20-1458

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JON L. BRYAN,

PETITIONER,

V.

ALLIED PILOTS ASSOCIATION

AND

AMERICAN AIRLINES, INC.,

RESPONDENTS.

ON PEITTION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court erred by ruling that a union member's duty of fair representation claim, filed two months after the union's withdrawal of his 19-year-old grievance, was untimely.

2. Whether the court erred by ruling the union did not violate its duty of fair representation.

PARTIES TO THE PROCEEDING

Petitioner Jon L. Bryan, in his individual capacity, was the Plaintiff/Appellant in the Court of Appeals.

Respondents Allied Pilots Association and American Airlines, Inc. were Defendants/Appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Jon L. Bryan is a natural person, not a corporation.

RELATED PROCEEDINGS

- *Jon L. Bryan v. Allied Pilots Association and American Airlines, Inc.,* No. 17-cv-12460-DJC. U.S. District Court, District of Massachusetts. Judgment entered December 19, 2018.

- *Jon L. Bryan v. Allied Pilots Association and American Airlines, Inc.,* No. 17-cv-12460-DJC. U.S. District Court, District of Massachusetts. Judgment entered June 15, 2020.

- *Jon L. Bryan v. Allied Pilots Association and American Airlines, Inc.* No. 20-1690. U.S. Court of Appeals for the First Circuit. Judgment entered February 16, 2021.

- *Jon L. Bryan v. Allied Pilots Association and American Airlines, Inc.* No. 20-1690. U.S. Court of Appeals for the First Circuit. Judgment entered March 23, 2021

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The United States District Court for the District of Massachusetts entered an order in Civil Action No. 17-cv-12460-DJC on December 18, 2018, denying the motion to dismiss for the Allied Pilots Association (APA) and granting the motion to dismiss for American Airlines, Inc. (American). On June 15, 2020, the district court granted the motion for summary judgment for the APA. In case No. 20-1690, the United States Court of Appeals for the First Circuit, on February 16, 2021, affirmed the district court's decision of summary judgment. On March 23, 2021, the First Circuit denied plaintiff/appellant's petition for rehearing and rehearing en banc.

JURISDICTIONAL STATEMENT

Petitioner Jon L. Bryan seeks this writ for certiorari following the exhaustion of remedies at the United States Court of Appeals for the First Circuit. The United States Supreme Court has jurisdiction under 28 U.S.C. 1254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This is an action for damages and other appropriate relief arising under the Railway Labor Act ("RLA" or "the Act"), as amended, 45 U.S.C. §§151-188. The RLA governs collective bargaining negotiations and labor contract administration in the airline industry and requires the parties to follow rules that are enforceable by the Courts of the United States. American Airlines, Inc. ("American") and the Allied Pilots Association ("APA") have flouted these rules in a manner that harms Bryan. This dispute originates from the joint failure of the APA and American to process a grievance filed by Bryan and from American's violation of a collective bargaining agreement.

STATEMENT OF THE CASE

This is a case of exceptional national importance that will impact hundreds of thousands of union workers, including those in key transportation industries of immense significance to interstate commerce and the nation's economy. The decisions below have far-departed from Supreme Court guidance and the usual course of judicial proceedings, as to call for the exercise of this Court's supervisory power. If left to stand, the decisions will weaken decades of rulings by the Supreme Court and the intent of the United States Congress that guided fair-dealing and comity in America's places of work. Further, it will provide a contemporaneous roadmap for managements to engage in unlawful actions against union members and officials, and an

invitation for unions to violate their duty of fair representation to the injured members. By logical extension, this new "roadmap" of worker maltreatment could also reach the millions of non-union workers in the nation.

Separately, the 1st Circuit Court's rejection of other Federal Circuit reasoning in *Bensel v. Allied Pilots Ass'n,* 387 F.3d 298 (3d Cir. 2004) creates a split in the Circuit Courts of considerable consequence. The 1st Circuit's reinterpretation of the reasoning adopted by the 3rd and 6th Circuits, and also followed by the 9th Circuit, will unsettle important legal understandings of the Railway Labor Act and other United States labor law. The 1st Circuit's rejection of the "rays of hope" principles propounded in *Bensel* will stimulate premature filings of Duty of Fair Representation claims and needless antagonism between members and their unions.

Petitioner Captain Jon L. Bryan was hired as a pilot by American's predecessor company, Mohawk Airlines, in 1969. Following a number of mergers and name changes, Bryan became a US Airways pilot in 1996 and served as a Boeing 767 International Captain. In December of 1996, Bryan was elected as chairman and chief executive officer of the US Airways Airline Pilots Association (ALPA), representing the airline's nearly 6,000 pilots. He was immediately thrust into a years-long and highly-contentious labor negotiation with US Airways' management.

His vigorous efforts to protect his pilot members drew the extreme animus of the airline's chief executive officer (CEO). That animus was so intense that he took the unprecedented step of intervening in Bryan's two-day recurrent training schedule by ordering it cancelled. *App.362, 373.* This cancelation of his training, which was "inviolable" under Section 11 of the collective bargaining agreement (CBA), was *the minimal recurrent training that every pilot at the airline participated in, including any and all who were in the subsequent early retirement program, such as Bryan. Id.* As a result of this lack of two-day training, Bryan's subsequent international airline flying career would be destroyed, together with loss of millions of dollars in income.

Bryan filed a grievance in 1999, which was denied by management. ALPA submitted the grievance to be heard by the RLA's System Board of Adjustment on August 29, 2000. The attacks of September 11, 2001, occurred shortly thereafter, setting in motion a historic downward spiral for US Airways and the entire industry. The aviation industry's downturn led to myriad bankruptcies (including US Airways), the layoffs of thousands of employees, and a plethora of grievances and other disputes that reached a historic level.

Like hundreds of others, the settlement of Bryan's grievance was delayed due to the existential conditions of their employer and the airline industry. His grievance was inherited by the US Airways Pilots Association (USAPA) when it was formed in 2007 and assumed pilot representation from ALPA. As the turmoil continued and grievances continued to accumulate, Bryan's grievance was thence inherited by APA in 2014, following the merger with US Airways. His was among hundreds of other unresolved grievances, some older than two decades. The long passage of time for the processing of the approximately 400 grievances was understandable, given the incessant stream of crises facing US Airways. The hundreds of grievances had accumulated, unresolved through the multiple bankruptcies, mergers, unending litigation and arbitrations, union decertification, and even the formation of an entirely new union.

The record clearly demonstrates that the Allied Pilots Association (APA), the surviving union following the merger of US Airways into American Airlines, owed Captain Bryan a duty of fair representation (DFR) under the Railway Labor Act (RLA). APA thence denied that obligation, and breached that DFR to Bryan through gross negligence, intentionally misleading conduct, dishonesty, and bad faith.

STATEMENT OF FACTS

On February 24, 1999, Bryan filed a grievance for the unprecedented cancellation of his contractually-inviolable two-day recurrent training session by the chief executive officer of US Airways. *App.447, ¶6.d. (CBA)*. The two-day training was the minimum training for every pilot of the airline, *including those such as Bryan who were participating in the early retirement program (ERIP)*. The grievance was denied by management and ALPA submitted it for processing before the RLA's System Board of Adjustment. *App. 018.* APA attempts to diminish their violation of their duty of fair representation to Bryan by entirely unrelated examples in their *Rule 56.1* statement, such as suggesting that "operational needs" in the early retirement program (ERIP) were responsible for Bryan's cancellation of training. However, they fail to produce a shred of evidence that Bryan's international captain's status wasn't the most needed skill in US Airways' operational needs through the very end of the ERIP. Thus, *but for the US Airways CEO's animus and attack on Bryan due to his union position*, he would have contractually had the opportunity to remain until the end of ERIP, thus needing that minor, low cost, 2-day training. APA also suggests that "it was not uncommon that training dates were *changed* at US

Airways," while never once citing any evidence that Bryan's training *cancellation* was not *unprecedented. App. 29, ¶78.*

During the following nearly two decades-long turmoil for the unions and the airline, the grievance survived multiple reviews that could have led to its withdrawal, but did not. *App. 787, 790, App. 366,369 (pl.st. ¶¶ 112-115,148), 723-733 (Mowery Dep.).* On October 16, 2017, APA withdrew Bryan's grievance, along with hundreds of others, without any notice, without ever interviewing witnesses, and without disclosure to the grievants. *App. 356-357 ¶18, App. 359 ¶¶51,52, App. 580, 581 (Bryan dep.) App. 617, 618 (Ciabatonni Dep) App. 655 (Colello Dep.).* On October 5, 2017, APA's director of representation, Kennedy, with full knowledge that Bryan's grievance was to be withdrawn at the APA Board meeting in just 11 days, falsely told Bryan that his grievance had been withdrawn years earlier by USAPA. *Id.* Importantly, Kennedy also told Bryan there would be "no reconsideration." *App. 579-580, (Bryan dep.).* If the statement of USAPA withdrawal had been truthful, there could not be any reconsideration, since the statute of limitations would have long-since past given APA's 2014 assumption of representational rights from USAPA. Thence, Bryan requested that Kennedy provide him with his grievance file; she agreed but failed to do so. *App. 580, 582 (Bryan Dep).*

The unrebutted evidence supports Bryan's affirmation that his meritorious grievance was open, and had not been withdrawn by the time it was inherited by APA, along with hundreds of other age-old grievances. *App. 366,367 (pl.st. ¶¶ 109-122), 723-733 (Mowery Dep.), App. 787,790.* In fact, the various unions, including APA, assured Bryan on at least four (4) occasions, as recent as April 13, 2017, that his grievance was still open. *Id., App. 787,790.* An email of August 13, 2015, from APA to American further confirmed that USAPA had not withdrawn Bryan's grievance. *Id.* While many of the grievances on that spreadsheet were indeed marked "Withdrawn," the exhibit lists that Bryan's grievance as "Open" and expected to be heard before the System Board of Adjustment ("Open-SBA"). *Id.*

The Court need not reach back to any of the unions' actions specific to Bryan's grievance prior to APA's acquisition of representation rights in 2014 in order to adjudicate this matter. Bryan had been informed that no action would be taken on the hundreds of grievances until a "joint working agreement" between US Airways and American had occurred. *App. 494, (Email, Parrella to Bryan).* Understanding that the joint agreement had, in fact, occurred in or about

February of 2017, he contacted APA on February 24, 2017. He queried APA's Trish Kennedy, Director of Disputes Resolution and an attorney, about the status of his grievance. *App.562-563, App.566-567.* After checking, she told him it was open and that APA would get back to him. *App.428 (Notes), App. 571 (Bryan Dep.).* In a call on April 13, Kennedy stated that she had found Bryan's file and his case was open. *Id., App. 367 ¶126.* She asked him what he was seeking for damages. *Id.*

In mid-May, Bryan called Kennedy again since she had not gotten back to him. At that time, she gave him further "rays of hope." *Bensel v. Allied Pilots Ass'n, 387 F.3d 298* (3d Cir. 2004) *App. 367 ¶127, Appellant's Brief, pp. 42-45.* Kennedy stated that American was feeling flush, and that his case would be discussed at a meeting between APA and American on June 15, 2017. *App.572-573 (Bryan Dep.); App.848 Email, JB to TK.*

Shortly thereafter, APA secretly embarked upon a plan to dispose of the hundreds of grievances in a "global" settlement, without ever informing the grievants. APA did not allow the greivants to be a part of the process, did not allow any witnesses, and did not allow their input in the massive settlement that would bargain-away their rights. *App. 327-353, App. 359 ¶¶43-47, App. 725 (Kennedy Dep.).*

In August and September 2017, Bryan unsuccessfully sought to contact Kennedy on three occasions. *App.574 (Bryan Dep); App.718 (Kennedy Dep.); App.848, Emails, Bryan to Kennedy).* Kennedy has no explanation as to why she never responded to Bryan's requests to be updated on the status of his grievances. *App.721-722 (Kennedy Dep).* APA's perfunctory and reckless lack of response to Bryan, despite having received his emails, denied him the opportunity for input regarding his grievance during the crucial months just prior to the October 16, 2017, global settlement. *Id.*

Notwithstanding Kennedy's false statement to Bryan on October 5, 2017, that his grievance had been dropped by USAPA, Kennedy knew that the APA Board of Directors was to meet on October 16, 2017, to withdraw hundreds of grievances without the members' knowledge. She also knew that Bryan's grievance was included in that cadre; his grievance was in fact withdrawn at the October 16, 2017, APA Board meeting. He filed his complaint in federal district court barely two months later, on December 14, 2017. *App.002 (Docket Sheet); App. 14-22 (Complaint).*

Bryan is not alleging that the predecessor unions, ALPA and USAPA, violated their duty of fair representation to him. As earlier stated, they were embroiled in a tsunami of internal and external events that overwhelmed their resources as unsettled grievances climbed into the hundreds. Yet, over those many years from 1999 through the 2014 representational takeover by APA, *neither ALPA nor USAPA withdrew Bryan's grievance, nor did they ever inform him that it was not meritorious. App. 787, 790, App. 358-364 ¶¶35, 41, 46, 53-60, 67, 74, 92, 93).* In fact, they never withdrew his grievance despite subjecting it to review on numerous occasions; they advised his grievance would be placed in the hands of APA for processing. *App. 420-424 (Email, Ciabatonni to Bryan), App 494 (Email, Parrella to Bryan) App. 787, 790.* Given that Bryan's grievance was open until the APA withdrew it on October 16, 2017, APA is the sole union to have violated Bryan's DFR and is the only defendant in this matter; not ALPA or USAPA. The violations of Bryan's grievance rights under the RLA and a union's duty of fair representation lie squarely in the lap of APA for their violative actions.

SUMMARY OF THE ARGUMENT

1. Petitioner's Grievance Was Not Time Barred

The lower court found that Captain Bryan should have known about the union's wrongdoing long before October 5, 2017. *Decision,* CV-12460-DJC, *p. 13. ADD 026. 1st Cir. Brief Appellant.* The Court's conclusion that Bryan's claim accrued prior to APA's certification as the collective granting agent is illogical. A claim can only accrue against a specific defendant and cannot accrue in the abstract as apparently found by the lower court. Bryan did not sue ALPA or USAPA because he concluded that those non-defendant unions had not breached their duties of fair representation, nor had they ever informed him that his case was not meritorious or had been withdrawn. *App. 359-367 ¶¶48-121.* Rather, Bryan sued APA upon learning they had abandoned his case. While in several instances Bryan sought to incent ALPA's and USAPA's action with considerations of litigation, he did not do so with full knowledge that the courts would quickly dismiss such a case given the extreme, indeed existential, circumstances the unions were in, together with the "rays of hope" that they offered. *Bensel v. Allied Pilots Ass'n,* 387 F3d 298 (3d Cir. 2004). As explained to the lower court in his *"1st Circuit Brief of the Appellant" (p. 45):*

> Captain Bryan acknowledges that as the former Chairman and CEO of the union he was aware of a union's duty to fairly represent him. In fact, it is exactly

> because of this 'sophistication' that he understood that any claim based on nothing more than delay, should be tolled given the 'rays of hope' given to him and that a premature DFR claim would be thrown out of court as soon as it arrived, given the financial straits of the airline and backlogs faced by the unions.

In *Abrams v. United Steel Workers of America, AFL-CIO,* 2011 WL 13202400 (S.D. Ohio 2009), the court sitting in the Sixth Circuit adopted the reasoning of the *Bensel* court and found that the limitations period in a DFR case is tolled "until efforts to resolve the situation are either completed or broken off." It is therefore irrefutable; that date is October 16, 2017, the day that the APA Board of Directors disposed of Bryan's grievance, along with hundreds of others.

In the *American Airlines Flow-Thru Pilots Coalition v. Allied Pilots Association,* 193 F. Supp. 3d (N.D. California 2016), in *dicta*, the Court "assumed" that "the basic principle of *Bensel* is generally consistent with Ninth Circuit law. Yet, in this case, the lower court sought to distinguish *Bensel*, noting nothing more than that in *Bensel* the union initially pursued arbitration, while in this case the union never pursued arbitration. *ADD029, 1st Cir. Plaintiff Brief.* The lower court concluded that "*Bensel* ... is distinguishable as the union in that case pursued arbitration and the court noted that a positive outcome in the arbitration would have mooted the duty of fair representation claim." *Id.* The lower court's "distinction" must be viewed as distinction without a difference. It completely fails to address the underlying policy of *Bensel*, which is that in labor disputes, an employee offered "any" ray of hope by the union *should not be forced to prematurely sue the union and antagonize the potential best champion of his cause.*

In fact, the *Bensel, 387 F.3d at 306,* court, anticipating exactly the type of reasoning adopted by this lower court, specifically held:

> This Court has applied the rays of hope analysis in the absence of any arbitration proceeding. *Our discussion of the doctrine makes obvious that its supporting principles are not inherently dependent on the presence of an arbitration proceeding. An arbitration proceeding is merely illustrative of one way in which a union can proffer rays of hope that it will obtain the relief the complaining employee desires*....If, however, a union purports to continue to represent an employee in pursuing relief, *the employee's duty of fair representation claim against the union will not accrue so long as the union proffers "rays of hope"*

> *that the union can remedy the cause of the employee's dissatisfaction.* It is irrelevant if the employees were aware of...the acts constituting breach at any time before the rays of hope were extinguished....

In policy that is directly on point to this case, the Court added:

> This policy is especially befitting in the context of labor disputes, where Congress has evidenced its desire to resolve disputes through arbitration. *Id.* Second, requiring an employee to sue the union within six months of discovering the union's breach puts the employee in an untenable position because "if he waits to sue the union he may lose the right to do so, but if he sues the union immediately *he may antagonize the best possible champion of his cause"* [emphasis added].

It is clear that the reasoning of *Bensel* is consistent with Supreme Court and Congressional guidance. It is especially apropos in this case, given its voluminous and unique facts and the historic turmoil within US Airways and the airline industry. As the dictum that the lower court correctly stated, but thence did not follow, the date and determination of a DFR violation is not a "bright line;" it is achieved by consideration of all of the facts in the instant case.

APA hatched another legal conundrum by simultaneously admitting that Bryan's grievance was withdrawn by APA on October 16, 2017, and concomitantly stating on October 5, 2017, that it had been withdrawn during USPA's representational control. *App. 131, (Bryan Dep), Kennedy Decl. par. 14, Ex.C., Global Settlement Agreement, at APA 001109, App. 356, ¶11, App. 366 ¶115, App. 367 ¶¶126,127, App. 787, 790.*

Indisputably, APA was attempting to escape legal liability by a transparently dishonest, and in bad faith, legal argument. Note that in her deposition, and in answer to the question about whether she knew "in fact" that USAPA had withdrawn Bryan's grievance, she responded: "Based upon the paperwork we received from USAPA...the grievance had already been withdrawn by USAPA before it came to APA." *App. 261,262 (Kennedy Dep.).* We know that to be a false statement, as there is no "paperwork" in the record that indicates Bryan's grievance was withdrawn by USAPA or ALPA. In fact, the paperwork showed that his grievance was "Open" and scheduled for the System Board of Adjustment (SBA). *App. 787, 790.* Four former ALPA and USAPA union officials testified that their unions never withdrew Captain Bryan's

grievance. *App. 732 (Mowery); App. 764 (Parrella); App. 665-666 (Colello); App. 421, 635 (Ciabatonni).* APA's actions and statements were, in the very least, reckless, perfunctory, and demonstrative of losing track of Bryan's grievance. More likely, they were dishonest and in bad faith, with the intent of exculpating them from liability.

By rejecting *Bensel*, the lower court ignored the circumstances faced by Bryan and the hundreds of other grievants who were understanding of the historic crises facing their employer and the strain on the resources of their union. The court suggests that Bryan alone had the responsibility to sue his union while hundreds of others stood by with patient understanding during the unions' years-long existential battle for survival. Bryan knew well that the union was making appropriate decisions in triaging the growing mountain of grievances, and correctly prioritizing those such as pilot terminations that ended their paychecks and the ability to support their families. APA attempts to rely on Bryan's at-times insistent language and legal insinuations in his communications to the unions as some type of dispositive exhibition that he should have filed his DFR complaint earlier. Any such actions would have been premature, unjustified, and quickly disposed of by the Court. As profoundly stated in *Bensel*, it would also antagonize of the "best possible champion of his cause." *Id.* It would also serve to clog our courts and unnecessarily sap their resources.

For the period of time prior to the 2014 assumption of representation rights by APA, the court applied the standard that "prolonged inaction is sufficient to give the diligent plaintiff notice that the union has breached its duty of fair representation." *Pantoja v. Holland Motor Express, Inc.*, 965 F.2d 323, 327 (7th Cir. 1992). That case is inapposite in this matter. Notwithstanding the dispositive "rays of hope" doctrine of *Bensel* addressed herein, the court erred in failing to interpret that, as a matter of law, the terms "prolonged" and "diligent" were factual issues, mere "moving targets" for the jury to determine after considering all of the facts in the specific case. Yet another area that made this case inappropriate for summary judgment.

While thence walking back from the assertion that the pre-2014 issues created a time bar, the lower court stated: "Even considering only the time following APA's certification as collective bargaining agent in 2014" Bryan's claim is time barred. Yet again, the reasoning expressed in *Bensel*, and adopted by the 3rd, 6th, and 9th Circuits, makes clear that the lower court's reasoning in this area is inapposite. As in the years from 1999-2014, Bryan was not alone in his

understanding of the unique circumstances of his union. He was joined by hundreds of other grievants who also understood that, between 2014 and the completion of the transition by the beginning of 2017, the union was still facing a chaotic landscape with a multiplicity of demands upon their resources. More importantly, Bryan was specifically told via written communication that, *despite APA's assumption of bargaining rights, none of the grievances would be dealt with until the joint working transition had been completed. App. 494 (Email Parrella), App. 420-424 (Email, Ciabatonni to Bryan).* Indeed, it is admitted that APA would not even meet with American until August 2, 2017, to discuss the hundreds of grievances. *App. 679, Principal Appellant's Brief, p. 13.*

While APA kept secret from Bryan their plans to join with American in abandoning his and hundreds of other grievances (some decades old), he was celebrating the significant "rays of hope" given to him by APA's Director of Disputes Resolution in May, 2017. *App. 019* ¶¶26,27, *App. 367 ¶127, App. 1st Cir. Brief Appellant, Statement of the Case.* Bryan, of course, did not know those rays of hope from APA were totally disingenuous, or that APA as early as November 2015 had planned to withdraw his, and hundreds of other, grievances. *App. 782, 783 (APA's November 8, 2015 decision to "Pull," or "withdraw (WD)" old USAPA grievances).* Interestingly, and perhaps due to their intuitive understanding of the precepts of *Bensel*, there is no evidence presented that any of the hundreds of grievants in the global settlement had challenged any of the unions for the timeliness of processing their grievance, disposed of in the so-called global settlement on October 16, 2017.

The record is replete with evidence showing that the withdrawal of Bryan's grievance lies squarely at the feet of APA, and that APA provided him with unrebutted "rays of hope" that his grievance was open. *App. 019* ¶¶26,27, *App. 367 ¶127, App. 1st Cir. Brief Appellant, Statement of the Case. App. 123, App. 572, 573 (Bryan Dep.)* At no time *prior to October 2017 did APA inform him of their intention to drop his grievance, which had never been withdrawn by the two predecessor unions. App. 732 (Mowery); App. 764 (Parrella); App. 665-666 (Colello); App. 421, 635 (Ciabatonni), App. 787,790.* Therefore, Bryan's filing of his complaint in the District Court on December 14, 2017, barely two months following APA's withdrawal of his "Open" grievance, was well-within the six-month statute of limitations adopted by the RLA and Court, and therefore not time-barred.

2. Union Violated Their Duty of Fair Representation

APA's actions relating to Captain Bryan's grievance during 2017 violated their duty of fair representation. APA's falsely stating to Bryan on October 5, 2017, that his grievance had been withdrawn by USAPA, which had lost its representation rights three years earlier, was "dishonest" and "intentionally misleading," therefore rising to "bad faith." Under the RLA, a union has a statutory duty "to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Air Line Pilots Ass'n, Int'l v. O'Neill,* 499 U.S. 65, 76 (1991) *(quoting Vaca v. Sipes,* 386 U.S. 171, 177 (1967*).* Also, "a union acts in bad faith *(App. 683, 684, 703)*... [which] encompasses fraud, dishonesty, and other intentionally misleading conduct." *Good Samaritan Med. Ctr. v. NLRB*, 858 F.3d 617, 630 (1st Cir. 2017) (quoting *Spellacy v. Air line Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998)).

APA's October 5, 2017, statement exhibited an even greater level of bad faith, when placed in juxtaposition to APA's knowledge that it had tentatively decided to drop Bryan's grievance following a joint APA and American meeting of August 2, 2017. *App. 264. App. 679, Principal Appellant's Brief, p. 13.* Thence, it was solely APA that did, in fact, drop Bryan's grievance just eleven (11) days after their false statement of October 5, 2017. APA's false statements to Bryan *are a bright-line act of bad faith and a violation of their duty of fair representation. App.037 (Def. St. 181, 183); App.687, 717 (Kennedy Dep).*

While in no way diminishing APA's bad faith in their false statement of October 5, 2017, it is also clear by their own testimony that APA "lost track" of Bryan's grievance. Four former ALPA and USAPA union officials testified that their unions never withdrew Captain Bryan's grievance. *App. 732 (Mowery); App. 764 (Parrella); App. 665-666 (Colello); App. 421, 635 (Ciabatonni).* Yet, Kennedy testified: *App. 683-684;App. 703.*

> Q. So your decision was based on the fact that USAPA had withdrawn the grievance, *not based upon a legal review of the contract provisions; isn't that correct?*(Emphasis added.)
>
> A. Correct. Correct. I felt it was reasonable. *See, also, App. 723 (similar testimony by Ms. Kennedy).*

Kennedy made those sworn statements despite the documents sent to her from an APA grievance reviewer on August 13, 2015, indicating that Bryan's grievances was "Open" and intended for the "SBA" (RLA's System Board of Adjustment) for hearing. *App. 787, 790.*

In juxtaposition with the above, recall Bryan's unrebutted testimony of Kennedy's May 2017 statements: In mid-May, Bryan called Kennedy again since she had not gotten back to him. At that time she gave him further "rays of hope," stating that American was feeling flush, and that his case would be discussed at a meeting between APA and American on June 15, 2017. *App.572-573 (Bryan Dep.); App.848 Email, JB to TK.*

It is indisputable from Kennedy's testimony that APA was either engaged in a stream of false statements or had completely and irrationally lost track of his grievance, either of which rises to a failure of their duty of fair representation. *NLRB Memorandum GC-19-01, App.878-879.* Perhaps more appropriately, as gleaned from the evidence and testimony, they were engaged in both. Notwithstanding the reason, legal guidance by the National Labor Relations Board (NLRB), applicable under federal law to the RLA, makes clear that losing track of a member's grievance will ordinarily result in a finding of a breach of duty of fair representation. *Id.*

APA further contradicts Kennedy's testimony with grossly misleading statements in their *1st Cir. Reply Brief, p.33.* They indicate that "Plaintiff was advised by APA that his grievance had been withdrawn in conjunction with the Global Settlement Agreement...." As admitted and unrebutted, that is a false statement; APA *never* told Bryan that his grievance has been withdrawn by APA. Kennedy stated it has been withdrawn by USAPA. *App. 576-577 (Bryan Dep*). Further demonstrating the falseness of the statement, Bryan's last conversation with Kennedy was eleven (11) days prior to the withdrawal of his grievance by the global settlement.

It's noteworthy that the *court below made a dispositive error when it adopted APA's false statement.* The court stated that *Bryan may indeed have had the right to pursue the grievance on his own, but he waived that right because he failed to contact APA after October 5, "more than a week before the Global Settlement Agreement became final.*" [Emphasis added]. *1st Cir. Opinion, p. 17.* The court is categorically wrong here: As cited above, Bryan was never told of the impending Global Settlement Agreement; the testimony is unrebutted he was told on October 5, 2017, that there would be "no reconsideration" of the withdrawal; and, finally, he was informed that his grievance had been withdrawn by USAPA, which lost its representational

rights in 2014 and therefore the withdrawal was well-beyond the statute of limitations. *App.576-577, (Bryan dep.).*

In addition to the dispositive arguments preceding, APA's dishonesty denied Bryan the opportunity to immediately pursue actions within APA to plead his case, or to pursue it on his own. In the Supreme Court case of *Elgin, J.&E. Rwy. Co. v. Burley,* 325 U.S. 711 (1945), the Court granted the right individually to process or otherwise participate in the processing of grievances. The Court noted that "the general aim of Congress in extending the Act {RLA} to air carriers was 'to extend...the same benefits and obligations available and applicable in the railroad industry.'" *Id.*

The specific language of the CBA provides that "Employees covered by the Pilot's Agreement may be represented at [adjustment] Board hearings by such person or persons as they may choose and designate..." APA's actions foreclosed that opportunity for Bryan *App 456 (Sec. 21(I).* In *Stevens v. Teamsters Local 2707, Airline, Aerospace, and Allied Employees,* 504 F. Supp. 332 (W.D.WA, 1980*),* the court found that the failure to notify a grievant in advance of the withdrawal of his grievance was arbitrary and reckless, and foreclosed the opportunity of the grievant "the right to individually process" his grievance, when giving that notice would not have increased the costs to the union, would not have harmed the union's bargaining position, and would not have prejudiced the rights of other employees, and would not have required the union to pursue what may have been deemed as a meritless grievance.

In this case, the only salient issue of "merit" must be construed after APA's takeover of representational rights in 2014. It was solely APA's review that led to the withdrawal of Bryan's grievance. The evidence is clear that APA reviewer Ciabatonni perfunctorily and with gross negligence failed to review Bryan's file and based his decision regarding the merits of Bryan's grievance on an incorrect contractual provision. *App. 182, 183.* Other reviewers had done the same. This was not a mere, forgivable error; it was reckless disregard of APA's duty of fair representation, stimulated by their grossly-negligent and "irrational" effort to abandon hundreds of grievances. *App. 359-370 ¶¶ 42-152.* Even more damning for APA, they entirely lost track of Bryan's grievance and failed to make any effort to resolve contradictory evidence, yet recklessly and in bad faith stated his grievance had already been withdrawn by USAPA. *App. 367-370 ¶¶ 122-152, App. 787,790, App. 869, 873.*

By failing to give Bryan notice of the impending withdrawal, as USAPA testified it planned to do prior to withdrawing any grievances, *App. 373 ¶¶180, 181,see brief Sec. IA 1, infra p. 24,* APA denied Bryan the opportunity to take over his own grievance. APA admitted that no one at American had asked them to drop the grievance, and could not identify any benefit from doing so. *App. 723-724 (Kennedy Dep.).* As in *Stevens*, the failure to inform Captain Bryan in advance that it was withdrawing his grievance must be viewed as arbitrary and reckless.

It is also important to cite that then-Grievance Chairman Captain Mowery, who originally filed Bryan's grievance and was the most knowledgeable union representative of the facts and Bryan's grievance file, *never* stated that Bryan's grievance lacked merit. *App. 392, Mowery Dep. p. 20.* APA representatives stated that Mowery had indicated the grievance did not have merit, and that is why they withdrew it. *That statement was entirely incorrect*, and demonstrative of their dishonesty, or, at best, gross negligence rising to failure of their DFR. *Id.* Neither ALPA nor USAPA, at any time during their representation tenure a US Airways, ever informed Bryan that his grievance lacked merit or would be withdrawn. *App. 359-367, ¶¶ 53-122.* In fact, they properly forwarded his grievance to APA for processing. The failure of the APA reviewers to read Bryan's file, together with their reckless misapprehension of the cited contractual claims in his grievance, led to their grossly-negligent assumption that his grievance did not have merit.

The lower court erred as a matter of law in this area as well by denying Bryan the opportunity to argue the merits of his grievance before a jury. It is not the Plaintiff's burden to establish that he had a "meritorious claim." In a DFR case, "in order to survive summary judgment, the plaintiff need not show with complete certainty that her grievances were meritorious. Rather, she need show on this point only that her grievances were arguably meritorious." *Graham v. Quincy Food Service Employees Association,* 407 Mass. 601, 607, 555 N.E 2d 543, 546 (1990). The provisions in the CBA making Bryan's training date, once issued, inviolable was more than sufficient to achieve merit, notwithstanding the unprecedented intervention of the US Airways' CEO in that minor, low-cost training event, granted to all pilots, by ripping it away and terminating the career of the union's leader.

Further, APA falsely asserted that all of the reviewers stated there was no merit to Bryan's grievance. *APA Brief at 31, 32.* That was grossly negligent and incorrect; APA reviewer Ron Nelson testified that he never informed Kennedy that the actions US Airways were not in

violation of the terms of the applicable CBA. *App. 738, 739.* Recall also that the entire review was fundamentally flawed by the failure of all APA reviewers to realize the contractual basis of Bryan's grievance; they failed to understand that he was removed from his training schedule by the US Airways' CEO in retaliation for his union activities, and instead mistakenly construed it as an early retirement grievance. *App. 182, 183.* These are all issues that should have been vetted by a jury, and, as a matter of law, the case was not ripe for summary judgment. "The court grants summary judgment where there is no genuine dispute as to any material fact." *Decision, District Court,* CV-12460-DJC, p. 1. "A fact is material if it carries with it the potential to affect the outcome under applicable law." *Santiago-Ramos v. Centennial P.R. Wireless Corp.* 217 F.3d 46, 52. (1st Cir. 2000*)*. In this instance, as in others, the facts were genuinely in dispute and the court erred by granting summary judgment.

In its reply brief, APA cites several cases for the proposition that the failure to notify a grievant of a decision to drop his grievance may not give rise to a DFR claim. *APA Brief, pp.46-48.* The most important of those cases cited by the APA is the First Circuit case, *Demars v. General Dynamics Corp.* 779 F.2d 94 (1st Cir. 1985*)*. In *Demars*, supra at 98-99, in dicta cited by Defendant (as the court did not reach the issue of whether the union had breached its duty in that case), the court found that "it is unclear to what extent a union has a duty to notify a member when it withdraws a grievance," but "without anything more" courts have found a failure to notify does not violate a duty. Bryan has presented considerably "more" problems with the nature of APA's investigation than the simple failure to notify him of its decision as well as presenting evidence of the prejudice that resulted from APA's failure to give notification. Thus, APA's use of *Demars* is inapposite to the instant matter.

In its brief to the 1st Circuit Court, APA cites *Emmanuel v. International Brotherhood of Teamsters, Local Union 25,* 426 F.3d 413 (1st Cir 2005). *Emmanuel* is inapposite to the instant case. In Emmanuel, the court examined the behavior of the union during an arbitration; they did not consider, as in this case, whether a union's actions during an investigation were *perfunctory.* In fact, the word "perfunctory" is not mentioned once in the decision. *Emmanuel* is merely the starting point upon which to build. *Emmanuel* does not discuss what type of conduct would be necessary to perform a minimal investigation.

Neither *Emmanuel*, nor other case law, supports APA's actions in this case, such as APA's so-called subject matter experts failing to even read the grievance and thereby utterly misunderstanding that it was a Section 11, "Training" grievance that cited "inviolable" contract provisions, and *not an ERIP grievance*. Nor could APA possibly invoke *Emmanuel* to defend actions such as the fact that APA reviewers:

> Never read the contractual issues of grievance, thereby confusing an "inviolable" training grievance with an early retirement grievance;
>
> Never read the applicable contract language or considered Bryan's rights under those provisions;
>
> Were not aware that Captain Bryan's training had been cancelled by US Airways' CEO as retribution for Bryan's union leadership activity;
>
> Never reviewed the relevant documents in the grievant' s file;
>
> Never sought the input of any witnesses; and
>
> Provided contradictory spreadsheets to APA, one stating Bryan's grievance was "Open" and scheduled to be heard by the RLA's (SBA) System Board of Adjustment (*App. 787,790*), and the other that his grievance was "Unknown" and with "No Documentation," *(App. 869, 873)* clearly indicative of their having "lost track" of Bryan's grievance, which is prima facia example of a violation of DFR. *NLRB Memorandum GC-19-01, App. 878, 879.*

See also App. 642-647 (Colello Dep.), App. 181-182, 609-611, 639 (Ciabatonni Dep.), App. 674-676, 689-690, 701,704-705, 706 (Kennedy Dep.), App. 738, (Nelson Dep) App. 801-805 (Mowery voice mail from Bryan).

This was an *"irrational," grossly negligent, and perfunctory review* that could have been fully predicted by the attempt of APA to dispose of circa 400 hundred grievances, accumulated over decades without ever contacting the grievants or interviewing witnesses or ascertaining the relevant contract provisions. The flushing away of 400 grievances would have been highly beneficial to the union and American, but thoroughly destructive to the hundreds of grievants

who were depending on their union for workplace justice. It was also a violation of their duty of fair representation under the RLA.

The record exposes yet another grossly-negligent and perfunctory level of review of Bryan's grievance by APA's reviewers. In his deposition, APA reviewer Ciabatonni testified as follows:

> Q. Did you contact any witnesses about this grievance?
>
> A. The only witness would have been Jon Bryan on this case. *I did not contact Jon Bryan.* [Emphasis added.]
>
> Q. Were you aware of the fact that according to Jon Bryan he had witnesses that the reason his training was cancelled was because [the US Airways CEO] had requested his training be cancelled after it was scheduled?
>
> A. No, I do not. I do not have that knowledge.
>
> Q. You didn't know that when you made a recommendation to withdraw Captain Bryan's grievance; is that correct?
>
> A. No, I did not have that knowledge.

See App. 182, 183. The responses from this so-called subject matter expert for APA demonstrate the gross negligence and perfunctory level of the review by APA in November of 2015. The information that Ciabatonni didn't have was squarely in Bryan's grievance file, including the cancellation of Bryan's training by the airline's CEO, placed there by Captain Mowery, who originally filed the grievance and had the long voice message from Bryan painstakingly transcribed for the record; now totally ignored by APA *App. 801-803.* In fact, Bryan's file contained the fact that he had identified eight witnesses who had information relating to his grievance, yet ignored by the APA reviewers. *App. 362 ¶ 72.* For the APA reviewers to have been completely unaware of the content of Bryan's grievance file, such as the names of the witnesses and even the nature of the training grievance (not ERIP as they assumed), shows a grossly negligent and perfunctory review that exceeds that necessary for a violation of DFR.

Notwithstanding the extensive evidence provided herein supporting the merits of Bryan's grievance, and the perfunctory and grossly-negligent review by APA, the testimony of APA's Kennedy makes clear that APA *never considered Bryan's grievance based upon any legal*

analysis or its merits. Kennedy testified that her decision to withdraw Bryan's grievance was based upon the reckless assumption that USAPA had withdrawn the grievance, and it was not based, whatsoever, upon any legal analysis of the contract provisions, evidence, or the comments of any of APA's reviewers. *App. 683-684, App. 703.* That was despite her receipt of data that confirmed Bryan's grievance was open, and that four former ALPA and USAPA union officials testified that their unions never withdrew Captain Bryan's grievance. *App. 787, 790, App. 732 (Mowery); App. 764 (Parrella); App. 665-666 (Colello); App. 421, 635 (Ciabatonni).*

It is clear that neither *Emmanuel*, nor any of the cases cited by APA, are a defense in the arbitrary, perfunctory, and grossly-negligent actions cited above.

In his *Principal Brief, pp. 29-37*, Bryan cites 13 different cases, rulings, and Guidance Memos, from ten different courts and administrative agencies, finding that facts similar to the facts found in this case are sufficient to state a case of breach of the duty of fair representation. APA, like the lower courts, failed to address the legal reasoning of these rulings that have found investigations, such as those performed by APA, to be perfunctory investigations. In its Appellate Brief, APA did not discuss a single one of these 13 different cases, rulings and Guidance Memos. APA's arbitrary, perfunctory, grossly-negligent, and dishonest actions violated their duty of fair representation and must not be allowed as a guide for the future actions of unions.

REASONS FOR GRANTING A WRIT OF CERTIORARI

The United States Congress has identified the proper functioning of interstate commerce to be of vital importance to the nation. In fact, one of the earliest and most significant labor laws passed by Congress was the Railway Labor Act of 1926, later applied to the rapidly-expanding air transport industry by amendment in 1936.

The United States Supreme Court has painstakingly interpreted the provisions of the RLA for nearly a century, as well as subsequent labor laws such as the National Labor Relations Act. Supreme Court rulings have provided lower courts, employers, unions, and employees with important guidance to facilitate their operations and daily interactions.

Yet, despite that extensive guidance, cases arise that either ignore or misinterpret that extensive case law of the high court. This writ of certiorari arises from one such case, and is

squarely centered upon a matter of significant national importance. Here, the lower court has substantially reinterpreted the type of union actions that constitute a violation of their duty of fair representation to the membership. Despite the Supreme Court's careful and well-reasoned decisions in *Vaca* and *Elgin*, for example, the lower court here has now stretched the meaning of "deference" to include elements such as willful misrepresentations, false statements, and gross negligence.

This case is replete with elements, now blessed by the lower court with deference, that the Supreme Court never intended to allow. That deference will surely percolate to litigation throughout the country, and cited as future legal precedent especially in the important interstate transportation industries. The ruling will unsettle the relationships between unions and management, and unions and their interactions with their membership.

It is vitally important the Supreme Court reign in this wrongful evolution of labor law. Especially with the rapidly-increasing concentration in unionized industries, where oligopolies reign and union membership exceeds tens of thousands in a single company, the importance of the courts in balancing the relationship between unions and their members has never been greater. Also, as in the instant case, carriers have been hit with myriad exogenous and endogenous shocks (e.g., September 11, 2001; the 2008 financial crisis, and now Covid-19) that require properly functioning labor law and stimulates fair dealing. The ruling in this case dramatically dilutes a member's rights and shifts the balance of power to the union. That will surely cause angst and activism that can lead to needless turmoil and increased litigation.

The ruling of the lower court will also spur instances of bad behavior from management, as the "trickle down" impact of diluting the union's duty of fair representation could provide the "green light" for treatment such as that inflicted upon the Plaintiff by the company's CEO in this case. There can be no mistake that both managements and unions will quickly apprehend the new "rules of engagement" precipitated by the interpretations of the lower court's ruling.

Of immense importance to managements is the impact of this ruling on "hybrid" cases such as this one. Companies know that they cannot be "reached" in a hybrid case unless the employee is successful in obtaining a finding that his or her union breached their duty of fair representation. Managements will not miss the fact that the ruling in this case will surely place new and formidable roadblocks to a union member's path to "hybrid" justice.

Yet another issue of national importance in this matter is the remarkable interpretation of *Bensel v. Allied Pilots Ass'n,* 387 F.3d 298 (3d Cir. 2004*)* by the lower court herein, which has now caused a split between that circuit and 3rd, 6th, and 9th circuits. Despite the *Bensel* court's yeoman efforts to elaborate their reasoning, the rejection by this lower court demonstrates that the significant "rays of hope" doctrine is in urgent need of Supreme Court guidance.

There are more than 15 million workers who are represented by unions in the United States, and more than 500,000 in the rail and air transport industries. Many of these employers are oligopolies, with tens of thousands of employees. The lower court's ruling in this matter will change the balance in workplace relationships, to the detriment of workers. Supreme Court precedent and the intent of Congress were surely misapplied in this case, and will now have a chilling impact on national labor relations. Petitioner respectfully requests that the Supreme Court resolve these nationally-important issues by reversing the rulings of the lower court, or remanding the issues to that court.

CONCLUSION

WHEREFORE, Petitioner Jon L. Bryan respectfully requests that this Court grant his Petition for Writ of Certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

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