

08-4122-cv(L),

08-4128-cv(CON), 08-4130-cv(CON)

**United States Court of Appeals
for the
Second Circuit**

JILL LINDSAY, individually and on behalf of all others similarly situated,
CAROL JOHNSON, CONSTANCE LAMATTINA, DANIEL SANTIAGO,
DEBORAH WHITTINGTON, DOTTIE LONG, JANET GOLD, JUDITH
ALEXANDER, KAREN RIVOIRA, LAURENCE E. SALOMON III,
PATRICIA KENNEDY, PATTY GENTRY, REBECCA SMITH,

Plaintiffs-Appellants,

– against –

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, a business
entity of unknown type, AMR CORPORATION, a Delaware corporation,
also known as American Airlines, AMERICAN AIRLINES, INC., also known as
American Eagle and JOHN WARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Introduction: The Big Picture Grows

The world that Appellees have conjured up, and that would obtain if they were to prevail here, is one in which unions and companies would be virtually unaccountable for their employment practices.

Near-Immunity For Unions

Union does not even deign to respond to the assertion that *U.S. v. Rawson* makes it clear that the duty articulated by *Vaca* is simply a floor, and does not set a ceiling on duties owed by unions. According to Union, *O'Neill* is now the be-all and end-all; it has no other or further responsibilities.

It goes on to re-imagine *Vaca* and *O'Neill* as articulating a single, integrated standard rather than three distinct tests. Thus, it conflates tests for "arbitrariness" with tests for "bad faith" and "discriminatory action" and applies the test reserved for evaluating the contents of a negotiated agreement, across-the-board -- including to non-bargaining actions and decisions. It thus replaces the flexible standard created by the Supreme Court with a single, inflexible rule: unless it operates "so far outside a wide range of reasonableness" as to be "wholly irrational," a union is not liable. It thereby posits a world in which it is virtually immune to challenge, and its Constitution is a dead-letter. It is no longer the contract it was thought for a century to be-- but now simply a screed, amendable by leadership fiat, even retrospectively. It further posits a world in which the LMRDA-imposed obligation

to "report" and "disclose" becomes meaningless because any policies and procedures they report are unenforceable.

Super-Immunity For Companies

For its part, Company imagines a world where it partakes of the union's near-immunity. It seeks to advance that agenda here by suggesting that the only claim an employee can bring against it is a derivative one for participating in a union's DFR-breach. Company insists employees cannot sue it directly under the RLA. Not because the statute or its legislative history or the Supreme Court has said so (they all say the opposite), but because Company deems it bad policy. Knowing that policy itself does not dispose of causes of action, however, Company proposes that-- notwithstanding separation-of-powers principles-- Plaintiffs' statutory causes of action are done in by federal common law.

Then, not content with near-immunity, Company goes even farther, arguing that it can only be found derivatively liable for a union's DFR-breach if substantial evidence shows it affirmatively "colluded" in it. It posits a world in which, even in rare instances in which a DFR-breach is found, the company will routinely be insulated from liability.

Thankfully, the legal theories Appellees espouse are not the law.

I

PLAINTIFFS HAVE STATED VALID STATUTORY CLAIMS

The question before this Court regarding Plaintiffs' statutory causes of action is a simple one: to whom do they accrue?¹ To those directly injured by Company's failure to maintain the status-quo-- i.e., its employees-- or their collective agent?

The answer to this question is determined by Congressional intent. (SPA-59 n.11). *See also City of New York v. Smoke-Spirits.com*, 541 F.3d 425, 445 (2d Cir. 2008)(recognizing the impropriety of engrafting a standing requirement which finds "no support in the statute or legislative history").

Notwithstanding the basis upon which the issue must be determined, Company has eschewed any discussion of the RLA's language, legislative history or the backdrop against which it was enacted. Instead, it argues policy, invokes a Third Circuit opinion, and takes potshots at Plaintiffs' authorities.

Its policy arguments are irrelevant; its reliance on *Bensel*, misplaced, and its potshots miss the mark.

A. *Bensel* Does Not Support The Company

There are multiple parts to *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004). Two are relevant here: the Third Circuit's discussion of Counts III-IV

¹ They arise under 45 U.S.C. §§152-Seventh and -First, and 28 U.S.C. §§2201 and 2202.

(pp. 317-320), and its discussion of Count II (pp. 315-316). The first is not on point; the second supports Plaintiffs' position.

1. The Part Of The Opinion Company Relies Upon

Counts III and IV involved claims by former TWA pilots against a purchaser and vendor airline for "failure to treat" with two successive unions. The Court found that §152-Second and -Ninth did not create a private right of action in favor of employees, but only their certified bargaining agents. Our case involves different statutory provisions (§§152-First and -Seventh), different claims (status-quo claims), and different arguments. In fact, none of the arguments Plaintiffs here have made was made to the Third Circuit. Had they been, Plaintiffs respectfully submit that the analysis in *Bensel* would have been very different-- even if its conclusion regarding §152-Ninth were ultimately the same.

2. The Part Company Ignores

In Count II, the pilots accused union #2 of having breached its DFR by failing to require carrier #2 to honor its status-quo obligations. In this instance, *Bensel* found the employees ***did have "statutory rights" and had not waived them.*** 387 F.3d at 316. It went on to find against them on the merits, however, because "the Class' statutory rights were not in issue." *Id.* The Class had agreed to be bound by Supplement C and Supplement C is what was implemented as the status-

quo. Accordingly, the carrier did not violate its status-quo obligations, and the union did not breach its DFR.

Although the pilots did not in fact assert claims against the carriers for having failed to maintain the status-quo, the Opinion suggests that they could have. They would clearly have lost on the facts, but stated a valid claim.

B. Company's Potshots Miss The Mark

1. The Act, Its Landscape And Legislative History

Plaintiffs cited the *Pennsylvania Railroad* case ("PRC") as an important part of the RLA's legal landscape. (PBf-20-23). Company attempts to discredit the case on four grounds. Only one is worth commenting upon. It argues that *PRC* is inapposite because it was decided pre-RLA, and the federal body authorized to hear railway-labor disputes in those days "did not have the power to issue binding decisions-- such as a decision to certify a union as the representative of a carrier's employees." (CoBf. 55-56). Company's point, presumably, is that, absent a system to "certify" a representative, two or more might have claimed authority and that, given that possibility, it made sense for Congress to view employees alone as having standing to sue.

Company fails to acknowledge *that the situation it describes as obtaining pre-RLA continued for years after its passage*. Thus, as originally enacted, the RLA did not explicitly refer to recognition or representation disputes, *Summit*

Airlines v. Teamsters Local Union, 628 F.2d 787, 790 (2d Cir. 1980), or set up any mechanism for certifying bargaining agents. Lacking such a mechanism, it "proved ineffective" in dealing with such disputes.² *Id.*

In 1934, Congress sought to remedy these defects. It created "machinery ... for the taking of a secret ballot ... to determine what representatives the employees desire to have negotiate for them," *Id.*, 792, empowered the NMB to issue certifications, and required carriers to bargain with the representative so certified. *Id.*, 793; 152 U.S.C. §152-Ninth.

There is no indication, however, either in amendments or legislative history, that Congress altered its philosophy as to who were principals under the Act, and who, the "representatives." On the contrary, carriers and their employees continued to be "parties" to both agreements and disputes. Surely, if Congress intended causes of action that were *once* meant to accrue to employees, to now accrue *only* to "certified representatives," it would have made this clear. There is no indication of any such change.³

² The Board of Mediation could hear and decide such a dispute if those involved so consented, 628 F.2d at 791-92, which rarely occurred. Only nine disputes were decided between 1926 and 1934. 300 U.S. at 546 n. 5.

³ On the contrary, see *Brotherhood of Sleeping Car Porters v. The Pullman Co.*, which was included in the Congressional Record, 3 RLA-LH 90-93. There, the District Court articulated the very principles Plaintiffs contend were embodied in the Act. It dismissed the case *inter alia* for *lack of standing by the plaintiff union*,

2. *Elgin*

In *Elgin*, the Supreme Court held that:

(1) one cannot draw any assumption from the fact that a union "occupie[s] the position of collective bargaining agent and as such ha[s] power to deal for the future," that it has similar authority "to settle" or "represent" employees on claims, looking to the past, 325 U.S. at 741;

(2) neither of the latter prerogatives is "part of the collective agent's exclusive statutory authority," *Id.*, 740; and,

(3) for a certified agent to act in either such capacity, it must first be given authorization by employees "over and above any authority given by the statute." *Id.*, 741; *accord, Simberlund v. L.I.R.R.*, 421 F.2d at 1225.

Company tries to avoid the force of these principles by pretending they apply *only* as to "minor disputes." In cases like this, it says, the collective agent has unbridled statutory authority over legal claims. It purports to support this proposition by relying upon a statement it takes out of context to the effect that the "RLA vests exclusive authority to negotiate and conclude agreements concerning major disputes in the duly selected collective agent." *Id.*, 728. Perusal of the Opinion, however, confirms that this statement was not referring to legal disputes or claims. Indeed,

which it found was not "expressly authorized by any statute," including the RLA, to sue on employees' behalf. Employees had that right themselves. 3 RLA-LH 92.

the Court uses the term "major dispute," throughout its Opinion, *in only one sense*-- not to refer to legal claims, but to disputes that:

- . have arisen during bargaining and lead to breakdown of negotiations;
- . may potentially disrupt commerce;
- . necessarily fall within NMB jurisdiction; and
- . are subject to a three-stage process under the statute: NMB-mediation, arbitration and self-help.

See 325 U.S. at 721-729.

Because the claims here lack those characteristics, are not subject to those procedures and fall outside NMB jurisdiction, they clearly are not the type of "major dispute" referred to by the Court.⁴ Plaintiffs' claims are simply legal claims for status-quo violations. Like the *Elgin* claims, they are "accrued monetary claims," seeking recompense for violating vested rights. They are, thus, not within an agent's "collective bargaining" authority, but, rather, within the residuum of rights reserved to employees.

325 U.S. at 739-741.

⁴ In *Norris v. Hawaiian Airlines, supra*, the Supreme Court recognized two types of minor disputes-- those within the jurisdiction of an Adjustment Board (because they involve CBA interpretation), and those properly before a court. As this case makes clear, the same distinction must be made with respect to major disputes.

3. LMRDA

The fact that Plaintiffs do not have a viable "denial of equal voting-rights" claim under one provision of the LMRDA does not mean that they are precluded from referring to another, or that Company can avoid the latter's clear meaning: unions cannot curtail employees' right to sue. 29 U.S.C. §411(a)(4).

4. Representational Standing, Conflict & Estoppel

Company essentially ignores Plaintiffs' "representational standing" and estoppel arguments (PBf.I.A.6-7) and belittles the question of conflict. Plaintiffs reiterate each of these arguments and respectfully refer the Court to PBf-28-31.

For the reasons set forth both in our Opening Brief and here, Plaintiffs have stated valid statutory claims.

II

**PLAINTIFFS' "CONSTITUTION
CLAIMS" ARE NOT PREEMPTED**

Claims At Issue

In order to narrow the issues before the Court, Plaintiffs appealed dismissal of only three state-law claims: Count XI, a claim against Union for breaching its Constitution; and Counts XII and XVI, claims against Company for interfering with the Union-member contract.

Appellees' Preemption Arguments

Company argues that a federal statute preempts Counts XII and XVI (CoBf-39-47); Union argues that federal common law preempts the breach-of-contract claim. (UBf-52-56). Plaintiffs challenged these preemption arguments on two grounds: (1) the RLA's preemptive reach was never intended to extend to Plaintiffs' Constitution Claims; and (2) they fall within a preemption-free zone.

Both Appellees share the pretense that Plaintiffs must prove *non*-preemption. Appellees suggest their only burden is to show that ***Congress*** "*nowhere indicated that ... the RLA lack[s] federal preemptive force.*" (UBf-55)(emphasis added).

Labels, however, do not determine who bears the burden on preemption. As "the practical manifestation of the Supremacy Clause," *ILA v. Davis*, 476 U.S. 380, 388 (1986), preemption is an issue of constitutional dimension. Since states "are independent sovereigns in our federal system," we presume "Congress does not cavalierly pre-empt state-law causes of action," and place the burden on the proponent of preemption to show Congress' "clear and manifest" intent.

Medtronic v. Lohr, 518 U.S. 470, 485 (1996).⁵ Where common law claims are

⁵ Congress knew it was required to "clearly manifest" intent to preempt state law if it wished the RLA to have that effect. *Savage v. Jones*, 225 U.S. 501, 537 (1912). In 1926, it enacted no preemption provision. In 1951, it enacted §152-Eleventh. Never in over 80 years has Congress added a general preemption provision. Cf. *Wyeth v. Levine*, 2009 U.S.LEXIS 1774, *32-34 (2009)("If Congress thought state-

involved, the burden on the preemption-proponent is greater because it must overcome anti-preemption presumptions.

Appellees run from, rather than meet, these burdens. Neither the RLA nor FCL preempt Plaintiffs' remaining state-law claims.

A. NO RLA PREEMPTION

In our main Brief, Plaintiffs started where traditional preemption analysis requires: with the statute's verbiage. We start there again.

1. No Express Preemption

Applying the time-honored principle "*expressio unius est exclusio alterius*" to the only preemption provision contained in the Act (§152-Eleventh), Plaintiffs concluded Congress intended to preempt state law narrowly. (PBf-31-33).

Appellees responded by suggesting that the only reason the RLA was amended to include §152-Eleventh was to distinguish it from the NLRA, and that the clause is otherwise meaningless. (UBf-55). The case upon which they rely says the opposite -- that by enacting §152-Eleventh, Congress struck down inconsistent right-to-work laws in 17 States and, but for its enactment "... there can be no doubt that it is within the police power of a State to prohibit the union or the closed

law suits posed an obstacle ... it surely would have enacted an express pre-emption provision ... during the FDCA's 70-year history").

shop.” *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 231-32(1956). The 17 laws would still be applicable absent §152-Eleventh.

Since Congress' enactment of a limited preemption provision implies that matters beyond its reach are not pre-empted, *Cipollone*, 505 U.S. 504, 517 (1992), "we need only identify the domain expressly pre-empted by ... [that] section[]" to assess the statute's reach. Plaintiffs' claims do not come within it.

2. No Field Preemption

Union attempts to parlay a stray exhortatory remark by one Senator, Ubf-55, into an intent by the entire Congress to broadly "occupy the field." Congress and the Supreme Court have unequivocally recognized that "the RLA was not a preemption of the field of regulating working conditions." *Terminal Railroad Ass'n v. Railroad Trainmen*, 318 U.S. 1, 6-7 (1943). Rather, "Congress developed the framework for self-organization and collective bargaining ... within the larger body of state law promoting public health and safety." *Metropolitan Life v. Massachusetts*, 471 U.S. 724, 756 (1985). "Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal act." *Hines v. Davidowitz*, 312 U.S. 52, 67n.20 (1941).

The RLA has thus long been recognized as compatible with a wide array of state laws. 318 U.S. at 6-7. As *Sim*, *White Rose* and *DeBoles* recognize, it is also

necessarily compatible with a union's constitution -- in particular its ratification requirements.

3. No Conflict Preemption

a. No Conflict Between Laws

Appellees' papers make clear that they do not claim any "actual conflict" between Plaintiffs' claims and federal law.

By arguing that Plaintiffs' state-law claims should be dismissed as replicating the §152-Fourth claim (which Plaintiffs did not pursue on appeal), CoBf-39, Company effectively acknowledges there is *no "actual conflict" between Plaintiffs' Constitution Claims and the RLA*.

Union makes a similar admission (UBf-53) by characterizing the breach-of-Constitution claim as a "mere refinement" of the DFR claims, and underscores that admission by noting only a "potential" conflict between the two. (UBf-54). To serve as the basis for conflict preemption, however, there must be "actual" conflict.

b. No Conflict Between Forums

The only circumstance under the RLA in which employee claims could possibly pose a forum-conflict is where a minor dispute requires a CBA's interpretation. That is the only class of such claims assigned to an administrative agency.

This case involves claims *over which there is no administrative agency jurisdiction* and poses no possibility of forum-conflict.

Our showing that there is no express preemption, no field preemption, and no conflict preemption, should conclude the matter. We nonetheless respond to further assertions in Appellees' *Garmon* and DFR arguments.

i. Garmon Is Inapplicable

Garmon was designed to "avoid[] the potential for jurisdictional conflict". *E.g., Brown v. Hotel Employees*, 468 U.S. 491, 502 (1984). There is no jurisdictional conflict to avoid here; thus, *Garmon* is inapplicable.

Company relies on footnote 19 of *Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 384 n.19 (1969)(CoBf-41), but misreads the decision.

A cursory reading of *Jacksonville* might lead one to erroneously believe that *Garmon* preemption was applied, but it was not:

First, the Opinion repeatedly states that NLRA rules and policies are **not** applicable to the RLA and are not being "applied." *Jacksonville*, 394 U.S. at 377, 383, 384, 391 ("NLRA has no direct application to the present case"; its application "would be neither justified nor practicable"; "even rough analogies must be drawn circumspectly," etc.). *Garmon* is such a rule.

Second, in footnote 19, the Court observes that “*care must be taken*” to distinguish between preemption designed to protect conduct and to protect the primary jurisdiction of an agency. It cites *Garmon* as an example of the latter type of preemption, and notes that there is no “equivalent to the NLRB” in the railway-labor arena. It then focuses on whether the conduct at issue (peaceful picketing) is protected by the RLA.

Third, finding the Act does not expressly regulate such conduct,⁶ the Court turns to a more fundamental issue: whether “the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act’s processes.” *Id.* at 380. It concludes that it would and that, until Congress expressly regulates these activities, it must “allow parties who have unsuccessfully exhausted the Railway Labor Act’s procedures ... to employ the full range of whatever peaceful economic power they can muster ...”. *Id.* at 393. “[U]ntil Congress acts,” such picketing must be “deemed conduct protected against state proscription.” *Id.* In other words, it must remain *unregulated*.

This, however, is not *Garmon* preemption. It is what subsequently has been called “*Machinists’*-preemption.” *Machinists* readily acknowledges the debt, for it

⁶ It finds that the Act is absolutely “silent ..., as is its legislative history” on the scope of self-help that parties might employ after exhausting §6 procedures. *Id.* at 380, 391.

not only adopts *Jacksonville*'s preemption test *verbatim*, but credits *Jacksonville* with its formulation:

the crucial inquiry regarding pre-emption is ...: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S., at 380.

Machinists, 427 U.S. at 147-48; Concurrence at 155 (agreeing *Jacksonville* is the correct test); Dissent at 156-159 (stating *Garmon* should have been applied).

Subsequent decisions confirm *Machinists* and *Garmon* are distinct. *E.g.*, *Golden State v. Los Angeles*, 493 U.S. 103, 110 (1989) ("fundamentally different");

Healthcare Ass'n v. Pataki, 471 F.3d 87, 107 (2d Cir. 2006) (noting "important distinction").

Fourth, where *Garmon* applies, it necessarily operates to oust a state tribunal or agency of jurisdiction. *E.g.*, *ILA v. Davis*, *supra* at 1907. Here, however, Florida courts were "not pre-empted of jurisdiction," *Id.* at 390.⁷ *See Sears*, 436 U.S. 180, 200 (1978).

⁷ The nearest *Jacksonville* came to applying *Garmon* was in Point II of its Opinion: There, it rejected Petitioner's claim that, although the dispute was between an RLA employer and employees, it was governed by the NLRA, because a small percentage of Petitioner's membership was arguably covered by that statute. Finding the case involved an "RLA dispute, pure and simple," it held the NLRA did not apply. Consequently, *Garmon* did not apply **and the state court was not deprived of jurisdiction**. 436 U.S. at 390.

ii. Sears Confirms Garmon's Inapplicability

Sears confirms *Garmon's* inapplicability here because it recognized that *Garmon* does not apply where an injured party "has no acceptable method of invoking, or inducing ... [the other party] to invoke, the jurisdiction of the Board." *Sears*, 436 U.S. at 201-202. Under the RLA, of course, no Board exists to which a litigant can take a major-dispute case for resolution. Adjustment Boards adjudicate only "minor disputes," and the NMB has no adjudicatory jurisdiction.

B. NO DFR PREEMPTION

Union cites four district court cases for the proposition that DFR law preempts claims, such as Plaintiffs' state-law breach-of-Constitution claim, that overlap or are "mere refinements" of DFR claims. (UBf-53). These cases may represent a trend, but are devoid of analysis. None considers *Rawson* or *Wolens*, or *Sim*, *White Rose* or *DeBoles*. And, none considers separation-of-powers implications of the theory they embrace.

Their suggestion that DFR law *alone* can preempt Plaintiffs' claims, even if the RLA does not, suffers from the following fundamental defects.

Appellees move inexplicably from the proposition that *Garmon* would have applied if the NLRA had applied (but neither did) to the conclusion that the Court applied *Garmon* in the RLA-context.

1. Federal Common Law Never Had
A Roving License to Preempt

Although it does not say so, Union's "DFR-preemption" argument is tantamount to a "complete preemption" argument. It presupposes that any state-law claim that in any way resembles a "DFR claim" is transformed into one.⁸ Stated otherwise, Union's claim is that even if the RLA has not occupied this field, federal common law has.

Such a claim is preposterous. *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998)("[a]fter *Metropolitan Life*, it would be disingenuous to maintain that, while ... [a federal statute] does not preempt state law claims directly, it manages to do so indirectly under the guise of federal common law". *Accord, O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

2. In Any Event, Congress Has Now Spoken

When Congress passed the LMRDA in 1959, it included several "savings clauses" to ensure the viability of state-law claims instituted to enforce rights under a union constitution. 29 U.S.C. §§413, 523. It follows that any license to preempt breach-of-constitution claims ever accorded DFR law was revoked. *Senator Linie GMBH v. Sunway Line*, 291 F.3d 145, 166 (2d Cir. 2002)("separation of powers concerns create a presumption in favor of preemption of federal common law

⁸ Company has gone so far as to improperly transform two federal statutory claims (Counts II and III) into DFR claims. (CoBf-8-9).

whenever ... Congress has legislated on the subject"); *Oswego Barge Corp. v. U.S.A.*, 664 F.2d 327, 335 (2d Cir. 1981). Such a revocation does not require that Congress' intent be "clear and manifest." 291 F.3d at 167.

3. So Has The Supreme Court

Whatever the original concept in 1944, any notion today that DFR law preempts state-law breach-of-Constitution claims is incompatible with the rationale of two more recent Supreme Court decisions: *United Steel Workers v. Rawson*, 495 U.S. 362 (1990), and *American Airlines v. Wolens*, 513 U.S. 219 (1995).

In *Rawson*, the Court characterized the DFR as a set of basic obligations that attach upon a union's becoming the collective bargaining agent. The Court made clear it has never held that a labor union cannot "voluntarily assum[e] additional duties to...employees **by contract.**" 495 U.S. at 373 (emphasis added). That the contract there was a CBA rather than a union constitution is immaterial-- for if, in the right circumstances, a union can assume additional duties *indirectly* under a CBA, then it can surely do so *directly* by way of its Constitution. (Contra UBF-36).

Finally, since a contract represents a "privately-ordered obligation," as opposed to positive state law, Plaintiffs' breach-of-Constitution claim survives all preemption arguments under the rationale espoused in *Wolens*. 513 U.S. at 228-229.

For each reason outlined above, Plaintiffs' Constitution Claims are not preempted.

III

DFR LAW CONSTITUTES A FLOOR RATHER THAN A CEILING

In Point III of their Argument, Plaintiffs posed a question: whether the Supreme Court intended the *Vaca* doctrine to constitute a floor, as opposed to both a floor and a ceiling as to a union's duties? Union tries to bury the point and the authority upon which it relied, *United Steel Workers v. Rawson, supra*. By collapsing Point III into Point IV of its argument, Union creates the impression that (1) Plaintiffs had advanced only one theory of liability, and (2) that this supposed lone theory would "alter" the *Vaca* and *O'Neill* standard. (UBf-32-37).

Plaintiffs actually, however, advanced two distinct theories of Union liability. First, Plaintiffs claimed that, because a union's constitution constitutes an FCL contract, a union owes members a duty comprised of obligations imposed by DFR law plus contractual obligations it assumes under its constitution. Under this theory, violation of *non-discretionary* provisions of a union constitution would result in FCL liability per se.

Second, Plaintiffs made it unmistakably clear that they were also proceeding, separately, on a second theory: in strict accordance with *Vaca* and

O'Neill's literal standards. Thus, both below *and in Point IV on appeal*, Plaintiffs met their *Celotex* burden of demonstrating "arbitrariness" and "bad faith." We point this out so that the Court will not interpret Union's conflating the two arguments into one as support for the notion that Plaintiffs have employed anything other than *Vaca's* and *O'Neill's* standards in the analysis in Point IV of our main and reply briefs.

We respectfully suggest that the separate question posed by Point III must be addressed. Union ignores the question because it does not like the answer *Rawson* itself suggests. Recognizing that *Rawson* did not have occasion to answer the question in the context presented here, we respectfully present it to this Court for decision.

IV

THE GRANT OF SUMMARY JUDGMENT TO APPELLEES ON DFR CLAIMS SHOULD BE REVERSED

Appellees view DFR law as a magic wand to make all the issues herein disappear: state-law claims (UBf-52-56); claims under the RLA (CoBf-27-28, 40, 47-48, 57); a distinct liability standard (IV.A); an established contributory-liability standard (IV.D.1); evidence of bad faith (IV.B.1-2); and established rules for determining summary judgment motions (IV.B.2). We examine these "disappearing acts" *seriatim*.

A. Union Conflates Liability Standards

A union breaches its DFR by arbitrary, discriminatory or bad faith conduct. Each branch is independent, *Simo v. U.N.I.T.E.*, 322 F.3d 602, 617 (9th Cir. 2003), and invokes a distinct test. Only one ("arbitrariness") is an objective test, measuring union actions against the "factual and legal landscape." *Id.* The other tests are subjective-- the standard for "good faith" is whether the union acted with "complete good faith and honesty of purpose in the exercise of its discretion." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976). "A union acts in bad faith when it acts with an improper intent, purpose, or motive... Bad faith encompasses fraud, dishonesty, and other intentionally misleading conduct." *Spellacy*, 156 F.3d at 126.

Union conflates these standards. While giving lip-service to each test's distinctness, UBf-26, it then suggests that the "highly deferential"/"wide latitude"/arbitrariness test applies to any "judicial review of Union decisions." (UBf-27-32-33).

Where Plaintiffs do make an "arbitrariness" claim, they invite the standard's application, but where they claim bad faith, they suggest that *O'Neill's* highly deferential arbitrariness-standard is inapplicable. It can neither be applied directly nor superimposed on the "bad faith" standard. *See O'Neill*, 499 U.S. at 73 n.6.

B. Union Tries To Wave Away The Evidence

1. Limiting Evidence To One Form

When Union finally deals with facts, its position is that the only relevant and admissible evidence as to DFR claims are official attorney-crafted Board Resolutions. (UBf-42-n.15). It claims not only that evidence must be direct, rather than circumstantial, but also that it must be produced, and officially approved, by the Union. (There is precious little direct evidence here because Union strove mightily to ensure an absence of evidence of its deliberations.) It then seeks to assure *by various means* that the only inferences the Court will permit from the evidence are inferences in its favor.

2. Assault On Permissible Inferences And Rules Of Construction

a. Constitutional Violations

Plaintiffs asked the District Court to infer bad faith from Union's repeated violations of its Constitution's plain language. *Cf. Sim*, 166 F.3d at 469; *Spellacy*, 156 F.3d at 128.

The District Court almost entirely ignored this evidence, presumably because it found Plaintiffs' Constitution claims preempted. Even assuming they were, that does not mean either that the Constitution or violations evaporated or that the latter could not give rise to inferences of bad faith. On appeal, Union equivocates. On the one hand, it invokes "the consistent federal standard of

deference accorded a Union's interpretation of its constitution, *Sim.*" (UBf-52). On the other, it almost defiantly admits to, generally, not having considered the Constitution's requirements during this period. (*E.g.*, UBf-52-n.22)("immaterial whether the BOD expressly debated whether...membership ratification" required).

There is evidence, in fact, of only one instance of Union's having contemporaneously "interpreted" its Constitution. (A1590-91). All of Union's other interpretations are retrospective, conjured *after* its actions' constitutionality became the "subject of controversy,"⁹ and devised for litigation purposes. Each contravenes the Constitution's plain meaning.¹⁰

⁹ *Cf. New Windsor v. Meyers*, 442 F.3d 101, 112 (2d Cir. 2006); *Lee v. BSB Greenwich*, 267 F.3d 172, 178 (2d Cir. 2001).

¹⁰ The court below circumvented this problem by declaring that APFA's Constitution gave APFA leadership *discretion* to act contrary to the Constitution's plain meaning.

In fact, it does the opposite. It not only expressly *vests ultimate authority in APFA's members*, Art.III.2.A., A1553, but requires the leadership *to act, at all times, in accordance with the APFA Constitution*. (Art. III(3)(A)("The Board of Directors is authorized and empowered to take any and all lawful action *consistent with this Constitution* to safeguard and protect the APFA..."); Article III(3)(L)(22)("Board of Directors may...take any and all appropriate action deemed necessary by the Board *and in accordance with this Constitution* to promote the welfare of the members of APFA"); Article I(8)(C)("All APFA officers and representatives shall enforce this Constitution"). By reading the highlighted provisos out of the "general powers" clauses, the court below altered the allocation of powers mandated by APFA's Constitution, conferred discretion on the leadership they had been denied by the members, and deprived members of their contract. It also, incidentally, deprived Plaintiffs of inferences they were entitled to have drawn.

None are entitled to deference, therefore, 166 F.3d at 470, which means that the lower court was not only permitted to draw the inferences Plaintiffs sought, but required to do so. *E.g., Tufariello, supra.*

b. Evidence Of Defects
In Voting System

Plaintiffs produced extensive evidence of fundamental defects in the voting process (*e.g.*, a system for assigning PIN numbers that allowed anyone's number to be determinable; an electronic methodology that permitted anyone's ballot to be accessed online; and an essentially unregulated release of thousands of PIN numbers during the one-day extension.) Union responds: since you can't prove that any ballot was improperly accessed or any PIN number improperly given out, you cannot say that Union conducted the vote in bad faith. Union misses the point. Plaintiffs do not suggest that the evidence gives rise to an inference that the *initial* vote was in bad faith, but that, together with other evidence, it yields an inference that *canceling the re-vote* was in bad faith. By then, the implications of these defects were readily apparent, whether or not there was evidence of actual tampering.

c. Evidence Of Inconsistencies In Actions,
Positions and Rationales

Plaintiffs produced extensive evidence of inconsistencies in Union's actions and pronouncements (*e.g.*, twice rejecting permitting members to change votes,

only to reverse itself on April 15; promising members a proper re-vote on April 22, only to reverse itself on April 24; repeatedly promising members the "final say-so," only to give final say-so to itself on April 25). Union responds: the inconsistencies are justified by Company's economic crisis and dire threats. But the economic crisis and dire threats were a constant throughout the period these inconsistencies and reversals were effected. They cannot, therefore, excuse refusing to draw inferences this Circuit has recognized are permissible (PBf-57-8), especially when summary judgment motions *require* such inferences be drawn in the non-movants' favor.

d. Union Leadership's Personal Agenda

Union alternates between being dismissive of this evidence, trying to bury it, and claiming that the deal in which Union leadership surrendered members' ratification rights in exchange for Carty's resignation was proper. Since the evidence of leadership's personal agenda in this regard is overwhelming (PBf-46), Plaintiffs were entitled to a jury trial on this evidence alone.

e. Failure to Preserve and Produce Evidence

Finally, Plaintiffs adduced evidence that Union was required by its Constitution to maintain a record of BOD and EC meetings; that its regular practice was to videotape them; that it affirmatively chose not to follow its regular practice during this period; that it destroyed the only videotape it made; and that,

after litigation began, it let AAA throw out critical evidence. (PBf-56-7). A jury may infer bad faith from these actions. Union's response: effectively, that it was entitled to bring its attorney in-house and go off-the-record for the entire period. However, that outside counsel was installed at those meetings has not prevented anyone else in attendance from testifying (at deposition) to what allegedly transpired. The only effect, therefore, of failing to make the required and customary record of those meetings was to deprive Plaintiffs of direct and reliable contemporaneous evidence.

C. There are Competing Sets of Inferences

Since the District Court viewed facts and drew inferences in movants' favor, and failed to resolve ambiguities and draw factual inferences in Plaintiffs' favor, summary judgment must be reversed. *Katzman v. Citibank, supra; Tufariello v. L.I.R.R., supra.*

D. Appellees' Alternative Grounds

Two "alternative grounds" Appellees raise must also be rejected.

1. Company's "Collusion Argument"

Company claims this and other Courts of Appeal have required proof that a carrier colluded in the union's DFR breach in order to establish its liability.

(COBf-37-39).

Most cases Company relies upon, however, have *nothing* to do with liability. They are true "hybrid" actions in which plaintiffs allege a union breached its DFR and the company, its CBA.¹¹ Courts thus must examine whether an Adjustment Board ("AB") has exclusive jurisdiction over the claim's minor-dispute aspect (*i.e.*, the CBA-breach) or whether there is a basis for excepting that claim from exhaustion requirements or AB's preemptive reach. It is in that context that a few courts have required a showing of "collusion" between carrier and union before allowing resort to the courts *rather than the AB*.¹² They do not reach liability questions.

Where, as here, AB jurisdiction is not implicated and the question is one of liability, the standard is participation, not collusion. *See, e.g., Aguinaga v. U.F.C.W.*, 993 F.2d 1463, 1474 (10th Cir. 1993); *Bennett v. Local Union*, 958 F.2d 1429, 1440-41 (7th Cir. 1992); *Lewis II*, 25 F.3d at 1145-46; *Walker*, 714 F.Supp. at 193 (W.D.N.C. 1989), *aff'd in part and rev'd in part*, 930 F.2d 276 (4th

¹¹ Company says *Schum v. South Buffalo Ry.*, 496 F.2d 328 (2d Cir. 1974) is inapposite because it involves a minor dispute, CoBf-38 n.10, so do all but one of Company's cases. (*See Dement, Martin, Simberlund and Masy.*)

¹² The rationale for requiring "collusion" in this context is explained in *Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d 771, 781 (7th Cir. 1983). *See also Raus v. B.R.C.*, 663 F.2d 791, 798 (8th Cir. 1981).

In any event, even in the hybrid/minor-dispute context, "the rule stated in *Raus*, and quoted in *Robinson*, is not the law of this circuit." *Musto v. T.W.U.*, 339 F. Supp. 2d 456, 472 (E.D.N.Y. 2004)(explaining why).

Cir.)(definition of class narrowed), *cert. den'd*, 502 U.S. 1004 (1991); *Price v. Int'l Union*, 927 F.2d 88, 94 (2d Cir. 1991); *Baskin v. Hawley*, 807 F.2d 1120 (2d Cir. 1986); *Farmer v. ARA Services*, 660 F.2d 1096, 1107 (6th Cir. 1981); *Cates v. T.W.A.*, 561 F.2d 1064, 1074 (2d Cir. 1977); *Jones v. T.W.A.*, 495 F.2d 790, 798 (2d Cir. 1974). *See generally Vaca*, 386 U.S. at 197 n.18.

In any event, Company's "collusion" argument is not properly before this Court since Company is seeking to enlarge its rights, and lessen Plaintiffs' rights, under the District Court's judgment. *Swarb v. Lennox*, 405 U.S. 191, 204n.1 (1972).

2. "Causation Argument"

Union makes a causation argument (allegedly under *Sim, supra*) that Company would have filed for bankruptcy and obtained greater reductions in Flight Attendants' pay and benefits than under the RPA. This possibility, they assert, prohibits Plaintiffs from claiming Appellees' wrongful acts proximately caused Plaintiffs' injuries.

The principal injury Plaintiffs incurred was the setting aside of the 2001 CBA and RPA's implementation in its place. It is clear on the face of their April 25 "LOA" that defendants' actions brought this about-- as they agreed that "on approval of this Letter of Agreement by the Boards of Directors of the Parties, ...

the Restructuring Agreement will be effective beginning May 1, 2003...”

(A4138).

Plaintiffs also claim Appellees' actions deprived them of an effective ratification under APFA's Constitution. Causation is clear. On the April 15 "Ballot Date," when the vote officially closed, the vote stood at 9,842 against ratification, 9,309 in favor. That same day, at Company's urging, Union improperly re-opened voting for 24-1/2 hours and altered longstanding rules prohibiting vote-changes. Company spent the 24-1/2 hours whipping up a frenzy and threatening and coercing attendants in an effort to reverse the tally.

Informally on April 18, and officially on April 22, Union invalidated the voting results. As of that point, Union must be deemed to have admitted that no valid ratification was in place. It promised members a new and valid vote consonant with APFA's Constitution, but cancelled that vote a few days later. Finally, on April 25, it agreed with Company to dispose of member-ratification and substitute BOD-approval. That Union's and Company's actions were the proximate cause of Plaintiffs' injuries is undeniable.

The only way to rationalize Union's argument is to interpret it as an assertion that there was a superseding cause of Plaintiffs' injuries-- either underlying economic conditions or a potential bankruptcy and §1113 application.

Such an assertion is an affirmative defense upon which Union bears the burden of proof, not an assertion upon which it can obtain summary judgment under *Celotex. Fairbrother v. Morrison*, 412 F.3d 39, 53 (2d Cir. 2005)(a party faces "a significantly heightened standard" to obtain judgment as a matter of law where it bears the burden of proof on an issue; granting summary judgment under such circumstances is "an extreme step").

Appellees cannot win summary judgment on the defense for three reasons. First, it is wholly speculative. The assertion that Company would file for bankruptcy at all, let alone prior to the conduct of a valid ratification vote, is pure *ipse dixit*. (Company acknowledges it never even submitted a resolution to its Board seeking authorization to file for bankruptcy, and its Board never authorized such a filing. (A5064)). The assertion that Company would have sought more in bankruptcy than it did under the RPA is no less speculative. (Company has refused, on privilege grounds, to produce its, allegedly, ready-for-filing application). Finally, the assertion that a Bankruptcy Court would necessarily have granted its §1113 application in its entirety, regardless of what it sought or contained, is of course ludicrous. No one can know what a Bankruptcy Court would have done because the whole exercise is hypothetical. Company never submitted a §1113 application and a Bankruptcy Court never had the opportunity to consider or pass on it.

Second, the defense rests upon evidence which the Court *could not* consider in support of Appellees' motions: Jerrold Glass' "expert report" (A3355). The Court below never performed its gate-keeping function with respect to it, presumably because it did not embrace the argument. *Raskin v. Wyatt*, 125 F.3d 55, 66-67 (2d Cir. 1997). Also, the report was not based upon "personal knowledge,"¹³ *see* F.R.Civ.P.56(e); was speculative and conclusory, *Major League Baseball Properties v. Salvino*, 542 F.3d 290, 311 (2d Cir. 2008); and consisted of inferences drawn in movants' favor.

Third, the defense is precluded as a matter of law. Outside a bankruptcy proceeding, financial problems do not justify setting aside, or failing to perform, a contract. *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 612 (2d Cir. 1979)("[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, *even to the extent of insolvency or bankruptcy*, performance of a contract is not excused")(emphasis added). *See also N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984). An employer can only abrogate a collective bargaining agreement with Bankruptcy Court approval and only after complying with 11 U.S.C. §1113's requirements. *Northwest Airlines v.*

¹³ Company asked Glass (not involved in underlying events) to assess the outcome of a hypothetical bankruptcy proceeding on Flight Attendant pay, rules and working conditions, if Company had filed for Chapter 11. He offered his opinion without examining Company's allegedly voluminous bankruptcy petition, its draft §1113 application, depositions of key Company officials, or the report of his proposed fellow defense expert, Stuart Gilson.

A.F.A.-CWA, 483 F.3d 160, 166, 171 (2d Cir. 2007); *Adelphia Business Solutions v. Abnos*, 482 F.3d 602 (2d Cir. 2007). Company, here, did not file for bankruptcy, let alone file a §1113 application.

CONCLUSION

For the reasons set forth, Plaintiffs respectfully submit that the judgment of the District Court should be reversed and the case remanded for class certification and trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) . It has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 point font.

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ANTI-VIRUS CERTIFICATION FORM
See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Jill Lindsay, et al v Associated of Professional Flight Attendants, et al

DOCKET NUMBER: 08-4122-cv(L), 08-4128-cv(CON) and 08-4130-cv (CON)

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I, Sonjia Richards, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at c/o APPEALTECH, 205 Lexington Avenue, 10th Floor, New York, New York 10016.

That on the 20th Day of March, 2009, deponent personally served via email the

Reply Brief of Plaintiffs-Appellants

upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

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20th Day of March, 2009.

Original

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