No. 21-309

In The Supreme Court of the United States

SOUTHWEST AIRLINES CO.,

Petitioner,

v.

LATRICE SAXON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE NATIONAL ACADEMY OF ARBITRATORS AND NATIONAL ASSOCIATION OF RAILROAD REFEREES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act's "transportation worker" exemption – for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 – covers supervisors of airplane baggage loaders even though neither the supervisors nor the baggage loaders actually transport anything, much less in foreign or interstate commerce.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST AND CONCERN OF AMICI[1]

Amicus *National Academy of Arbitrators (NAA)* was founded in 1947 to ensure standards of integrity and competence for professional arbitrators of industrial disputes, including canons of professional ethics and programs promoting the understanding and practice of arbitration.[2] As historians of the Academy observe, it has been "a primary force in shaping American labor arbitration."[3]

Arbitrators elected to Academy membership are only those with widely accepted practices and scholars who have made significant contributions to labor and employment relations. Currently, the Academy has more than 500 members in the United States and Canada. Members are prohibited from serving as advocates or consultants for parties in the field, from being associated with those performing those functions, and

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[1] Rule 37.6 statement: Counsel of record is the author of this brief on behalf of amici. Other members of the organizations assisted. No person or entity other than amici made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), responding to a timely request, the parties provided written consent to the filing of this brief.

[2] Gladys Gruenberg, Joyce Najita & Dennis Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* 26 (1997).

[3] *Id*. A special contribution has been The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, developed with the Federal Mediation & Conciliation Service and the American Arbitration Association, at: https://naarb.org/code-of-professional-responsibility/.

from serving as expert witnesses on behalf of labor or management.

The traditional function of labor arbitration has been to resolve disputes between management and labor over the interpretation and application of collective bargaining agreements (CBAs). More recently, arbitration has been approved for claims involving the statutory rights of individual employees in the non-union workplace, and the NAA has developed professional standards and due process protections for those proceedings.[4] On several occasions, the NAA has contributed its views to the Court in cases affecting arbitration, including disputes concerning the Federal Arbitration Act (FAA).[5]

In keeping with this experience, NAA members have long arbitrated under the Railway Labor Act (RLA) for the heavily unionized airline and railroad industries.[6] Subjects related to the RLA have been

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[4] See https://naarb.org/due-process-protocol/; https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/.

[5] 9 U.S.C. § 1. See, e.g., *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986); *Wright v. Universal Maritime Service Corp*., 525 U.S. 70 (1998); *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018).

[6] 45 U.S.C. § 151, et seq., and § 181, et seq.

addressed frequently at its annual meetings,[7] and former members of the National Mediation Board (NMB), the administrative agency responsible for RLA proceedings, have been NAA members and officers.[8]

Amicus *National Association of Railroad Referees (NARR)* was founded in 1991. The NARR's purposes include promoting the exchange of information and ideas among members, communicating with the NMB and with parties to assist and comment upon railroad arbitration procedures, and educating its members about professional interests and goals. Annual meetings are conducted for referees and advocates to consider developments in law and practice under the RLA. At present, there are approximately 50 members of the NARR.

NARR members have been selected or appointed directly by the parties or by the NMB to hear and decide labor-management disputes established or authorized by the RLA for the railroad industry. In this capacity, members serve as referees for the National Railroad Adjustment Board, as a neutral member of a Public Law Board or Special Board of Adjustment, as a directly selected arbitrator, and in other dispute resolution capacities. To be eligible for NARR membership, an individual cannot currently serve as a partisan practitioner in railroad labor-management

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[7] For the variety of topics discussed by arbitrators and advocates: see https://naarb.org/?sfid=35037&_sft_proceeding_tags=railway-labor-act.

[8] The statutory authority of the NMB is set forth in 45 U.S.C. §§ 154, 183.

disputes, or perform other services as a partisan in railroad labor relations. Working with the NMB, ethical guidelines have been developed for arbitrator service with the government and the parties.[9] Since the NARR was established, many of its members and officers also have been members of the NAA and former members of the NMB.

Amici share the goals of their members to provide neutral, competent and ethical professional service in resolving labor and employment disputes. It may appear puzzling that organizations of professional arbitrators oppose petitioner's proposal to increase the use of arbitration under the FAA, but it is not. Amici's position is grounded in their fundamental fidelity to the institution of arbitration, to a clear understanding of Congress' legislative intent in the RLA, and to judicial precedent. With this background of a strong, common interest in the field, including the history and administration of the RLA, amici offer labor relations and public policy considerations to assist the Court in rendering a decision.

[9] https://static1.squarespace.com/static/5ab424eea2772c0f00605add/t/5d8a4fd559e41802b51b1722/1569345493527/contractor-ethics-policy.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici NAA and NARR submit four principal arguments to support the Seventh Circuit's decision in *Saxon v. Southwest Airlines Co*.[10]

First, the answer to the question before the Court can be found in its reasoning in *Circuit City v. Adams*;[11] that is, where the Court explained how to apply the exemption set forth in Section 1 of the FAA, excluding from enforcement, "seamen and railroad employees, or any other class of workers engaged in foreign or interstate commerce."[12] Petitioner argues that the concluding, residual phrase – "any other class of workers engaged in foreign or interstate commerce" – applies *only* for employees who physically cross interstate or foreign borders transporting people or goods. This proposition advances a cramped statutory reading inconsistent with the relevant law and facts, and is rejected by amici as a misapplication of both the FAA and the RLA. Central to the *Circuit City* decision is the Court's reasoning that Congress crafted the residual phrase to protect dispute resolution systems already established, and those to be developed, for *classes* of transportation workers, relying in particular on the RLA.

Drawing upon *Circuit City*, the Seventh Circuit's analysis emphasizes the meaning of words used in

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[10] 993 F.3d 492 (7th Cir. 2021).

[11] *Circuit City, supra*, 532 U.S. 105 (2001).

[12] 9 U.S.C. § 1.

Section 1 – "seamen and railroad employees" – to understand Congressional intent in 1925 when the FAA was enacted. The next year, the RLA became law, followed in 1936 by the RLA amendment covering air carriers and their employees. Amici maintain that the residual phrase applies to the respondent as an airline employee within a *class* of workers engaged in the business of interstate and foreign commerce, even though her work does not require that she transport people or goods across a state or international border.

Second, a careful review of the text of the RLA, the statutory touchstone for the Court's reasoning in *Circuit City*, strengthens a conclusion about Section 1's residual phrase. Petitioner's abbreviated discussion of the RLA states that it applies only to those employees covered by CBAs and working interstate.[13] Petitioner is wrong on both points. Under Sections 151 and 181 of the RLA, the definitions of "carrier," "commerce," and "employee" apply, without qualification, to air carriers and to the ramp agent employee who initiated this proceeding, placing her fully within a *class* of workers engaged in interstate commerce.[14] While the Section 1

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[13] Brief for Petitioner, pp. 8, 30, 46-48. As examples of petitioner's view, it states, " . . . railroads' regular interstate operations and the typical duties of their employees . . . confirm that Congress had in mind workers who rode the rails while transporting goods or people between states." (*Id.*, p. 30.) Petitioner also declares, " . . . the RLA applies only when employees are subject to a CBA." (*Id.*, p. 48.) Amicus Airlines for America (A4A) also errs, stating, "The RLA applies only to the transportation industry's union-represented employees. . . ." (A4A Br. p. 13.)

[14] 45 U.S.C. §§ 151, Fourth, and 181.

transportation exemption is broader than the RLA, as respondent has shown, it would be contrary to the RLA, as written and applied, to reject the statute as a basis for the exemption for all who are subject to it.

By its express terms, the RLA covers employees and subordinate officials (that is, first-level supervisors) of railroads and air carriers. The RLA, as administered by the NMB, also provides for representation requests and union elections based on classifications in a variety of positions in the transportation business, many of which do not physically cross borders or transport anything, whether covered or not by a CBA. Regardless, under the RLA, such workers are "engaged in interstate and foreign commerce."[15] This statutory phrasing of the RLA parallels the "engaged in foreign and interstate commerce" text in Section 1 of the FAA.

Third, to illustrate the nexus between the RLA and the FAA's transportation exemption, amici examine the CBA negotiated by Southwest Airlines and Transport Workers Union (TWU) Local 555.[16] The CBA describes the work of ramp agents within interstate and foreign commerce for bargaining unit employees engaged in petitioner's air transportation business. Under the CBA, ramp agents deemed supervisors by petitioner are excluded from CBA coverage, yet they can perform the duties of rank-and-file agents, subject

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[15] 45 U.S.C. § 181.

[16] In the absence of a joint appendix, amici will refer to exhibits filed in the District Court, including the CBA excerpt accompanying the Memorandum of Law Supporting Defendant's Motion to Dismiss or Stay in Favor of Arbitration at Exh. 1.

to several limitations. As the Seventh Circuit observed, the uncontradicted record shows that first-level supervisors regularly carry out ramp agent work.[17] Not surprisingly, disputes over supervisors being assigned bargaining unit work have been raised on a regular basis in grievance and arbitration proceedings alleging CBA violations.

Last, amici contend that petitioner is proposing a new test that, if adopted, will rewrite and limit the scope of the FAA exemption for transportation workers – *a physical-crossing-borders test*. As a consequence, the new test would disrupt administration of the RLA and the U.S. transportation industry. Boiled down, petitioner (and its amici) propose a policy-driven reconstruction of the FAA resembling a layer-cake by placing a new, narrowing exception on top of an exception that already narrows enforcement of the FAA. Creating a new arbitration test under the FAA will, inevitably, create conflicts with NMB representation rulings, federal and state court decisions, CBA arbitration proceedings, and state-law arbitration cases in workplace disputes in the airline and railroad industries.

The risk of disruption is heightened because petitioner's ADR Program does not mention the RLA or the NMB.[18] This omission contrasts with the program's express preservation of the jurisdiction of several other agencies, such as the Equal Employment Opportunity

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[17] 993 F.3d at 497.

[18] The ADR Program is cited in Memorandum of Law, *supra* n. 16, Exh. E.1.

Commission, and other types of proceedings, such as workers' compensation or unemployment insurance disputes. Instead of a clear line, the ADR Program promises a procedural and substantive morass regarding appropriate dispute resolution forums and governing laws. For nearly 100 years and with minimal interruption, the RLA's statutory design has covered employees subject to CBAs, and others who are not, regardless of whether they physically transport people or goods across state lines. This design has sustained a transportation system vital to U.S. and international commerce. In this setting, amici maintain that the Court should not add a new test to a statute enacted by Congress nearly 100 years ago.

ARGUMENT

1. The Rationale of the *Circuit City* Decision Answers the Question Posed in This Case.

Petitioner seeks enforcement of its ADR Program to compel arbitration under the FAA of respondent's lawsuit alleging violation of overtime pay required by the Fair Labor Standards Act (FLSA). *Circuit City* counsels otherwise.

Petitioner's argument relies on Court decisions, such as *Epic Systems*,[19] affirming judicial enforcement of arbitration under the FAA when class or collective statutory claims have been waived by an employee.

[19] *Epic Systems Corp. v. Lewis*, *supra*, 138 U.S. 1612 (2019).

Petitioner urges that it is changing the forum for resolving disputes, not the law to be applied, a perspective consistent with previous decisions of the Court.[20] These decisions, however, cannot steer petitioner away from its collision course with the RLA.

A guidepost for applying *Circuit City*'s analytic approach is the Court's conclusion that the FAA's transportation worker exception in Section 1 did not cover a retail store employee, or employees generally.[21] More recently, the scope of the exception was considered by the Court in *New Prime, Inc. v. Oliveira*.[22] In *New Prime*, in an "antecedent statutory inquiry" requiring judicial review prior to enforcing arbitration under the FAA,[23] the Court held that an interstate trucker working as an independent contractor was a "worker" excluded under the residual phrase of Section 1. In both *Circuit City* and *New Prime*, a textual approach to statutory coverage was emphasized. This was the analytical method used by the Seventh Circuit in *Southwest*. The same method assessing an antecedent issue applies here.

In *Circuit City*, a determining factor was how the exclusionary phrase in Section 1 should be read; that is, broadly or narrowly.[24] The Court in *Circuit City*

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[20] See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), and cases cited.

[21] 532 U.S. at 120-121.

[22] 139 S.Ct. 532 (2019).

[23] *Id*. at 538.

[24] 532 U.S. at 115-116, distinguishing the broad scope of "affecting commerce" and "involving commerce" for enforcement

adopted a narrow reading, as evident in the following passage:

> We see no paradox in the congressional decision to exempt the workers over whom the commerce power was most apparent. . . . When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§ 300-316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C. § 651 (repealed). It is reasonable to assume that Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.
>
> As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more

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under Section 2 of the FAA from the more narrow scope of the exclusion for those "engaged in commerce" under Section 1. (9 U.S.C. §§ 1, 2.)

> specific legislation for those engaged in transportation. [Citation omitted.] Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees, see 49 Stat. 1189, 45 U.S.C. §§ 181-188.[25]

The present proceeding directly implicates Congressional actions affecting the transportation industry that, in the words of the Court, were "imminent" and "developing" when the FAA was adopted. Congress and the Court understood that transportation enterprises consist of a series of tasks in which the physical carriage of people and goods is dependent upon and integrated with other activities such as loading, unloading, managing flights, and maintaining equipment.

As the Court explained, the "enumerated types" of workers excluded from Section 1 – "seamen and railroad employees" – were subject to then-existing Congressional authority over commerce. Congress foresaw that classes of workers "engaged" in transportation would be covered in the future, as "indeed . . . was to follow" when the RLA was amended in 1936 for air carriers and their employees. No exception to the exception was hinted, much less stated. And none should be created now.

The Court need not look beyond *Circuit City*'s references to the RLA to affirm the Seventh Circuit's decision. Consistent with the Court's direction in *Circuit City*, the Seventh Circuit observed that, for

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[25] 532 U.S. at 120-121.

respondent, "The act of loading cargo onto a vehicle to be transported interstate is itself commerce, as that term was understood at the time of the Arbitration Act's enactment in 1925."[26]

Petitioner's departure from *Circuit City* seeks a stamp-of-approval for redrafting the FAA by inserting, without Congressional approval, additional text in Section 1 to redefine and limit the scope of the FAA exemption. As a collateral consequence, petitioner's proposed modification would redefine and limit the scope of the RLA, contrary to the Court's precedent in *Circuit City.* If petitioner's position prevails, the FAA would be rewritten so that the residual phrase in Section 1 would state: " . . . or any other class of workers engaged in foreign or interstate commerce by *physically transporting people or goods across international or state borders.*"

2. Enforcement of Arbitration Agreements Under the Federal Arbitration Act is Barred for Classes of Workers Covered by the Railway Labor Act who, by Definition, are Engaged in Interstate and Foreign Commerce.

Any uncertainty regarding *Circuit City*'s understanding of the residual phrase in Section 1, and

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[26] 993 F.3d at 494. This is not a novel view. In other cases, classes of workers have been deemed interstate even if not crossing state lines. (See, e.g., *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 913-915 (9th Cir. 2020); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004); *Osvatics v. Lyft*, *Inc.*, 535 F.Supp.3d 1, 17-18 (Dist. D.C. 2021).)

specifically the meaning of the words "engaged" and "foreign and interstate commerce," is resolved by the unqualified terms of the RLA. The RLA establishes air carrier employees as a *class* of workers, as are railroad employees, who are exempt under Section 1. For amici, coverage of the RLA for air carriers and their employees, and for railroads, is coterminous with the exemption under Section 1 of the FAA.[27]

As noted in *Circuit City*, the RLA was adopted in 1926 as another step in the evolution of transportation-related labor legislation passed by Congress in preceding years. The RLA was amended in 1936 in 45 U.S.C. § 181 by extending Congressional authority over labor relations to air carriers "engaged in interstate or foreign commerce." Except for transposition of the words "interstate" and "foreign," the RLA uses the exact phrase found in the residual passage in Section 1 excluding "any other class of workers in foreign or interstate commerce."[28]

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[27] The Seventh Circuit declined to draw a "bright and clear line" for airline employees because the FAA's residual passage is not premised on employer status. (993 F.3d at 497.) However, an examination of the employee-oriented text of the RLA addresses the appellate court's reluctance.

[28] The RLA was passed in 1926 through a collaborative labor-management effort. (*Railway Employees v. Hanson*, 351 U.S. 225, 240-241 (1956) (Frankfurter, J., concurring); Douglas W. Hall and Marcus Migliore, *The Railway Labor Act*, Sec. 2.IV (2022).) A prime mover for the 1936 amendment for the emerging airline industry was the Air Line Pilots Association, which management did not actively oppose. (*Id*., Sec. 2.V.B.); also see Charles M. Rehmus, "Evolution of Legislation Affecting Collective

The key statute, Section 181 of the RLA, explicitly links air carriers and their employees, stating:

> *All of the provisions of subchapter I of this chapter*, except section 153 of this title, are extended to and *shall cover every common carrier by air engaged in interstate or foreign commerce*, and every carrier by air transporting mail for or under contract with the United States Government, *and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers*, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.[29]

Standing alone, Section 181 defines the relevant *class* for this proceeding as it includes "*every* common carrier by air engaged in interstate or foreign commerce." Section 181 continues, applying the RLA to "*every* air pilot or other *person* who performs *any* work as an employee or subordinate official." Petitioner's

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Bargaining in the Railroad and Airline Industries," *The Railway Labor Act at Fifty*, Chap. 1 (1977).)

[29] 45 U.S.C. § 181 (emphasis added). The carve out in Section 181 referring to Section 153 concerns the National Railroad Adjustment Board. The 1936 amendment extending the RLA to air carriers provides in 45 U.S.C. § 185 for a similar National Air Transport Board, but this means of resolving disputes has not been utilized. Instead, under 45 U.S.C. § 184, Congress approved system boards of adjustment to arbitrate what are called "minor" CBA disputes for airlines. These have been the commonly used means for final dispute resolution for the airline industry. (See, generally, Hall and Migliore, *The Railway Labor Act*, *supra*, Sec. 7.V.F.)

new border-crossing test gives no weight to the RLA's all-inclusive coverage of "every carrier" and "every . . . person" who performs "any work" for a carrier.[30]

But there is more. Incorporated in Section 181 are the definitions of "carrier," "commerce" and "employee" found in Section 151, the RLA's text from 1926. By this Congressional action, the term "carrier" applies without limitation to the work at issue in this case; that is, to "*any* company" that is "operating *any* equipment or facilities or performs *any* service" related to the "*transportation*, receipt, delivery, elevation, transfer in transit . . . and *handling* of property transported . . . by *any* such carrier."[31] With this statutory text, can there be

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[30] Beyond the immediate purview of this case, but potentially affected by its resolution, are disputes involving third-party contractors known as "airport service providers" (ASPs), such as the employer in *Eastus v. ISS Facility Services, Inc.*, 960 F.3d 207 (5th Cir. 2020), a decision relied on by petitioner. ASPs are hired by air carriers for functions such as baggage handling, custodial work and food service. Whether they are subject to the RLA or the National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.) has been extensively litigated. (See, e.g., *ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F.3d 1137 (D.C. Cir. 2017).) Comparable issues have arisen for railroads. (See *Delpro Co. v. Broth. Ry. Carmen*, 676 F.2d 960 (3d Cir. 1982).)

[31] 45 U.S.C. § 151, First (emphasis added). This provision tracks the Esch-Cummins Transportation Act of 1920, cited favorably by the Court in *Circuit City*, 532 U.S. at 121, quoted above. That legislation in Section 400(3) defined "transportation" as including,

> . . . *all services* in connection with the receipt, delivery, elevation, and *transfer in transit*, ventilation, refrigeration or icing, storage, and *handling of property transported*. (41 Stat. 456, 475; emphasis added.)

any argument advanced that Congressional regulation of interstate and foreign commerce under the RLA is confined to a narrow, individual crossing-borders test?[32]

Again, there is more. Section 181 incorporates Section 151's definition of "commerce" for the airline industry, thereby applying the airline amendment of the RLA to commerce "*between*" or "*among*" states, or "*between points in the same State but through any other State*."[33] By this provision acknowledging the interrelated flow of commerce, as incorporated by Section 181, the RLA does not require cross-border travel for covered employees.

Lest there be any doubt that the 1936 amendment of the RLA was intended to broadly cover those working in the airline industry, as in the railroad industry, the term "employee" is defined as "*every person* in the service of a carrier . . . who performs *any work* of an employee or subordinate official. . . ."[34] Absent a statutory exclusion or other restriction modifying this

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[32] The railroad industry provides an instructive example of the RLA's coverage of employees "engaged" in commerce without crossing borders. Car repair personnel sought union representation at a short-line railroad operating within a local navigation district and connecting to other carriers crossing state lines and the Mexican border. The representation request was approved in *Brownsville & Rio Grande*, 44 NMB 155 (2017), but was later followed by decertification in *In Re Gonzales*, 47 NMB 64 (2020).

[33] 45 U.S.C. § 151, Fourth (emphasis added).

[34] 45 U.S.C. § 151, Fifth (emphasis added).

unqualified text, it follows that the work at issue in this proceeding is covered by the RLA.

Is there a statutory exclusion? No, there is not. Contrary to petitioner's ADR Program, there is no definition under the RLA distinguishing employees who are subject to CBAs and excluding others who are not. Granted, as recognized by the Court in *Universal Maritime* and *Pyett*, special arbitration considerations pertain to a negotiated option, or to a waiver of statutory rights, for employees subject to a CBA.[35] However, the converse proposition offered by respondent does not logically follow to extend petitioner's ADR Program to all other employees.

Here, too, respondent's argument runs head-long into Section 181 of the RLA's air carrier amendment in 1936. The statute explicitly covers, without exception, "an employee or subordinate official" of air carriers.[36] This is the identical phrase previously used by Congress in 1926 when the RLA was passed and defined an employee in Section 151, Fifth.[37]

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[35] *Universal Maritime*, *supra*, 525 U.S. 70; *Pyett*, *supra*, 556 U.S. 247.

[36] 45 U.S.C. § 181.

[37] 45 U.S.C. § 151, Fifth. The Congress was not writing on a blank slate in 1926 or 1936. Reference to "subordinate official" is found in Section 300(5) of the Transportation Act of 1920. (41 Stat. 469.) Hence, when the FAA was enacted in 1925, and included the exemption for "railroad employees" over whom there was federal jurisdiction, federal labor law already applied to a "subordinate official."

Respondent, even if labeled a supervisor by petitioner, remains an airline employee covered by the RLA as a "subordinate official." Petitioner incorrectly asserts that the RLA only applies to employees subject to a CBA.[38] Under the RLA, statutory coverage extends to first-level supervisors who are subject to higher-level management. In workplace parlance, subordinate officials often are known as lead workers, crew chiefs, working foremen, or team leaders.[39]

The working title aside, subordinate officials are covered by the RLA, even if not in a bargaining unit. In one case, for example, a flight service supervisor was deemed a "subordinate official" entitled to judicial protection after a retaliatory reassignment following concerted activity with other employees.[40] Judicial

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[38] Brief for Petitioner, page 48.

[39] Unlike petitioner, two of its competitors include ramp service supervisors in bargaining agreements. The labor agreement between American Airlines and its Fleet Employee Association applies to crew chiefs for ramp operations and for other functions. (http://www.twu-iam.org/wp-content/uploads/2020/03/Fleet-Service-JCBA-TA-final-3-9-2020.pdf, p. 16.) The CBA for United Airlines and the International Association of Machinists and Aerospace Workers covers lead ramp service employees. (https://iam141.org/wp-content/uploads/2017/03/united_fleet_service_contract_2016.pdf, pp. 1-1, 3-3.)

[40] *Dorsey v. United Parcel Service Co.*, 195 F.3d 814 (6th Cir. 1999). The court stated:

> The words "subordinate official" in the definition of those protected – i.e., "employee or *subordinate official*" – means that the Act covers workers at a higher level than mere employees and laborers who have no supervisory authority. 45 U.S.C. § 181. . . . The wording of the Act means that top management is not included but

enforcement of organizing rights under the RLA, free from employer interference, has long been within the domain of the federal courts.[41] As discussed in greater detail below, petitioner's ADR Program will have an unsettling impact on the RLA by preempting well-established legal remedies.

In deciding whether an individual employee is "management" and therefore outside the RLA's definition of "employee or subordinate official," the NMB, the agency overseeing representation issues under the RLA, applies several factors.[42] The NMB also assigns the nationwide classifications and crafts that comprise

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> that "officials" at a lower level with substantial responsibilities are included. To use an analogy, the phrase covers sergeants, lieutenants and captains, but not generals. (*Id*. at 817; emphasis in original.)

When the RLA was amended in 1936 to cover air carriers and employees it followed enactment in 1935 of the NLRA. The NLRA excludes employers and employees subject the RLA. (29 U.S.C. §§ 152(2), 152(3).) Unlike the RLA which extends coverage to and protects subordinate officials, the NLRA does not. (29 U.S.C. §§ 152(11), 164(a).) Supervisors have formed unions under the RLA in the railroad industry. (See, generally, https://tcu829.org/about/.)

[41] *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548 (1930); Hall and Migliore, *The Railway Labor Act*, *supra*, § 5.I.A.

[42] The NMB's Representation Manual lists disciplinary and policy-making authority as key considerations in determining employee status. (NMB Representation Manual, Sec. 9.211, at pp. 12-13; also see *In the Matter of Representation of Employees of Northwest Airlines, Inc. – Mechanical Department Foremen and Supervisors of Mechanics*, 2 NMB 19 (1948).)

appropriate bargaining units, many of which involve work beyond the narrow group that petitioner would treat as exempt under Section 1.[43]

Turning to employee representation in bargaining units formed under the RLA, a subject of continuing interest to employers and labor organizations, the NMB entertains union requests for the accretion (that is, addition) of unrepresented employees to existing bargaining units. Southwest Airlines, for example, has been a party in accretion requests at least four times since 2008, including for team leaders in one case.[44]

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[43] Currently, the NMB recognizes nine distinct air carrier-employee classifications or crafts, as follows: flight deck crew members, flight engineers, flight attendants, mechanics and related employees, fleet service employees (including ramp agents), passenger service employees, office clerical employees, dispatchers, and instructors. (Hall and Migliore, *The Railway Labor Act, supra*, § 4.II.E.2.) Positions within these classifications are subject to the RLA, even if not physically crossing borders or transporting people or goods. (*Id*., § 3.III.B, n. 227.) Similarly, in the railroad industry, the petitioner's test for determining the Section 1 exemption conflicts with the RLA's detailed statutory listing of covered positions. Under 45 U.S.C. § 153(h), the RLA extends to freight handlers, as here, and also to yard-service personnel, machinists, power-house workers, blacksmiths, coach cleaners, shop laborers, and store employees, among others.

[44] *In the Matter of the Application of the International Association of Machinists and Aerospace Workers*, 42 NMB 110 (2015) (approving accretion for passenger service class); *In the Matter of the Application of the Aircraft Mechanics Fraternal Association*, 39 NMB 246 (2011) (approving accretion for the mechanics and related employees craft); *In the Matter of the Application of the Aircraft Mechanics Fraternal Association*, 38 NMB 87 (2011) (approving accretion, including operation team leaders, for mechanics and related employees craft); *In the Matter of the Application*

The relief sought by petitioner poses a risk of negating the RLA's representation process if arbitrators under petitioner's ADR Program render decisions that conflict with NMB classification determinations for unrepresented employees.[45]

The text and history of the RLA when considered together with *Circuit City* should lead the Court to affirm the Seventh Circuit without hesitation.

3. The Change Proposed By Petitioner Invites Conflicts with Its Established Collective Bargaining Relationship.

Southwest Airlines and TWU have negotiated a CBA that covers ramp, operations, provisioning and freight agents, but not supervisors.[46] The labor agreement spells out terms and conditions of employment, and, in part, protects and preserves bargaining unit work. The labor agreement, however, also allows for work in CBA classifications by those petitioner considers supervisors, provided such work does not intrude on jobs reserved to bargaining unit employees.

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of Southwest Airlines Employee Association, 35 NMB 139 (2008) (denying accretion for flight dispatcher class).

[45] Unions, too, are affected by NMB representation proceedings for those labeled supervisors. In *Carnival Air Lines*, 24 NMB 256 (1997), the NMB counted the votes of flight attendant supervisors, rejecting an argument by a union that they were ineligible managers.

[46] CBA, *supra* n. 16. The complete CBA can be found at https://www.twu555.org/wp-content/uploads/2016/04/TWU555CBA_Final201160407.pdf.

The pertinent section in the labor agreement permits and limits supervisor work, stating:

> Supervisors are not covered by this Agreement but may continue to perform covered work while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the workforce.[47]

In a 2019 memorandum, petitioner and TWU negotiated work rule interpretations of the CBA to clarify permissible areas of supervisor activity on work reserved for unit employees.[48] Labor-management disputes remain, notwithstanding these agreements, prompting grievances and arbitrations challenging whether non-unit personnel have engaged in covered work.[49]

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[47] *Id.*, p. 3.

[48] Work Rule Interpretations, pp. 2-4 (https://www.twu555.org/wp-content/uploads/2020/01/Interps-Nov.-19-2019_searchable.pdf).

[49] Arbitration decisions granting and denying grievances involving covered work can be found at https://www.twu555.org/arbitration-rulings/. In an instructive decision in 2016 denying a grievance, the arbitrator, a long time NAA member and former officer, provides a comprehensive review of negotiating history leading to the CBA's supervisor language, an additional set of "contract parameters" adopted by the parties, and the large number of disputes and other decisions over the contract's supervisor language. (See Southwest and TWU 555, Case No. SAN-R-1725/15 (Agent X – Covered Work) (Neumeier, Apr. 27, 2016) at: https://www.twu555.org/wp-content/uploads/file/arbitrations/SAN-R-1725_15_Neumeier.pdf.)

Although supervising ramp agents are excluded from the CBA, the constitution and bylaws of TWU provide that they can be members and associate members of the union.[50] This possible membership bond may have struck a chord in this case. Plaintiff initially was employed as a ramp agent and, 15 months later, was promoted to a first-level supervisory position.[51] The allegations in her lawsuit suggest that she was displeased to find that, although an hourly employee subject to demanding physical requirements, she no longer received the CBA-protected wage and hour benefits enjoyed by her unionized coworkers in non-supervisory positions.[52]

4. Petitioner's New Test for the Federal Arbitration Act Will Have an Adverse Impact on Longstanding and Stable Labor Relations Under the Railway Labor Act.

Congress has established a complex system of regulatory oversight affecting hundreds of thousands of employees in the airline and railroad industries. The

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[50] TWU Constitution, pp. 4, 32-34 (https://www.twu555.org/wp-content/uploads/2019/04/2017-Edition-TWU-Constitution.pdf; TWU Bylaws, p. 6 (https://www.twu555.org/wp-content/uploads/2019/02/TWU555_By-Laws2019_Strike-Through.pdf).

[51] Plaintiff's Brief on the Applicability of Section 1 of the Federal Arbitration Act, Saxon Declaration, Exh. 1, Paras. 2-4.

[52] Respondent's job description identifies as qualifications an ability to lift over 70 pounds and regularly lift 40 to 50 pounds, being able to kneel, crawl and stoop in cramped spaces, and availability for overtime. (See Southwest Airlines Co.'s Supplemental Brief on Threshold Issue, Exh. B, p. 2.)

sweep of petitioner's proposal, if adopted, will lead to a major change in airline industry labor relations and business practices. The railroad industry also will be affected. Based on the substantial economic interests at stake, an observer might ask why petitioner risks subverting the RLA's longstanding labor relations model in favor of individual arbitrations? The RLA establishes a nationwide bargaining unit requirement for separate classifications, contract and wage stability through mandatory mediation and arbitration, administrative regulation of bargaining impasses and intervention for the use of strikes, and voting by a majority of the whole unit to select a union representative. The labor law alternative is the NLRA's framework permitting single-facility local bargaining units, earlier and greater availability of strikes and other economic weapons, and majority approval of only those voting.[53]

The Court's cautionary reminder in *New Prime* applies here. Petitioner seeks refuge in the expansive policy of the FAA because it is "[u]nable to squeeze more from the statute's text."[54] As in *New Prime*, the Court in making its antecedent statutory inquiry should refrain from exercising its authority to "pave

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[53] A telling illustration of the potential trade-off is provided in the high-stakes conflict between United Parcel Service and FedEx over whether the RLA or the NLRA is the appropriate governing statute. (See Frank N. Wilner, "RLA or NLRA? FedEx and UPS Follow the Money Trail," *The Federal Lawyer* 40-46, 63 (Jan. 2010).)

[54] 139 S.Ct. at 543.

over bumpy statutory texts in the name of more expeditiously advancing a policy goal."[55]

Petitioner argues that, since respondent and others in her position are not covered by the CBA with ramp agents, this provides an appropriate distinction for its ADR Program. This distinction is without merit, as consideration of the RLA has demonstrated. Regardless, CBAs do not always address all workplace issues.[56] Moreover, as shown by the facts of this case, the work of ramp agent supervisors, what is permitted and what is not, is closely tied to the work of bargaining unit employees. This is revealed by the permissive language of the CBA, and by a series of grievances and arbitration decisions regarding the handling of planes traveling in commerce. While a CBA demarcation might categorize employees in non-transportation cases, it does not fit the present circumstances under the RLA and the FAA.

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[55] *Id.*

[56] Emphasizing this point is the Court's seminal decision on labor arbitration, *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 564 (1960). The Court stated:

> Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. (*Id.*, at 580-581.)

A hypothetical scenario demonstrates the destabilizing shortcomings of petitioner's new test. Suppose a ramp agent supervisor at ABC Airlines is working with a union to add unrepresented supervisors to an existing ramp agent bargaining unit. In this effort, the union files a representation request with the NMB. Soon after, ABC fires the ramp agent supervisor alleging poor performance. What happens then?

Applying legal principles already discussed, several potential conflicts arise if the ADR Program is used by ABC Airlines. In part, conflicts emerge because the ADR Program omits any mention of the RLA or the NMB, even though it specifically refers to other laws, agencies, and employee rights. For the hypothetical organizing drive, the NMB could determine that ramp agent supervisors should be added to the ABC bargaining unit under an existing CBA. If no union was in place, and a representation election was held which the union lost, the NMB could decide that a retaliatory dismissal by ABC tainted the vote and order a new election. If a union already is in place, the terminated employee (and the union) could allege in federal court that ABC interfered with the union's organizing and that allegations of poor performance are a pretext. The union also might seek relief in a CBA arbitration by invoking the union's right to represent employees without reprisal.[57]

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[57] Forum questions aside, an individual employee, and a union assisting the employee, could be chilled in exercising statutory rights. The ADR Program warns that an "attempt to bring a lawsuit instead of arbitration" permits an action to recover attorneys'

The ADR Program states that enforcement will be sought to compel arbitration under the FAA for any claim by or on behalf of the ABC supervisor for wrongful termination.[58] But, assuming arbitration is required under the FAA, could it preclude or supersede a proceeding under the NMB, or an RLA-premised lawsuit in federal court, or a CBA grievance, without undermining each of those potential remedies? Such a preemptive displacement of independent statutory and contractual rights is invited if the ADR Program is approved by the Court.[59] This concern is compounded because omission of the RLA and the NMB from the ADR Program is contrary to the Court's recognition that FAA arbitration enforcement is limited if a government agency, as a third-party, has an independent non-contractual basis to exercise its statutory jurisdiction.[60] At a minimum, petitioner's physical-crossing-borders test will cause extensive delay and

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fees for enforcing arbitration. (ADR Program, *supra* n. 18, p. 7.) Will employees and unions risk litigation when, regardless of a good faith belief in the merits of a claim, thousands of dollars might be on the line for bringing suit?

[58] *Id.*, p. 2.

[59] The prospect of uncertainty is inherent in the gaps in petitioner's ADR Program. Although the program does not mention the NMB or the RLA, it states that employees can communicate, file a complaint or charge, or cooperate with government agencies. (ADR Program, *supra* n. 18, p. 3.) But which agencies? Even if petitioner argues that its program does not preempt other proceedings, the program's failure to specifically mention the RLA or the NMB, the primary law and agency for labor relations in the airline industry, is a conspicuous omission that is likely to lead to continuing litigation over the program's obscure parameters.

[60] *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

confusion at odds with the low cost, efficiency and speed that petitioner seeks from FAA enforcement.[61]

Uncertainty, compounded many times over if petitioner prevails, is evident in other ways. Under petitioner's new test, how often must an employee of a railroad or an airline cross a border in order to be excluded from FAA enforcement? Similarly, how much time must an employee spend crossing borders, or how far across a state line must an employee travel? Merely asking the questions identifies the line-drawing headaches petitioner's approach will cause for courts and arbitrators, and for businesses seeking clarity for staffing and scheduling. Petitioner asserts that its ADR Program will streamline dispute resolution procedures, but, instead, perplexing results are more likely. Curiously, some of petitioner's amici seem to agree, urging the Court to avoid these obvious questions other than to say minimal or incidental interstate travel is insufficient to trigger the Section 1 exemption.[62]

Beyond the facts related to petitioner's business, the outcome sought by petitioner would, in practice, create a conflict between two statutes, the RLA and the FAA. For petitioner, the former governs those

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[61] Brief for Petitioner, pp. 4-5, citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). Confusion also will arise because, other conflicts aside, disparate results can be expected in individual arbitrations under the strict confidentiality rules of petitioner's ADR Program. ADR Program, *supra* n. 18, p. 8.

[62] See, e.g., Lyft Amicus Brief, pp. 8-14; Uber Amicus Brief, pp. 4-15; Amazon Amicus Brief, pp. 19-20.

employees with CBAs, but the ADR Program governs all others. But this distinction, as amici have demonstrated, muddles the text of both statutes. How is an employee "engaged in interstate and foreign commerce" under the RLA, but not so "engaged" for "a class of workers" under the virtually identical text of the FAA? Simply stating the inherent conflict in petitioner's position demonstrates that its new test cannot be reconciled with the text of both the FAA and the RLA.

Apart from implications for CBA administration, petitioner's approach threatens well-established labor law preemption principles regarding the relationship of the RLA to state and local law.[63] As the Seventh Circuit confirmed, claims in this proceeding, even if exempt under the FAA, nevertheless are subject to review in other forums, whether that be in court or in state-law based arbitration.[64] Affirming the Seventh

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[63] See, e.g., *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994). Petitioner is familiar with disputes over preemption of state law claims that possibly conflict with the terms of a CBA. (*Miller v. Southwest Airlines Co.*, 926 F.3d 898, 903-904 (7th Cir. 2019) (preemption of biometric privacy claim under state law). Also see *Crooms v. Sw. Airlines Co.*, 459 F.Supp.3d 1041, 1047-1049 (N.D. Ill. 2020) (preemption of biometic claim by Saxon and other non-supervisor ramp agents).)

[64] 993 F.3d at 502. Petitioner acknowledges that arbitration statutes have been enacted in all 50 states. (Petition for Certiorari, p. 28, n. 2, citing Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Calif. L. Rev. 577, 596 (1997).) Amicus A4A argues that the system of federal-state relations within which the RLA operates creates a "dizzying patchwork of rules. . . ." (A4A Amicus, p. 4.) The characterization

Circuit identifies the forum to hear the dispute, but it will not deny petitioner a say in the proceeding.

Petitioner should turn to Congress if, as a policy goal, FAA enforcement is sought for disputes involving employees who are covered by its ADR Program. Federalizing a new category of arbitration proceedings is not the answer. As observed in *Circuit City*, the Court should exercise caution when, as here, the relief sought by petitioner would "bring instability to statutory interpretation."[65]

CONCLUSION

Petitioner seeks the Court's approval for a major rewriting of the FAA so that the residual phrase in Section 1 would apply *only* to workers who transport people or goods and physically cross state or foreign borders. Neither the RLA nor the NMB are mentioned by petitioner's ADR Program, and inevitable conflicts with the Congressional design will follow. If petitioner's approach to the FAA is adopted, the Court will be authorizing a new system of individualized arbitration to replace traditional dispute resolution methods found not only under CBAs, but in administrative proceedings, in federal and state courts, and in state-law based arbitration.

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is inaccurate, but, in any event, the remedy to change the statute is with Congress, not the Court.

[65] 532 U.S. at 117.

Looking ahead, the logic of petitioner's argument extends to *any* union employee making a claim that is not subject to a CBA or that does not involve physically crossing a state or foreign border. These are not always easy questions to resolve. Congress sought to avoid the prospect of unsettling labor relations in the transportation industry, a reason noted in *Circuit City* for excluding transportation workers from the FAA.[66] The sensitive balance of rights and expectations under the RLA with federal, state and local regulation, as construed over many decades, is jeopardized by a new test under the FAA to create a dispute resolution superstructure that will undermine the existing system of stable labor relations.

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Respectfully submitted,

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[66] 532 U.S. at 121.