Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re: AMR Corporation, *Debtor*.

JOHN KRAKOWSKI, *et al.*,
Petitioners,

v.

ALLIED PILOTS ASSOCIATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A labor union operating under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, has the exclusive statutory authority to bargain on behalf of the employees who are members of its collective bargaining unit. This exclusive bargaining authority brings with it the "statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Air Line Pilots Assoc. Int'l v. O'Neill*, 499 U.S. 65, 76 (1991).

This statutory obligation is called the union's duty of fair representation.

The question presented is:

Where a labor union imposed as part of its collective bargaining agreement a seniority system that admittedly discriminated in bad faith against a disfavored employee group at a time when the union owed the disfavored employees no duty of fair representation because it did not yet represent them, may the union subsequently, after the duty of fair representation to those employees has attached, agree to re-implement the same discriminatory seniority system following elimination of the contractual *status quo* by a bankruptcy court order under 11 U.S.C. § 1113 approving the employer's abrogation of the collective bargaining agreement and its seniority system?

LIST OF PARTIES

Petitioners John Krakowski, Kevin Horner, and M. Alicia Sikes ("Pilots") are airline pilots. Pilots were plaintiffs in the two adversary proceedings in the bankruptcy court and appellants in the district court and in the court of appeals.

Respondent American Airlines, Inc. ("American" or "AA"), is an international airline. American was a defendant in the adversary proceedings in bankruptcy court and an appellee in the district court and in the court of appeals.

Respondent Allied Pilots Association ("APA") is an unincorporated association and labor union that has served as the collective bargain representative under the Railway Labor Act ("RLA") for all pilots employed by American at all relevant times. APA was a defendant in the adversary proceedings in bankruptcy court and an appellee in the district court and in the court of appeals.

Pilots were all employed by American and represented by APA during the events giving rise to this dispute. Pilots brought the two adversary actions as class actions on behalf of a class of similarly-situated American pilots.

CORPORATE DISCLOSURE STATEMENT

Pilots and the members of the putative class are all individuals.

American is a Delaware Corporation. American is 100% owned by American Airlines Group, Inc., a publicly-traded corporation (NASDAQ: AAL). More than 10% of American Airlines Group's shares are owned by The Vanguard Group, Inc.

APA is an unincorporated association of airline pilots employed by American.

LIST OF PROCEEDINGS

In addition to the proceedings that are the subject of this Petition for Certiorari, the following proceedings in federal court are directly related, as that term is defined in Rule 14(1)(b)(iii), to the case in this Court:

Allied Pilots Assoc. v. AMR Corp. (In re AMR Corp.), 471 B.R. 51, 2012 Bankr. LEXIS 1945, 56 Bankr. Ct. Dec. (LRP) 102 (Bankr. S.D.N.Y. 2012), subsequent proceeding *In re AMR Corp.*, 477 B.R. 384, 2012 Bankr. LEXIS 3756, 194 L.R.R.M. 2035, 2012 WL 3422541 (Bankr. S.D.N.Y. 2012), subsequent proceeding *In re AMR Corp.*, 478 B.R. 599, 2012 Bankr. LEXIS 4258, 68 Collier Bankr. Cas. 2d 137 (Bankr. S.D.N.Y. 2012).

In re AMR Corp., 2012 Bankr. LEXIS 4169, 194 L.R.R.M. 2152 (Bankr. S.D.N.Y. Sep. 5, 2012), *affirmed sub nom. Supplement B Pilot Beneficiaries v. AMR Corp. (In re AMR Corp.)*, 523 B.R. 415 (S.D.N.Y. 2014), *affirmed Supplement B Pilot Beneficiaries v. AMR Corp. (In re AMR Corp.)*, 622 F. App'x 64, 2015 U.S. App. LEXIS 21122 (2d Cir. 2015).

Scerba v. Allied Pilots Ass'n, 2013 U.S. Dist. LEXIS 175291 (S.D.N.Y. Dec. 10, 2013), *magistrate's report adopted* 2014 U.S. Dist. LEXIS 45890 (S.D.N.Y. Mar. 31, 2014), *affirmed* 589 F. App'x 554, 2014 U.S. App. LEXIS 18739, 201 L.R.R.M. 3215, 2014 WL 4851713 (2d Cir. 2014), *writ denied* 135 S. Ct. 2313, 191 L. Ed. 2d 979, 2015 U.S. LEXIS 3374, 83 U.S.L.W. 3856, 203 L.R.R.M. 3148 (2015).

There are no directly-related state court cases.

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Krakowski v. Allied Pilots Association., 834 Fed. Appx. 660, 2021 U.S. App. LEXIS 2644, 2021 WL 319443, Appeal Nos. 19-3506 (L), 19-4378 (CON) (2d Cir. Feb. 1, 2021), *reh'g and reh'g en banc denied* Doc. No. 156 (March 24, 2021).

Krakowski v. American Airlines, Inc., 610 B.R. 714, 2019 U.S. Dist. LEXIS 218479, 2019 WL 6879517, Case No. 17-CV-03237 (S.D.N.Y. Dec. 17, 2019) ("*Krakowski II*").

Krakowski v. American Airlines, Inc., 610 B.R. 434, 2019 U.S. Dist. LEXIS 171319, Case No. 18-cv-06187 (S.D.N.Y. Oct. 2, 2019) (*Krakowski I*").

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 2018 Bankr. LEXIS 1726, 2018 L.R.R.M. 208039, Adv. No. 13-01283 (Bankr. S.D.N.Y. June 12, 2018) ("*Krakowski I*").

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 567 B.R. 247, 2017 Bankr. LEXIS 1035, 64 Bankr. Ct. Dec. 6, Adv. No. 14-01920 (Bankr. S.D.N.Y. April 14, 2017) ("*Krakowski II*").

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 538 B.R. 213, 2015 Bankr. LEXIS 3189, Adv. No. 14-01920 (Bankr. S.D.N.Y. Sept. 22, 2015) ("*Krakowski II*").

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 536 B.R. 360, 2015 Bankr. LEXIS 3038, 61 Bankr. Ct. Dec. 138, Adv. No. 13-01283 (Bankr. S.D.N.Y. Sept. 3, 2015) ("*Krakowski I*").

Krakowski v. American Airlines, Inc. (In re AMR Corp.), 2014 Bankr. LEXIS 2610, 199 L.R.R.M. 3584, 164 Lab. Cas. (CCH) P10,695, Adv. No. 13-01283 (Bankr. S.D.N.Y. June 3, 2014) ("*Krakowski I*").

JURISDICTIONAL FACTS

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The court of appeals issued its judgment February 1, 2021 (Appeal No. 19-3506, Doc. 149-1). A petition for rehearing or rehearing en banc was timely filed February 16, 2021 (Doc. 153) and denied March 24, 2021 (Doc. 156).

The court of appeals had jurisdiction under 28 U.S.C. § 158(d)(1) from the final judgments of the United States District Court for the Southern District of New York in a pair of appeals to that district court from the final orders of the United States Bankruptcy Court for the Southern District of New York. The bankruptcy court orders were entered in two separate but related adversary actions. The district court had jurisdiction to hear the appeals from the bankruptcy court's final orders under 28 U.S.C. § 158(a)(1).

This was a consolidated appeal from two separate judgments. The first case, referred to as *Krakowski I*, was filed in the United States District Court for the Eastern District of Missouri on May 1, 2012, Case No. 12-cv-00954-JAR. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 because the action was filed under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq*. The Eastern District of Missouri exercised its discretion under 28 U.S.C. § 1412 to transfer the action to the bankruptcy court, which had a then-pending bankruptcy, *In re AMR Corp.*, Case No. 11-15463. (E.D. Mo Case No. 12-cv-00954-JAR, Doc. 37). The transferred case was docketed by the bank-

ruptcy court as Adversary Proceeding No. 13-01283. The bankruptcy court entered its final order June 12, 2018 (Doc. 151) and a notice of appeal to the district court was timely filed June 26, 2019 (Doc. 153). The district court entered its judgment affirming the final order of the bankruptcy court October 2, 2019 (Doc. 31) and a notice of appeal to the court of appeals was timely filed October 23, 2019 (Doc. 32).

The second case, referred to as *Krakowski II*, was filed in the United States District Court for the Eastern District of Missouri on March 3, 2013, Case No. 13-cv-00838-RWS. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 because the action was filed under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq*. The Eastern District of Missouri exercised its discretion under 28 U.S.C. § 1412 to transfer the action to the bankruptcy court, which had a then-pending bankruptcy, *In re AMR Corp.*, Case No. 11-15463. (E.D. Mo Case No. 13-cv-00838-RWS, Doc. 15). The transferred case was docketed by the bankruptcy court as Adversary Proceeding No. 14-01920-SHL. The bankruptcy court entered a memorandum of decision dismissing the action April 14, 2017 (Doc. 54) and a notice of appeal to the district court was filed April 28, 2017 (Doc. 56). A final order of dismissal was filed by the bankruptcy court May 9, 2017 (Doc. 59). The notice of appeal was deemed filed as of that date. *Rule 4(a)(2), Federal Rules of Appellate Procedure*. The district court entered its judgment affirming the final order of the bankruptcy court December 18, 2019 (Doc. 20) and a notice of appeal to the court of appeals was timely filed December 23, 2019 (Doc. 21).

STATUTES INVOLVED IN THE CASE

The statutes involved in the case are: (1) the Railway Labor Act, specifically 45 U.S.C. § 152, which is the section of the RLA granting the collective bargaining representative, or union, the exclusive right to represent the members of its collective bargaining unit, which exclusive right gives rise to the union's duty of fair representation; and (2) 11 U.S.C. § 1113, the section of the Bankruptcy Code authorizing an employer who is a debtor-in-possession in bankruptcy to, among other things, abrogate its collective bargaining agreement with a union representing the employer's employees.

The two statutes are set out in full in the Appendix.

STATEMENT OF THE CASE

In 2001, American entered into an agreement with Trans World Airlines ("TWA") to acquire TWA's assets, including its aircrafts, routes, and gates, and to hire almost all of TWA's unionized employees. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 301 (3d Cir. 2004). APA was the collective bargaining representative for the American pilots. The TWA pilots were represented by a different union.

American conditioned the asset purchase on TWA filing for bankruptcy and on the waiver of the TWA pilots' right to have their seniority position within the consolidated airline determined by a neutral arbitrator — a contractual labor-protective provision referred to as the pilots' *Allegheny-Mohawk* rights. *Id*. When the TWA pilots resisted this demand, TWA filed a motion in bankruptcy court under 11 U.S.C. § 1113 to abrogate the pilots' collective bargaining agreement. The threat of contract abrogation caused the TWA pilots to waive their *Allegheny-Mohawk* rights. *Id*. at 302.

With the elimination of the TWA pilots' right to compel a seniority integration arbitration, APA had a free hand to negotiate directly with American to decide the TWA pilots' future positions within the future integrated seniority list. APA negotiated an amendment to its collective bargaining agreement ("CBA") with American that gave the TWA pilots dramatically reduced seniority on the combined list. This amendment was known as Supplement CC. Under Supplement CC, more than half the incoming TWA pilots, about 1,200 in all, were stapled to the bottom of the

seniority list with no seniority. The remaining 1,100 TWA pilots were integrated into the list with only a small fraction of their former seniority at TWA. As a result, TWA pilots with a dozen years of flying experience were made junior to American pilots with only a day of flying experience.[1]

At the time the seniority lists were integrated, APA and its officers acknowledged the unfairness of the seniority integration to the TWA pilots. APA could get away with disadvantaging the TWA pilots as severely as it did in Supplement CC because at the time the seniority lists were integrated, the TWA pilots were not members of the American pilots bargaining unit to which APA owed a duty of fair representation. [R. 494-95].

APA successfully argued before the Third Circuit in an appeal from a class action brought by former TWA pilots that APA was free to treat the TWA pilots in a discriminatory and bad faith manner because it owed no duty of fair representation to the former TWA pilots until APA was certified by the National Mediation Board ("NMB") as the pilots' representative on April 3, 2001. *Bensel*, 387 F.3d at 303, 312-15.

The Third Circuit held that the creation of a nominally-independent "TWA, LLC" by American to hold the TWA pilots before the merger of the two pilot groups immunized APA from liability: "This fiction

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[1] *See* Appellants' Appendix in the Court of Appeals for the Second Circuit ("Record" or "R.") at 491, 492-93. *Record* consists of two consecutively-numbered volumes.

enabled APA to unilaterally negotiate the Class' seniority with American without the Class' input." *Id.* at 314.

The extreme and prejudicial seniority integration established by Supplement CC was mitigated somewhat by the reservation of a fixed number of Captain positions for the former TWA pilots as well as by the establishment of a protective "fence" giving the former TWA pilots a preference in bidding on flights into and out of TWA's former hub in St. Louis. The reserved Captain positions and the protective fence were established by Supplement CC. APA acknowledged that the reserved Captain seats and protective fence, which provided some job protection to the former TWA pilots, were "integral" to the seniority list. [R. 493].

Without the protective aspects of Supplement CC, most of the former TWA Captains would have been immediately demoted to First Officer because their resulting seniority would not allow them to successfully bid for a Captain position at American. APA recognized that these protective aspects of Supplement CC were necessary to prevent the legacy American pilots from reaping a further unfair windfall by gaining employment advancement opportunities that belonged to the former TWA pilots before the merger of the two pilot groups. [R. 158, 493].

The protective aspects of Supplement CC notwithstanding, the seniority integration of the TWA pilots into the American pilots' seniority list is recognized as the most unfair and one-sided seniority integration in aviation history. It led directly to Congress passing a law to prevent a recurrence of such an unfair airline seniority integration in the future. That law is known

as the McCaskill-Bond Amendment, codified at 49 U.S.C. § 42112. [R. 493-94]. *See Bakos v. American Airlines, Inc.*, 2017 U.S. Dist. LEXIS 98671, *5-6 (E.D. Pa. 2017), *aff'd*, 748 Fed. Appx. 468 (3d Cir. 2018).

Supplement CC's protections, while critical to the former TWA pilots in preserving a portion of the economic opportunities the TWA operations brought to the merged air carrier, had minimal impact on the much larger group of legacy American pilots. Nevertheless, there were several attempts in the years following the merger by legacy American pilots to get the APA Board to pass resolutions to terminate those protections. The APA's Board, however, recognized that "the protections and restrictions of Supplement CC go hand in hand with the seniority numbers; if you change one, you have to change the other." In its official communications to its members, APA stated that it would be "unfair and discriminatory" to terminate Supplement CC's protections for the former TWA pilots without restoring their seniority. [R. 495-96].

Due to the interconnected nature of the seniority list and the job protections in Supplement CC, and because APA was unwilling to adjust the former TWA pilots' seniority upward to eliminate the need for those job protections, APA's Board never passed a resolution to terminate the Supplement CC job protections. [R. 495-96].

Ten years after its acquisition of the TWA assets and pilots, American was in bankruptcy. Pursuant to 11 U.S.C. § 1113, American began negotiating with APA to amend the CBA as part of American's reorganization. American proposed to APA that Supplement

CC's job protections for the former TWA pilots be eliminated while keeping the former TWA pilots in their inferior positions on the seniority list. APA immediately agreed to American's proposal, notwithstanding that it would directly and discriminatorily harm the former TWA pilots to whom APA now owed a duty of fair representation. [R. 496].[2]

APA's willingness to agree that American could end the Supplement CC's protections alarmed the former TWA pilots. APA's General Counsel Edgar James addressed their concerns in a February 2012 letter to a lawyer representing former TWA pilots. In this letter James stated APA's intentions about the proposed termination of Supplement CC:

> APA well understands its duty to fairly represent all pilots. … We recognize that the minimum staffing requirements in Supplement CC were intended to provide protections for former TWA pilots within the parameters of that document. To the extent that the restructuring negotiations result in the diminution or modification of those protections, APA intends to pursue conditions which will result in provisions reflecting the protections provided under Supplement CC.

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[2] As observed by the Third Circuit in *Bensel*, the legal loophole permitting APA to treat the former TWA pilots in a discriminatory and bad faith manner closed April 3, 2001, when the NMB recognized APA as the former TWA pilots' collective bargaining representative. "It is only subsequent to April 3, 2002 that APA held a statutory duty to the Class." *Bensel*, 387 F.3d at 314

[R.274].

Ultimately, American and APA could not agree to other changes in the CBA demanded by American. Unable to negotiate a modification of the CBA, American sought and obtained an order from the bankruptcy court under 11 U.S.C. § 1113 abrogating the CBA in its entirety. This order abrogated the entire CBA, including its seniority list and Supplement CC, thus clearing the way for a new CBA to be negotiated between American, as debtor-in-possession, and APA. [R. 496]. Although Supplement CC was terminated, American continued "to apply certain terms of Supplement CC as non-contractual employment conditions for former TWA Pilots." [R. 375]. American's continued application of these certain terms was "non-contractual" because the abrogation eliminated the *status quo* relating to Supplement CC and the abrogated seniority list.

American's abrogation of the CBA allowed APA the opportunity to correct the harm caused to the former TWA pilots in the 2001 seniority integration. Indeed, with the contractual slate wiped clean by the bankruptcy court's abrogation order, APA had a duty to negotiate new provisions that did not treat any of the pilots whom it represented, and to whom it owed a duty of fair representation, in a manner that was discriminatory or in bad faith. Notwithstanding its duty, APA soon agreed with American to enter into a new CBA that reinstated the abrogated seniority list, a list that was admittedly discriminatory against the former TWA pilots, but without reinstating the reserved Captain seats and protective fence former Supplement CC had provided. [R. 497]. As a result, those

former TWA pilots still in the bargaining unit would suffer the full discriminatory and harmful impact of the unfair seniority integration without any mitigation through job protections.

Recognizing the harsh impact of the re-imposition of the abrogated discriminatory seniority list combined with the abrogation of the Supplement CC job protections, American and APA agreed to an arbitral process for the purported objective of addressing the "loss of flying opportunities" suffered by the former TWA pilots. This agreement was reflected in a letter of agreement entered into by American and APA denominated LOA 12-05, which provided that American and APA would engage in interest arbitration to establish alternative contractual rights for the former TWA pilots.

LOA 12-05 imposed material limitations on what alternative rights the arbitrators could award. These limitations included that the contractual rights must be non-economical, *i.e.*, that they not cost American any money (except for training), and that they not modify the seniority list that American and APA had just (re)established:

> The Company [American] and APA agree that the TWA Pilots' existing seniority placements on the Pilots' System Seniority List are final and shall continue pursuant to Section 13 of the CBA notwithstanding the termination of Supplement CC and any preferential flying rights associated with those seniority placements. …

> The arbitrators shall decide what non-economic conditions should be provided to TWA Pilots as a result of the loss of flying opportunities due the termination of Supplement CC and the closing of the STL base, provided that training costs associated with the closure of the base shall be considered non-economic. In no event shall the arbitrators have authority to modify the Pilots' System Seniority List, require the establishment or continuation of any flight operation at any location, or impose material costs beyond training costs on the Company, and any preferential flying rights under the award shall not modify or be deemed a modification of the TWA Pilots' seniority placements on the Pilots' System Seniority List.

[R. 375, 376].

The bankruptcy court in its orders mocked Pilots' assertion that the arbitration to replace the Supplement CC job protections was intended to "replicate" the protections established in Supplement CC. [*See, e.g.*, Appendix ("APP.") at 68, 84–85, 99–101, 203–06, 223], The bankruptcy court went so far as to declare that, "One cannot build even a metaphorical fence around something that does not exist." [APP-40].[3] The district court followed the bankruptcy court's lead [APP-30, 33, 38, 39–42, 54] and, in turn, the Second Circuit adopted

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[3] Pilots did not ask that a fence, metaphorical or otherwise, be built around the to-be-closed St. Louis base or any other base. Rather, they merely asked for job protections that would replicate the level of protection they had had under Supplement CC.

both the district court's and the bankruptcy court's multiple opinions as its own. [APP-2].

Yet "replicate" is how APA sold the reinstatement of the abrogated seniority list and the replacement of Supplement CC with the LOA 12-05 arbitration to the members of its collective bargaining unit, including the former TWA pilots. Sometimes using the term "replicate" and sometimes phrasing it slightly differently, APA consistently represented that the intention of the LOA 12-05 arbitration was to provide the same level of job protections the former TWA Pilots had had under Supplement CC. APA made this representation on numerous occasions and in numerous venues — excluding critically, however, on the most important occasion and in the most important venue, that is, during the LOA 12-05 arbitration itself.

APA attorney Steven Hoffman, in commenting on an early draft of LOA 12-05, asked his law partner Ed James, the APA's General Counsel, whether the document's description of the scope of the remedy would "adequately cover the rights Supp CC currently provides to the STL pilots." [R. 277].

APA Board member Doug Gabel, a former TWA pilot and a member of APA's negotiating team during the American bankruptcy, was involved in drafting LOA 12-05. Gabel expressed his concerns with the initial draft of proposed LOA 12-05. He worried that if the arbitrators were entirely precluded from modifying seniority, then any preferential flying of any type could be argued to be a *de facto* modification of the seniority list and thus outside the scope of what could be considered by the arbitrators. [R. 161].

APA General Counsel James told Gabel that his fears were "silly" because modifying the seniority list was limited to the concept of literally changing the seniority order and that no one could argue that a job preference of some type was a seniority modification prohibited by LOA 12-05. [R. 161].

Gabel replied to James: "I am still troubled that someone might make the case that any substitute protections are a de facto change in the former TWA pilots' placement on the seniority list." Gabel then spoke with James and with American's lawyer about his concern. The lawyers said they understood Gabel's concern and would address it in the next draft of the agreement. The next, and final, draft of LOA 12-05 included the following new language: "any preferential flying rights under the award shall not modify or be deemed a modification of the TWA Pilots seniority placements on the Pilots System Seniority List." The lawyers assured Gabel that this new wording made it clear and would preclude any objection to a proposed award of preferential flying rights to the TWA pilots as being a *de facto* modification to the seniority list. This assurance by APA's and American's lawyers satisfied Gabel that the LOA 12-05 arbitration would result in job protections for the former TWA pilots that would replicate Supplement CC's protections. [R. 161].

The new proposed CBA that included LOA 12-05 was put out for member ratification in December 2012. APA General Counsel James came to St. Louis for a pilot meeting to explain the proposed new CBA. Former TWA pilot Dave Williams met privately with James in advance of the meeting to discuss proposed

LOA 12-05 and the interest arbitration it provided. James assured Williams that the protections provided by Supplement CC would be replicated so they would be "just like they were in 2001." At the pilots meeting, James explained to the pilot group, consisting mostly of former TWA pilots: "It will be up to the arbitration and particularly your base and team to determine what the protections, replication of Supp CC will be." [R. 289].

Following APA's repeated assurances that the objective of LOA 12-05 was to replicate Supplement CC's protections, the new CBA received pilot approval, including from a majority of the former TWA pilots. American then sought approval of the CBA from the bankruptcy court. In addressing the bankruptcy court, and in response to objections from former TWA pilots, APA General Counsel James told the bankruptcy court:

> What's happening now is the company is closing St. Louis as the result of the abrogation of Supp CC and we said there was protected flying that we promised those pilots back in 2001 and so we're going to go to three members of the National Academy of Arbitrators, they will decide how to replicate those protections and the debtors agreed with us to do that. Just take it out of our hands, say here was the intent back in 2001, let these three respected neutrals decide how to replicate those protections. …
>
> … not only do we have the legal duty to go in and make the presentation on what ought to

> happen … we think that's the only fair way to try and see if we can replicate what happened in 2001.

[R. 293-94].[4]

The Bankruptcy Court approved the new CBA. APA and American began preparing for the LOA 12-05 arbitration. James reiterated the goal of the arbitration in a February 2013 email to Gabel shortly before the arbitration began, stating: "the purpose of the interest arbitration is to develop non-seniority protections equivalent to the ones Supplement CC provided — not better or worse than them." [R. 298-99]. While this statement said "equivalent" rather than "replicate," it meant the same: new job protections as good as the old.

The LOA 12-05 process, however, mandated the reimposition of an admittedly discriminatory seniority list and limited arbitral authority to non-economic

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[4] The bankruptcy judge suggested in open court that what the objecting former TWA pilots were seeking was an order keeping the St. Louis base open, fence and all. [R. 294]. APA's General Counsel James corrected the court, noting that objecting pilots "would concede" that the St. Louis base was closing and that what they wanted was to reopen the 2001 seniority integration, which was something to which APA would not agree. "We're not going back and redoing the whole integration from 2001." James then reiterated: "we're going to let the arbitrators decide how to replicate that which they're losing." [R. 295].

The bankruptcy judge nevertheless persisted in his written orders in his mistaken belief that the request to "replicate" meant that the objectors sought to keep the St. Louis base open and fenced.

mitigation of the economic harm visited upon the former TWA pilots. With these limits upon the arbitrators, combined with the abandonment of procedural provisions that provided for a position advocated by APA instead of by competing pilot groups, *see infra* at 19, it is not surprising that the LOA 12-05 arbitration award did not come close to replicating the job protections in Supplement CC. Only 346 Captain positions were reserved for the former TWA pilots, just 32% of the 1,060 Captain positions reserved by Supplement CC, and the award states that number of Captain positions can never be increased. [R. 165-66].

The arbitration award also did not provide the former TWA pilots any protected opportunities to fly. While former TWA pilots were previously able to successfully bid for flights out of St. Louis notwithstanding their low seniority because of the protective fence, with no protected flying provided to replace that lost when the St. Louis base closed, the former TWA pilots became unable to successfully bid for flights anywhere because of their low seniority numbers. As a result, nearly all of the former TWA pilots, including nearly all of those holding reserved Captain seats, were placed on "reserve pilot" status. A reserve pilot flies only when a regularly scheduled pilot is unable to fly. Reserve pilots are paid substantially less than pilots who have regularly scheduled flights. This situation, and the resulting reductions in pay, continued for years. [R. 165-66].

The result of the arbitration, which discriminated against and harmed only the former TWA pilots, was the natural result of the arbitration process APA

adopted. It was a highly partisan process covered with a gloss of neutrality.

An early draft of LOA 12-05 prepared by American called for "participation [at the arbitration] by both TWA Pilots and AA Pilots." APA General Counsel James directed that the language be removed, explaining to his law partner Hoffman that he was "of the view that it is APA v. AA, and we get an institutional position rather than invite the AA pilots to beat up on the TWA pilots without the latter being able to threaten to re-open the seniority list." [R. 155]. The provision calling for pilot group participation at the arbitration was therefore removed and replaced with the final language of LOA 12-05, which states: "the Company and APA will engage in final and binding interest arbitration …" [R. 375].

In obtaining bankruptcy court approval of LOA 12-05, James affirmed that American and APA would be the parties to the arbitration, not separate pilot groups, and represented that "we [APA] have the legal duty to go in and make the presentation [to the arbitrators] on what ought to happen" with the TWA pilots. [R. 294]. APA, however, then did almost nothing to develop an official institutional position that it could advocate at the arbitration and ultimately declined to take an institutional position at all.

APA's Negotiating Committee did nothing to develop an official APA position to present at the arbitration. [R. 306-07]. If they had done so, then their fulfillment of their "legal duty" to develop an official union position would have subjected that position to the standards inherent in the duty of fair represen-

tation. Instead, in an apparent effort to evade their duty, APA told legacy American pilot Mark Stephens and former TWA pilot Gabel to develop APA's position for the arbitration. Stephens and Gable had just one substantive meeting and that meeting did not produce any agreement about what APA's institutional position should be. Thereafter, despite its acknowledged "legal duty" to do so, APA made no further effort to develop an institutional position for the arbitration. [R. 101].

Instead, APA announced it would be "neutral" and not present an official institutional position at the arbitration. It instead created two *ad hoc* pilot committees, one a legacy "AA Pilots Committee" and the other a former "TWA Pilots Committee," giving each committee "party status" and funding to present competing proposals against each other and American at the arbitration. [R. 142].

Using its purported neutrality as an excuse, APA declined to inform the arbitrators that the intent of LOA 12-05 was to replicate the protections provided by Supplement CC — not by building a metaphorical fence around a non-existent base, but by providing a level of job protections equivalent to those that had been provided by Supplement CC's reserved Captain positions and protective fence.

APA's "neutrality" allowed its AA Pilots Committee to submit a proposal that eliminated most of the protected Captain positions provided under Supplement CC, effectively transferring 313 Captain positions held by former TWA pilots to legacy American pilots. The AA Pilots Committee's proposal suggested that the arbitrators mitigate this lose of Captain jobs by requir-

ing American to continue to pay the 313 former TWA pilots as though they were still Captains. This suggestion by the AA Pilots Committee, if accepted, would have imposed material costs upon American — an outcome which was explicitly prohibited by LOA 12-05 and thus outside the power of the arbitrators. [R. 163].

APA knew that its AA Pilots Committee was going to make their improper and predatory proposal before the proposal was submitted to the arbitrators. The Chairman of the AA Pilots Committee admitted he discussed the proposal with APA's Board — *excluding the two former TWA pilots who served on the Board* — before the arbitration. [R. 292-94].

The hearing soon made clear that APA's fake neutrality was designed to aid the legacy American pilots in their efforts to deprive the former TWA pilots of all job protections.

American's lawyer noted in his opening remarks that, "The AA Committee's proposal gives no preferential flying opportunities to the TWA pilots outside of St. Louis. So right off the bat, it's not responsive to what's been asked of this Board." [R. 164]. American's lawyer however, also disavowed the representations previously made to the TWA pilots and the bankruptcy court that the intent of LOA 12-05 was to replicate the economic protections previously provided by Supplement CC, stating: "Replicate … is not the standard."

APA General Counsel James, who attended the hearing, sitting at counsel table, did nothing to correct this misstatement, claiming simply that APA was "neutral." [R. 164].

American and APA's AA Pilots Committee both then presented arguments that violated the agreement surrounding the clarifying language added to LOA 12-05 at Gabel's request. Each argued to the arbitrators that the clarifying language meant that the job preferences advocated by the TWA Pilots Committee were *de facto* modifications of the seniority list and thus prohibited by LOA 12-05. Thus they made the very argument that APA General Counsel James had told Gabel in October 2012 would be "silly" to make, and for which the clarifying language was added to establish that this was not the intent. [R. 164].

James again sat silent and took no action to present to the arbitrators the agreed-upon intent of LOA 12-05 that the Supplement CC protections would be replicated, notwithstanding that he told the former TWA pilots that this was the intent of LOA 12-05 to induce the former TWA pilots to support the new CBA and LOA 12-05. [R. 164].

In the end, as the result of APA's actions in negotiating the new CBA and its LOA 12-05, and as a result of APA's fake neutrality during the interest arbitration, the former TWA pilots ended up materially worse *vis-a-vis* the legacy American pilots than they had been previously under the abrogated CBA, seniority list, and Supplement CC protections.

ARGUMENT

This case sits at the confluence of two important issues relating to collective bargaining agreements under federal labor law. The first relates to the duty of fair representation. The duty of fair representation in the context of collective bargaining is simply the duty of the collective bargaining agent, or union, not to discriminate against or intentionally harm disfavored members of the bargaining unit in negotiating the union's CBA with the employer. *Bernard v. Air Line Pilots Asso., Int'l*, 873 F.2d 213, 216 (9th Cir. 1989).[5]

The duty of fair representation contains a loophole: a union can lawfully discriminate against and intentionally harm a disfavored group if the members of the group are *not employees currently represented by the union*. This loophole allows a union to negotiate discriminatory and intentionally harmful CBA terms and conditions applicable to *future members* of the bargaining unit. When the disfavored group are not yet members of the bargaining unit, the union can discriminate against them because the union does not owe them a duty of fair representation.

The pre-bankruptcy relationship of the former TWA pilots to their union, the APA, presents a textbook case of aggressive albeit lawful discrimination using this

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[5] Unions operating under the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* ("NLRA"), owe the same duty of fair representation to their members. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). Thus this case presents issues of broader interest than to just those in the railway and aviation industries.

loophole. Before the former TWA pilots became members of the American pilots bargaining unit, the APA, APA, acting on behalf of its then-members, the legacy AA pilots, negotiated with American a seniority integration between the legacy AA pilots and the incoming TWA pilots that discriminated against and intentionally harmed the latter. While this seniority integration eliminated most of the seniority and related job opportunities that the pilots had accrued at TWA, APA did not violate its duty of fair representation to them because APA did not owe a duty to the TWA pilots whom it did not yet represent. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004).

The second important doctrine at issue in this case relating to collective bargaining comes from the ability of an employer who becomes a bankruptcy debtor-in-possession to obtain an order allowing it to reject its collective bargaining agreements with its employees as part of its reorganization. 11 U.S.C. § 1113.

Employers with unionized work forces who become debtors-in-possession in bankruptcy routinely seek to reject their CBAs. Bankruptcy courts consistently issue Section 1113 orders abrogating CBAs at the request of those employers. Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 *Am. Bankr. L.J.* 103, 114-16 (2010).

In this study of every large publicly-traded company bankruptcy filed between 2001 and 2007, researchers identified each bankruptcy case in which the debtor was a large publicly-traded company with a unionized workforce. 316 large publicly-traded company bankruptcies were filed in the time period. Of these, 136 of

the companies had a unionized workforce. *Id.* at 116. The researchers then analyzed court records to identify in which of these 136 bankruptcy cases a Section 1113 motion was filed. The researchers found that employers filed at least one Section 1113 motion to reject a CBA in 30 of the 136 cases. In other words, a Section 1113 motion was filed in 22% of the cases. Those 30 cases had a total of 103 Section 1113 motions filed, as some companies had CBAs with multiple unions representing different employee groups. The majority of the Section 1113 motions — 62 out of 103 — were settled, presumably with an agreed modification to the CBA. Nine other Section 1113 motions were never ruled upon because the employer failed to reorganize. Of the remaining 32 motions, the CBA was abrogated by the bankruptcy court *in every instance*. Only once in all these cases over seven years did a bankruptcy court deny an employer's Section 1113 motion — and that court granted a second motion to abrogate the CBA. *Id.*

Our case presents the collision of these two common issues in labor law: first, the use by labor unions of a loophole in the duty of fair representation that allows them to discriminate against or intentionally harm incoming or other future employees who are not yet part of the collective bargaining unit; and, second, the use by employers of Section 1113 of the Bankruptcy Code to abrogate their CBAs and thereby eliminate the *status quo* in the workplace. These two common issues collide because by the time the employer abrogates the CBA in bankruptcy, the disfavored group of employees, who have been the victims of intentional discrimination, perhaps for years, *are now members of the collective bargaining unit* and thus are owed a duty of fair

representation by their union the same as all of the other bargaining unit members.

An abrogated seniority list is no longer part of the *status quo*. "Seniority is wholly a creation of the collective agreement and does not exist apart from that agreement." *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1205 (2d Cir. 1972), quoting *Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968) (en banc); *Baker v. Newspaper & Graphic Communications Union*, 628 F.2d 156, 160 (D.C. 1980) (following *Local 1251*).

Once a bankruptcy court grants a Section 1113 motion to abrogate a CBA, the CBA "cease[s] to exist," and the *status quo* previously created by the CBA is terminated. *Northwest Airlines Corp. v. Association of Flight Attendants-CWA (In re Nw. Airlines Corp.)*, 483 F.3d 160, 169-70, 173 (2d Cir. 2007). In short, there is no seniority *status quo* after a CBA's abrogation. Nevertheless, the bankruptcy court here inconsistently allowed APA to reinstate the abrogated seniority list without simultaneously requiring it to replicate the job protections provided by Supplement CC on the basis that Supplement CC was "part of the pilots' collective bargaining agreement that was swept away by the Court's grant of Section 1113 relief." *Krakowski II*, 567 B.R. 247, 256 [APP-155 (citing prior *Krakowski* decisions)]. This holding was affirmed by the district court and the court of appeals.

Thus the collision of the two important issues in labor law described above, along with the fundamental legal principle that a seniority list that is abrogated

ceases to exist, brings us to the heart of the issue, as set out in the Question Presented, to-wit:

When a discriminatory or intentionally harmful CBA is abrogated and thus no longer part of the workplace *status quo*, can the union nonetheless reinstate its discriminatory provisions in a new CBA without breaching the union's duty of fair representation to the disfavored employees intentionally harmed by those discriminatory provisions?

And, assuming that the re-adoption of the discriminatory provisions of an abrogated CBA in a new CBA can somehow be viewed as simply restoring the *status quo*, does that conclusion change and does the union's conduct breach its duty of fair representation if, in reinstating the abrogated discriminatory provisions, the new CBA fails to reinstate other provisions of the abrogated CBA that had once helped mitigate the intentional harm of the discriminatory provisions?

These are questions the courts below assiduously failed to answer, or even acknowledge, despite multiple attempts by Pilots to raise them. Instead, the bankruptcy court, the district courts, and the court of appeals all adopted the internally inconsistent position that the Section 1113 order eliminated the *status quo* with respect to the Supplement CC job protections while preserving unabated the *status quo* of its integral seniority list.

The question presented by the petition for certiorari is important and worthy of the Court's attention because this combination of conditions, that is, union discrimination in a bankruptcy proceeding against dis-

favored members of a collective bargaining unit who were merely future members when their abrogated discriminatory CBA was adopted, can be expected to occur many times in the future. It can be expected to occur not just in cases where an incumbent employee group, like the legacy American pilots here, had imposed a discriminatory seniority integration upon a group of incoming employees, but also in the many workplaces where a union had agreed to a two-tier wage scheme imposing lower wages (and often worse terms and conditions of employment) on future members of the bargaining unit for the benefit of the then-incumbent members.[6]

This combination of conditions can be expected to recur frequently because an employer who demands that their employees' union agree to a two-tier wage scheme, or any scheme that benefits present employees

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[6] A two-tier wage scheme is one in which existing employees keep their current wages and benefits while new hires are employed at materially lower wages and, usually, materially lower benefit levels. Two-tier wage scheme became increasingly common in the mid-1980s and were widely adopted in several industries, including among airlines, in 1984. George Ruben, U.S. Bureau of Labor Statistics, "Modest labor-management bargains continue in 1984 despite the recovery," *Monthly Labor Review* (Jan. 1985) (available online at: https://www.bls.gov/opub/mlr/1985/01/art1-full.pdf) at 3, 4 (auto manufacturers), 6-7 (airlines), 7 (aircraft and aerospace).

The Court may take judicial notice that many of the famous employers listed in this BLS publication as having negotiated a two-tier wage scheme subsequently were debtors in well-publicized bankruptcy cases, including United Airlines, Northwest Airlines, Republic Airlines, and Frontier Airlines.

over future employees, justifies the demand by reason of financial hardship. The employer demands concessions from the union to remain competitive — and the union agrees to take those concessions out of the hide of the new guys and gals on the job. Since two-tier wage schemes are justified by the employer's financial hardship, it is not surprising that those same financial hardship leads some of those employers to ultimately find themselves in bankruptcy. And it is in bankruptcy where Section 1113 awaits the financially challenged employer as a tool to leverage further wage and cost concessions through abrogation of its CBA, leading to situations like that in the present case, which future situations will again raise the same important issues.[7]

The law of the duty of fair representation as it now exists, with its loophole allowing unions to discriminate against and intentionally harm incoming future

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[7] Although in this case it was the union, APA, that sought the discriminatory seniority integration, often it is the employer who entices the union to discriminate against future bargaining unit members by offering a two-tier wage scheme to benefit existing union members at the expense of future members.

Many unions are strongly opposed to these two-tier schemes, both because they violate a fundamental principle of unionism of equal pay for equal work and because in the long run they are destructive of unionism. These concerns are discussed on the websites of many union-side organizations, including: the United Electrical, Radio & Machine Workers of America (https://www.ueunion.org/stwd_twotier.html); Teamsters for a Democratic Union (https://www.tdu.org/how_two_tier_contracts_hurt_workers_and_weaken_unions); and the Canadian Union of Public Employees (https://cupe.ca/fact-sheet-two-tier-bargaining-how-recognize-it-and-reject-it).

members of the bargaining unit, is well-established and may only be changed by an Act of Congress. *But the extension of this loophole in the Second Circuit's decision below* — allowing a union to discriminate against and intentionally harm *existing members* of the collective bargaining unit when negotiating a new CBA after the old *status quo* has been completely wiped away in bankruptcy by a Section 1113 order — *is not well-established*. It is not good policy. It is not consistent with the duty of fair representation. *The Second Circuit's decision in this case institutionalizes a union's discrimination against a disfavored group to whom it owes a statutory duty not to discriminate* and it does so contrary to the well-established doctrine that a union bears the full duty of representation towards employees, including the duty of fair representation, once it is certified to represent them.

The existing loophole in the law permits the union to discriminate against those who are not yet members of the bargaining unit. The Second Circuit's decision stretches that loophole beyond recognition to allow a union to discriminate against current members of the bargaining unit.

The Supreme Court should grant certiorari to correct the Second Circuit's erroneous extension of this legal loophole and to insure that discrimination against and intentional harm towards disfavored employees, once eliminated by abrogation of the discriminatory CBA that initially caused such harm, cannot be revived, reinstated, and institutionalized during the employer's bankruptcy, and that such a reversion to a pre-bankruptcy discriminatory *status quo* is a violation

of the duty of fair representation that every union owes to the members of the collective bargaining unit whom it exclusively represents.

CONCLUSION

The Supreme Court should grant the Petition for a Writ of Certiorari to the Second Circuit and the Question Presented should be set for briefing and oral argument before the Supreme Court.

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