"American Workers in Crisis: Does the Chapter 11 Business Bankruptcy Law Treat Employees and Retirees Fairly?"

Testimony of Richard L. Trumka

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Before the Commercial and Administrative Law Subcommittee

Of the

U.S. House of Representatives Committee on the Judiciary

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Good morning Madame Chairwoman Sanchez and members of the Subcommittee. On behalf of the ten million members of the unions of the AFL-CIO, I would like to express our gratitude to this committee for holding this oversight hearing on the bankruptcy system's treatment of America's workers. I am particularly honored to be here today with people like Kim Townsend, a hard working member of UAW local 138 in Michigan; Greg Davidowitch, Master Executive Council President of the Association of Flight Attendants-CWA, AFL-CIO at United Airlines, United Steelworker International Vice President Fred Redmond, and ALPA President and Captain John Prater. I hope you've found their testimony as informative and powerful as I have. Because of your leadership, Chairwoman Sanchez, the voices of working people are once again heard in these chambers. And it is about time. Our bankruptcy laws are a critical safeguard in our economy, but one that has become dangerously unbalanced. Laws that were created to protect workers in times of economic stress have become effective devices for imposing the costs

imposed by economic change and the stresses of the business cycle almost entirely upon those least able to absorb those costs.

Business failure is a part of life in a market economy. At one time, business owners, workers, customers, suppliers and investors were left to fight over whatever assets remained when businesses failed. The result was the worst possible outcome—firms that had real value if sacrifices could be shared equally were instead liquidated, with devastating consequences for business and all who depended on them. Beginning in the 1930's, Congress enacted the bankruptcy laws to make business reorganization, rather than liquidation, the preferred approach to business failure. A central purpose in enacting the federal bankruptcy laws was to preserve troubled businesses ability to operate and provide jobs, preventing economic cycles from becoming downward spirals.

In 1977, Congress revamped the entire bankruptcy code with the purpose of once again making clear that the purpose of the code was to encourage, where at all possible, reorganization rather than liquidation, and to encourage the equitable treatment of various classes of creditors in the course of bankruptcy.

In the 1980's, Congress responded to the Supreme Court's ruling in the *Bildisco* case by enacting Section 1113, which provided for special protections for collective bargaining agreements in the bankruptcy process.[1] Section 1113 was premised on Congress' recognition that employees were uniquely vulnerable in bankruptcy—that unlike other creditors, employees generally have only one employer, are resident in only one community, have only one retirement plan and only one

[1] NLRB v. Bildisco, 465 U.S. 513 (1984).

health care plan. In enacting Section 1113, Congress made clear to the courts it intended that bankruptcy courts only set aside collective bargaining agreements as a last resort, after all other avenues for rescuing a company had been tried. And of course, the assumption was that if a court did set aside a collective bargaining agreement, workers and their unions would be free like other creditors, to withhold their labor going forward, just as other creditors are free, if their contracts are rejected to withhold goods and services.

Despite a seventy five year history of Congress repeatedly acting to define bankruptcy as a process that seeks to balance sacrifice among corporate constituencies, today the bankruptcy system has become effectively a device for the wholesale transfer of wealth from workers to other creditors. It has become a system that exploits workers' vulnerabilities rather than seeking to create a balance between workers and other creditors, and finally and most appallingly—a system that says to workers in the airline industry—you can have your contracts rejected, but unlike every other creditor, you cannot act to protect yourself— oil companies can withhold fuel deliveries, aircraft leasing companies can take back planes, bankers can refuse to lend, but mechanics, and flight attendants and pilots are not entitled to the rights we give other commercial actors. Today in practice the bankruptcy system no longer provides protections to workers commensurate with their vulnerabilities—rather the courts have decided workers are uniquely subject to exploitation in ways no other party to the system can be exploited.

As you listen today to witnesses telling the grim stories of what happened to workers in airlines and steel and auto parts plants – remember, no mere lender of money gets treated this way, no bank presidents sit across the table from their families after the bankruptcy court has done its work, wondering how to provide health care to their children or what retirement will mean? No

CEO, no matter how dismal the failure, contemplates losing their home, or faces a court order to refrain from quitting their job after their pay was cut in half. In America, in 2007, our bankruptcy system reserves that fate for the people who do the work -- who make the planes fly and forge the steel and mold the rubber and stamp out the parts.

How has our bankruptcy system become a vehicle for attacking workers—a profitable strategic option for companies?

We see a number of distinct causes:

First—Bankruptcy judges have allowed the procedural details of major bankruptcy cases to structurally disadvantage workers. Debtors have been allowed to deal with motions to set aside labor contracts and attack worker benefits separately and in advance of addressing the fate of other creditors. The entire creditor body then sees every dollar taken from workers as a dollar they may not have to concede.

Second—Bankruptcy courts have increasingly treated the procedural protections of Section 1113 as formalities—signaling a willingness to set aside contracts early in cases, which emboldens management to not make concessions in the bargaining that precedes the filing of an 113 motion by management.

Third—Bankruptcy courts have agreed to pay packages that actually reward management that took the company into bankruptcy as a strategic choice, rather than forcing management to share the pain. (Recent AFL-CIO testimony on executive compensation in bankruptcy is attached). Thus executives thinking about bankruptcy as a way to attack labor contracts can do so secure in the belief that while their current package of options may become worthless, the court will award

them a new package that will become instantly valuable once the court has set aside labor agreements and allowed management to get rid of other peoples' benefits.

Fourth—The Pension Benefit Guarantee Corporation and the Bush Administration has treated bankruptcy and the abandonment of pension obligations as a routine part of the landscape, rather than using every tool in their arsenal to make companies meet their obligations under their plans. So we see the spectacle of government contractors like United Airlines using the bankruptcy system to shed billions in pension obligations, devastating tens of thousands of families, leaving a Federal program to foot the bill for benefits, while paying executives hundreds of millions of dollars and emerging as highly profitable enterprises. The result: the retirement security protections Congress sought to provide all Americans working in the private sector through ERISA have been rendered an empty gesture by the bankruptcy courts.

Fifth—While Congress recently increased the wage priority, both the amount of the wage priority, and the status of severance and health benefits under the wage priority have proven to be insufficient to protect workers in major bankruptcies like Enron. Promises from the White House and the Republican majority to address these issues and issues relating to the impact of employer bankruptcy on workers whose retirement money was invested in employer stock turned out to be just that—empty promises.

And finally, and most appallingly, in the last two years we have seen court decisions holding that airline workers covered by the Railway Labor Act, whose contracts were rejected by bankruptcy courts, did not have the right to strike following rejection of their contracts.[2]

[2] Northwest Airlines Corp. v. Association of Flight Attendants-CWA, 483 F.3d 160 (2d. Cir. 2007).

There is no question that the business bankruptcy system no longer works for working people. The bankruptcy courts will continue to meekly implement the agenda of management and its senior creditors at the expense of the working people of this country until they are directed to do otherwise by Congress. Workers' unhappy experience with Section 1113 suggests that Congress needs to think about mechanisms that recognize all the key actors in a bankruptcy proceeding—company executives, bankruptcy judges, secured creditors—are incentivized to act in certain ways by the law and by economics. The court's role must be to insure fairness to workers and not just defer to corporate executives' plans and interests. If Congress wants fairness to workers to be a key objective of the process, these key actors must have both the positive and negative incentives to make it so.

And of course that is indeed what Congress and the public have wanted consistently for more than seventy years—a bankruptcy system that encourages reorganizations and is fair to workers. Last month the AFL-CIO sponsored a Presidential forum in Chicago, 17,000 people attended, and the most powerful moment of the forum came not from the candidates but from Steve Skvara, a retired worker at bankrupt LTV Steel who cannot afford health care for himself and his wife of 36 years after the bankruptcy courts and the PBGC stripped him and his co workers of a third of their pensions and their retiree health care. Steve Skvara asked, "what's wrong with America, and what will you do to change it." I bring Steve Skvara's question here today to this subcommittee. What's wrong with the bankruptcy system is not a mystery, and Congress can act to fix it. The AFL-CIO looks forward to working with you, Chairwoman Sanchez, and the entire Subcommittee and the entire Congress, to do just that. Thank you.

United States House of Representatives

Committee on the Judiciary

John Conyers, Jr., Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(4) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: "American Workers in Crisis" re Chapter 11 Business Bankruptcy Law

Date: Thursday, September 6, 2007 at 10 a.m.

1. Name:

Richard L. Trumka,
AFL-CIO Secretary-Treasurer

2. Entity(ies) you are representing:

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

3. Business Address and Telephone Number:

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4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?

☐ YES ☒ NO

5. Have any of the entities that you are representing received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?

☐ YES ☒ NO

6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. *(Please use additional sheets if necessary.)*

7. Signature: Richard L. Trumka Date: 9-04-07

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