(c), the United States Attorney General has until August 27, 2019, to intervene in this action; and it is further,

ORDERED that the current motion to dismiss (Dkt. No. 9) is stayed pending the Attorney General's intervention or the expiration of the time period within which the Attorney General may intervene. Within 7 days from either the Attorney General intervening or the expiration of such time, the parties shall jointly submit a proposed briefing schedule with regard to the pending motion to dismiss.

Case: 20-1106 Document: 12-2 Page: 55 Date Filed: 04/16/2020

45 USCS § 152

Current through Public Law 116-135, approved March 26, 2020, with a gap of P.L. 116-113.

§ 152. General duties

First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act [enacted May 20, 1926], then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [*45 USCS § 156*].

Eighth. Notices of manner of settlement of disputes; posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. In any such election for which there are 3 or more options (including the option of not being represented by any labor organization) on the ballot and no such option receives a majority of the valid votes cast, the Mediation Board shall arrange for a second election between the options receiving the largest and the second largest number of votes. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecutions and penalties. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such

prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a)to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership,

(b)to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [*45 USCS § 153*, subsec. First, para. (h)] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.

Twelfth. Showing of interest for representation elections. The Mediation Board, upon receipt of an application requesting that an organization or individual be certified as the representative of any craft or class of employees, shall not direct an election or use any other method to determine who shall be the representative of

such craft or class unless the Mediation Board determines that the application is supported by a showing of interest from not less than 50 percent of the employees in the craft or class.

History

HISTORY:

Act May 20, 1926, ch 347, Title I, § 2, *44 Stat. 577*; June 21, 1934, ch 691, § 2, *48 Stat. 1186*; April 10, 1936, ch 166, *49 Stat. 1189*; Jan. 10, 1951, ch 1220, *64 Stat. 1238*; Feb. 14, 2012, *P. L. 112-95*, Title X, §§ 1002, 1003, *126 Stat. 146*.

United States Code Service
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End of Document

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 19-cv-61298-SINGHAL

CHRISTIAN POPP,

Plaintiff,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendant.
_____/

ORDER OF DISMISSAL

THIS CAUSE is before the Court on Defendant's Motion to Dismiss (DE [28]) the Amended Complaint. Following briefing in opposition and in support, re-briefing on supplemental authority, and additional briefing on the Court's sua sponte concern regarding standing, the Court is fully advised in the premises. This matter is now ripe for review and, for the following reasons, the motion to dismiss is **GRANTED**.

I. BACKGROUND

Plaintiff Christian Popp ("Popp") is a pilot for JetBlue Airways ("JetBlue"). *See* Am. Compl. ¶ 8 (DE [23]). Defendant Air Line Pilots Association, International ("ALPA") is the labor union with exclusive bargaining power for employees of JetBlue. *Id.* ¶ 7. Popp is not a member of ALPA, nor does he want to be. *See id.* ¶¶ 8, 18. Despite this, each pay period, ALPA charges him and other nonmembers "dues-equivalent fees," which are automatically deducted from their paychecks. *Id.* ¶ 16. If he or other nonmembers complies with ALPA's "opt-out requirements," that automatic deduction can be reduced a certain amount to ensure the union does not collect "nonchargeable" dues, specifically

monies for ALPA's political activities. *Id.* But, at a minimum, members and nonmembers alike are automatically charged each pay period "chargeable" dues—and they cannot opt out of *these* charges. *Id.* ¶ 13.

In December 2018, Popp sent a letter to ALPA opting out of paying the unrelated fees. *Id.* ¶ 19. He sent this opt-out letter via United Parcel Service ("UPS") and paid $33.01. *Id.* Ten days later, he received a confirmation email acknowledging his objection and confirming he would not be charged for the so-called "nonchargeable" dues. *Id.* ¶ 20.

On May 23, 2019, Popp filed this action against ALPA on three counts. Count I alleges ALPA's opt-out requirement violates the Railway Labor Act ("RLA"), *see* 45 U.S.C. § 152. Count II alleges the opt-out requirement violates the First Amendment. Finally, Count III alleges the opt-out requirement is a breach of the duty of fair representation. In the complaint, he sought declaratory relief and injunctive relief. After ALPA moved to dismiss the complaint (DE [17]), Popp amended the complaint without the claims for declaratory and injunctive relief, seeking only compensatory and nominal damages. ALPA moved to dismiss the amended complaint, which is the subject of this order.

II. DISCUSSION

In disputes over unions' collecting dues, case law instructs the Court first to consider whether the union involved in the matter is a public-sector union or a private-sector union. Next—and almost equally as important—the analysis shifts to the purpose for which the union seeks to collect the money at issue. There are two categories of money involved in union disputes. In labor-law lexicon, these two categories have inconsistent names. In an attempt to bring some consistency to an otherwise inconsistent

system of nomenclature, the Court will use those names used by the Supreme Court: Monies collected by a union that are "germane" to its collective-bargaining functions are referred to as "chargeable"; those that are used to further the union's "political and ideological projects" are "nonchargeable."[1]

The struggle invariably involves *non*members challenging the union's authority to automatically deduct monies from their paychecks. For a little over forty years, under the framework of *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977), the Supreme Court held that public-sector unions could automatically collect from nonconsenting nonmembers *chargeable* expenditures and not offend the U.S. Constitution. In 2018, the Supreme Court overruled *Abood*, finding its precedent "unworkable" and determining the "line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2481 (2018). Now, under post-*Janus* precedent, with no distinction between "chargeable" and "nonchargeable" fees, "State and public-sector unions may no longer extract agency fees from nonconsenting employees." *Id.* at 2486.

The matter currently before the Court is of first impression for this district: Whether *private*-sector unions can automatically collect chargeable expenses from nonconsenting nonmembers. In other words, the central issue in this case is whether *Janus* applies to *private*-sector unions. But this case is even further complicated by the fact that, because

[1] *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2461 (2018).

ALPA is a private-sector union, Popp also challenges its opt-out requirement under the RLA—statutory authority—in addition to under constitutional grounds.

While, again, this appears to be a matter of first impression, there is some case law from which the Court can glean guidance. In *Railway Employee's Department v. Hanson*, 351 U.S. 225, 238 (1956), the Supreme Court upheld the constitutionality of the RLA and determined "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." Interestingly, in *Hanson*, the Supreme Court upheld the RLA's constitutionality despite the language that requires all employees to become "members" of the union. 351 U.S. at 238. In *IAM v. Street*, 367 U.S. 740 (1961), and *Ellis v. Brotherhood of Railway, Airline & S.S. Clerks*, 466 U.S. 435 (1984), the Supreme Court reaffirmed these principles as they related to the *private* sector.

At least one district court has unequivocally rejected the same position put forward by Popp here when the District of New Jersey flatly recognized, "*Janus* did not overrule *Hanson*" and that "*Janus* applies to public sector employees, not private sector employees." *Rizzo-Rupon v. Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 2019 WL 6838001, at *3 (D.N.J. Dec. 16, 2019), *appeal filed*, No. 20-1106 (3d Cir. Jan. 16, 2020). Perhaps even more clearly, the District of New Jersey stated: "In short, *Janus* stands for the limited proposition that when a government entity and labor organization agree to require government employees to pay agency fees, the First Amendment is implicated in ways dramatically distinct from when agency fees are agreed to in the private sector." *Id.* (emphasis added).

The Court appreciates the fact that *Rizzo-Rupon* is not directly on point. Upon reading it several times, the Court recognizes there did not appear to be an opt-out requirement there. Further, the Court understands New Jersey does not have a "right-to-work" law, as Florida does. Popp focuses on this distinction in his response brief. However, the Court cannot say this difference between New Jersey and Florida law compels a different result in the absence of the Supreme Court extending *Janus* to private-sector unions.

In sum, the Court agrees with *Rizzo-Rupon* in that *Janus* did not overturn *Hanson*. Thus, the compulsory fees that Popp was required to pay to ALPA—*chargeable* fees—did not violate the RLA. And there is no case law whatsoever from the Supreme Court to instruct the Court that it violates the U.S. Constitution.

Even if *Hanson* and *Rizzo-Rupon* were not dispositive, the Court determines that Popp lacks standing to challenge the collection of the chargeable fees because he cannot plead an injury-in-fact. After briefing on the motion to dismiss closed, the Court ordered additional briefing, instructing both parties to address the issue of whether Popp had standing to bring this action. *See* Order (DE [51]).

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). Article III of the United States Constitution requires three elements that form the "irreducible constitutional minimum" for standing: (1) an injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury "must be . . . distinct and palpable, and not abstract or conjectural or hypothetical." *Id.* A corollary of the requirement that an injury not be hypothetical is that the injury must be

"fairly traceable to the challenged action." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). It follows that a plaintiff "cannot manufacture standing merely by inflicting harm on [himself] based on [his] fear of hypothetical future harm that is certainly not impending." *Id.*; *see also Swann v. Sec'y, State of Ga.*, 668 F.3d 1285, 1288 (11th Cir. 2012) ("[C]ontroversy is not justiciable when a plaintiff independently caused his own injury.")

In *Schumacher v. Inslee*, 2019 WL 330167, at *1 (W.D. Wash. Jan. 25, 2019), the plaintiffs were in-home medical care providers, remunerated through the state's Medicaid program. Although *Schumacher* involved public-sector unions, the facts are otherwise nearly identical. *Id.* The plaintiffs brought a class action for declaratory and injunctive relief, seeking to declare the existing state statute unconstitutional and the collective bargaining agreement violative of the First Amendment. *Id.* at *2. The court, however, determined the plaintiffs lacked standing because the union already adapted to *Janus* and moved from an opt-out system to an opt-in system. *Id*. The court dismissed the claims because the plaintiffs faced an "absence of any negative consequences." *Id.*

Here, Popp cannot face any negative consequences either. He has already opted out of the nonchargeable fees and, as discussed above, ALPA can lawfully deduct chargeable fees. In other words, the only injury he could seek redress for—the nonchargeable fees—he has already opted out of. The Court cannot redress the harm of ALPA deducting nonchargeable fees from Popp because he does not pay any. And the Court cannot redress the harm of ALPA deducting chargeable fees because it is allowed to do so.

III. CONCLUSION

Popp cannot state a claim against ALPA. Under the current state of Supreme Court case law, ALPA is lawfully entitled to collect chargeable fees from Popp because it is a private-sector union. Further, Popp had already opted out of ALPA collecting nonchargeable fees—the only injury for which Popp would have been able to seek redress. Accordingly, Popp's claims must be dismissed.

The Clerk of Court is directed to **CLOSE** this case. Any pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida this 24th day of March 2020.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies to counsel via CM/ECF

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ARTHUR BAISLEY, PLAINTIFF,	§	
V.	§	CAUSE NO. 1:19-CV-531-LY
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DEFENDANT.	§	

ORDER ON MOTION TO DISMISS

Before the court are [International Association of Machinists and Aerospace Workers]'s Motion to Dismiss and Supporting Memorandum filed July 2, 2019 (Doc. #16); Plaintiff's Response to Defendant's Motion to Dismiss filed August 1, 2019 (Doc. #23); and [International Association of Machinists and Aerospace Workers]'s Reply Memorandum in Support of Motion to Dismiss filed August 8, 2019 (Doc. #25). Also before the court is the United States of America's Acknowledgment of Plaintiff's Notice of Claim of Unconstitutionality filed July 12, 2019 (Doc. #22).

The court conducted a hearing on the motion on September 13, 2019, at which the court entertained argument from counsel for the parties. Following the hearing, Defendant's Notice of Supplemental Authority was filed on December 16, 2019 (Doc. #30). Plaintiff Arthur Baisely's Response to Defendant [International Association of Machinists and Aerospace Workers]'s Notice of Supplemental Authority was filed January 9, 2020 (Doc. #31). Having considered the motion, response, reply, statement, argument, and supplemental authority and response, along with the applicable law, the court is of the opinion that the motion to dismiss should be granted for the reasons to follow.

I. BACKGROUND

Plaintiff Arthur Baisley works as a ramp agent for United Airlines at Austin-Bergstrom International Airport and is subject to the exclusive representation of Defendant International Association of Machinists and Aerospace Workers ("the Association"), the certified collective-bargaining representative of United Airlines's ramp agents pursuant to a majority vote of employees in an election conducted by the National Mediation Board.[1] The collective-bargaining relationship between United Airlines and the Association is governed by the Railway Labor Act ("RLA").[2] Pursuant to union security clause contained in the a collective-bargaining agreement governing the terms and conditions of employment at United Airlines, employees including Baisley are not required to become members of the union, but they are required as a condition of employment to pay "service fees," also know as agency fees, to the union on a monthly basis. Nonmenbers of the union, such as Baisley, may become "dues objectors" and pay a reduced fee rate for expenses germane to the collective-bargaining process only and not for political activities. The Association administers a system outlined in its "Notice to Employees Subject to [the Association] Security Clauses" requiring employees who seek to become dues objectors to file an objection notice with the Association. The Association restricts the times at which an employee may opt-out for a reduced fee as a dues objector to: (a) November; (b) the first 30 days in which the employee becomes legally obligated to pay forced fees; or (c) within 30 days of resigning membership in the union. Baisely

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[1] The Association is one of the largest labor unions in North America. *International Association of Machinists and Aerospace Workers*, http://www.goiam.org/about (last visited Feb. 21, 2020).

[2] 45 U.S.C. § 152 (2007) (Supp. 2019).

complied with the Association's procedures by notifying the Association of his objection by letter in November 2018, which was accepted by the Association on November 28, 2018.

Baisley asserts that the Association's objection procedures violate Section 2, Eleventh of the RLA by authorizing the Association and United Airlines to force employees to pay union fees under threat of termination. Baisley asserts in the alternative that the Association's procedures violate the First Amendment of the United States Constitution.

II. STANDARD OF REVIEW

Rule 12(b)(6) allows for dismissal of an action "for failure to state a claim upon which relief can be granted." Although a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, in order to avoid dismissal, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). A plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court expounded on the *Twombly* standard, explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In evaluating a motion to dismiss, the court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2009).

III. ANALYSIS

Baisley asserts that the Association's procedures violate the RLA because Section 2, Eleventh of the RLA does not permit the Association to charge employees for its political activities; therefore, Baisley argues, the Association "cannot lawfully require employees to pay for such activities unless and until they jump through union-created hoops." *See Communications Workers of America v. Beck*, 487 U.S. 735, 745 (1988) ("Over a quarter century ago we held that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes."). Baisley further argues that if the Association's procedures are authorized by the RLA, the RLA violates the First Amendment as the United States Supreme Court held in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, ____ U.S.____, 138 S. Ct. 2448 (2018) and *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 317 (2012).[3] These cases, Bailey contends, support construing the RLA to prohibit the procedures required to become a dues objector. *See, e.g.*, *Janus*, 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.").

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[3] In *Janus*, the Supreme Court held that public-sector unions may not deduct agency fees or "any other payment to the union" from the wages of nonmember employees, unless the employees waive their First Amendment rights by "clearly and affirmatively consent[ing] before any money is taken from them." 138 S. Ct. at 2486. In *Knox*, the Court held that "[b]ecause a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, . . . the compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights'." 567 U.S. at 310–11 (quoting *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, and Express and Station Employees*, 466 U.S. 435, 455 (1984)). Unlike *Janus* and *Knox*, the Association in this case is a private-sector union.

The Association argues that its procedures are consistent with binding Supreme Court and Fifth Circuit precedent and do not violate the RLA or the First Amendment. *See Int'l Ass'n of Machinists v. Street,* 367 U.S. 740 (1961); *Shea v. Int'l Ass'n of Machinists*, 154 F. 3d 508 (5th Cir. 1998); *see also Serna v. Transp. Workers Union*, No. 3:13-cv-2469, 2015 WL 5239668 (N.D. Tex, March 30, 2015), *aff'd mem.*, 654 Fed. Appx. 665, n.1 (5th Cir. 2016) ("*Shea* obliges us to uphold the union's current opt-out policy"; *Street* and *Shea* foreclose challenge to opt-out procedures). In response, Baisley asserts that the cases that the Association cites do not foreclose Baisley's claims because they all predate *Janus*. Thus, Baisley contends, none of the cases the Association cites consider whether the RLA can be construed to avoid the First Amendment problem that *Janus* now poses, and this court is free to consider the question of statutory interpretation as a matter of first impression.

The Association asserts that *Janus* and *Knox* are inapposite because they involve public-sector employees through which the state, as the employer, compelled agency fees to be paid to public-sector unions, which by their nature are inherently political. *See Knox*, 567 U.S. at 310–11; *Janus*, 138 S. Ct. at 2467, 2473. In this case, the Association argues, private-sector agency fees agreed to in a private agreement raise no First Amendment issues, and Baisley's ability to dissent ends any potential RLA or First Amendment claim. *See Street,* 367 U.S. at 774. This court agrees.

The collective-bargaining relationship between United Airlines and the Association is governed by the RLA. Although Baisley refers to *Janus* in support of his claim that federal law makes the union security provision of the collective-bargaining agreement unlawful, the important distinction in this case is that *Janus* addressed First Amendment issues applicable only to public-sector employees. 38 S. Ct. at 2478. The *Janus* Court held that arrangements whereby a

governmental entity and a labor organization agree to require government employees to pay fees that are used by the union to negotiate how governmental funds are spent and in what amounts implicate the First Amendment in ways distinct from agency fees in the private sector. Public-sector fees involve "the government . . . compel[ling] a person to pay for another party's speech," on matters involving "the budget of government" and "the performance of government services." *Id.* at 2467, 2473. Private-sector agency fees raise no such issues.

Janus addressed no issues about a private-sector employee, such as Baisley, who works for a private company, such as United Airlines. "Congress' bare authorization of private-sector union shops under the Railway Labor Act . . . .[raises] a very different . . . question . . . [than] when a State requires its employees to pay agency fees." *Id.* at 2479. Based on the collective-bargaining agreement negotiated between United Airlines and the Association, Baisley is required to pay all union fees to the Association unless he files an objection notice in accordance with the terms mandated by the Association's procedures.

> Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of [Section] 2, Eleventh were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities.

Street, 367 U.S. at 774. Thus, the RLA does permit the Association to charge employees for its political activities unless the employee affirmatively dissents.

Further, the Supreme Court in *Railway Employee's Department v. Hanson* upheld the constitutionality of Section 2 Eleventh of the RLA, stating explicitly "that the requirement for

financial support of the collective-bargaining agency by all who receive the benefits of it work is within the power of Congress under the Commerce Clause and does not violate either the First of the Fifth Amendments." 351 U.S. 225, 238 (1956). *Janus* did not overrule *Hanson*. The *Janus* Court specifically differentiated between *Hanson*, which involved Congress's authorization of private-sector union under the RLA and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court recognized a very different First Amendment question that arises when a State requires its employees to pay agency fees. 138 S. Ct. At 2460. The *Janus* Court did not overturn Section 2, Eleventh or the cases cited by the Association, which control in this case. Because *Hanson* and the cases that rely on it are not overruled by *Janus*, this court concludes that Baisley's claim that Section 2 Eleventh of the RLA is unconstitutional under Fifth Amendment must be denied.

IV. CONCLUSION

IT IS THEREFORE ORDERED that the International Association of Machinists and Aerospace Workers's Motion to Dismiss and Supporting Memorandum filed July 2, 2019 (Doc. #16) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Arthur Baisley's complaint is **DISMISSED WITH PREJUDICE**.

A Final Judgment shall be filed subsequently.

SIGNED this 19th day of March, 2020.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE