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Attorneys for Plaintiffs AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, GREGORY R. CORDES, DRU MARQUARDT, DOUG POULTON, STEPHAN ROBSON, and PHILIP VALENTE III on behalf of themselves and all others similarly situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, GREGORY R. CORDES, DRU MARQUARDT, DOUG POULTON, STEPHAN ROBSON , and PHILIP VALENTE III, on behalf of themselves and all others similarly situated, Plaintiffs, vs. ALLIED PILOTS ASSOCIATION and AMERICAN AIRLINES, INC., Defendants.	Case No.: 3:15-cv-03125 RS **OPPOSITION TO MOTION TO DISMISS FILED BY DEFENDANT AMERICAN AIRLINES, INC.** November 12, 2015 1:30 P.M. Courtroom 3, 17th Floor Judge Richard Seeborg

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INTRODUCTION

This case concerns the representation of a group of pilots at American Airlines ("American")—the Flow-Through Pilots ("FTPs")—by their collective bargaining representative, Allied Pilots Association ("APA"). The FTPs came to American under an agreement that allowed commuter jet ("CJ") captains to move from the American Eagle ("Eagle") regional airlines to American. This agreement was executed in 1998 and is known as the Flow-Through Agreement ("FTA"). The FTA allowed Eagle CJ captains to flow-up to jobs at American but also allowed pilots at American to flow-down to Eagle CJ captain positions in the event of layoffs at American.

The First Amended Complaint (FAC) alleges that APA breached its duty of fair representation owed the FTPs by repeatedly discriminating against FTPs in favor of other pilot groups. This discrimination arose because of APA's hostility to the FTPs and their rights under the FTA or from APA's desire to favor other numerically larger pilot groups—particularly pilots formerly employed by TWA. FAC ¶¶ 23 through 28, 43, 44. Among other things, APA's breach of duty has resulted in loss of Length of Service Credits for FTPs that all other American pilots received and that impact pilots' employment income and benefits. FAC ¶¶ 26, 47 (First Claim for Relief). APA has continued to discriminate against FTPs in connection with a Seniority List Integration (SLI) process to develop an integrated seniority list for pilots following the merger of American with USAirways. FAC ¶¶ 30-38, 52-53 (Second Claim for Relief).

The issue on this motion is American's liability for damages or for injunctive relief. The FAC seeks both damages and equitable relief FAC ¶¶ 48, 55), including an injunction against both APA and American prohibiting them from using any integrated seniority list arising from the SLI process. FAC ¶ 55(d).

The FAC alleges facts plausibly showing that American's liability arises from its own duty not to join in causing or perpetuating a breach of duty by APA where American knows, or should know, of APA's violation of its duty towards the FTPs. *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230, 235-236 (5th Cir. 1957). The FAC specifically alleges that American knew

that APA was discriminating against the FTPs and joined with APA in such discrimination. FAC ¶¶ 39, 45, 46(b). The FAC alleges the facts of such discrimination, American's repeated participation in the discrimination and discriminatory agreements, the outcome of arbitrations finding that APA and American violated the rights of the FTPs, American's knowledge of APA's hostility towards the FTPs and the resulting situation at American where "FTPs with greater AAL pilot seniority are paid less than TWA-LLC pilots with lesser AAL seniority and FTPs who have worked longer at AAL are paid less for the same jobs than TWA-LLC pilots who have worked less time at AAL." FAC ¶ 27(c).

In addition, American's continued participation in this case is necessary to ensure the ability of this Court to provide complete relief, including injunctive relief, if plaintiffs establish a breach of APA's duty of fair representation at trial. *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 229 (1969).

SUMMARY OF THE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT

A. The Flow-Through Agreement and the Flow-Through Pilots (FTPs).

The Flow-Through Pilots (FTPs) came to American under the terms of a multiparty agreement, known as the Flow-Through Agreement, between American, its regional airline subsidiaries ("American Eagle"),[1] and the unions representing pilots at American (APA) and pilots at the American Eagle regional airlines (ALPA). FAC ¶¶ 4, 16. Prior to September 2001, about 513 FTPs had obtained positions on the American seniority list, but most of them (about 388) had been held back at American Eagle because of American Eagle's operational needs. FAC ¶ 16. The Flow-Through Agreement also allowed American pilots to flow-back to American Eagle while furloughed from American. FAC ¶ 21.

[1] Technically, both American and the Eagles were subsidiaries of AMR, Inc. However, the FAC alleges that AMR "controlled labor relations at American Airlines and American Eagle, including the negotiation of collective bargaining agreements and other agreements pertaining to the wages, hours and terms and conditions of employment of pilots employed by American Airlines and American Eagle. employment conditions at both American and American Eagle." FAC ¶ 6.

APA, although a party to the Flow-Through Agreement, was "hostile to the Flow-Through Agreement and the rights of FTPs thereunder because APA did not desire pilots employed at American Eagle to have any rights to flow-up to [American], but desired only to secure the right for [American] pilots to flow-down to American Eagle." FAC ¶ 44.

B. American's Acquisition of TWA In 2001 and Addition of the TWA-LLC Staplees To the Bottom of the American Pilot Seniority List.

In 2001, American acquired the assets of TransWorld Airlines (TWA) and created a subsidiary (TWA-LLC) to fly TWA's routes. FAC ¶ 17. Thereafter, in April 2002, the former TWA pilots were integrated into the American seniority list, with the majority (1225 pilots known as the "TWA-LLC Staplees") being placed at the bottom of the seniority list without having performed work for American and furloughed directly from TWA-LLC. FAC ¶¶ 18, 19. In April 2002, APA also became the collective bargaining representative of the TWA-LLC pilots as well as the American pilots; APA represented all the pilots on the American seniority list in connection with their employment conditions at American. FAC ¶ 20.

C. APA's Discrimination Against the FTPs and Favoritism of the TWA-LLC Staplees.

After the acquisition of TWA's assets, APA began a pattern of discrimination against the FTPs and favoritism of the TWA-LLC Staplees. In summary:

1. APA revised its agreement with American that had excluded the TWA-LLC pilots from the flow-down provisions of the Flow-Through Agreement (FAC ¶ 21) to allow the TWA-LLC pilots to flow-down to American Eagle and displace FTPs from their jobs. FAC ¶¶ 23, 24.[2] American agreed to this, knowing how this would affect the FTPs and APA's intention to discriminate against the FTP. FAC ¶¶ 23, 39

[2] The FTPs were still at American Eagle because they had been held back for operational reasons and prevented from moving to American when they were initially able to do so. FAC ¶ 16.

2. APA arranged with American to have TWA-LLC Staplees, who were below the FTPs on the seniority list, recalled to new jobs at American when American began hiring pilots in 2007. FAC ¶ 27(a). This agreement was subsequently found to violate the FTPs rights under the Flow-Through Agreement. FAC ¶ 28.
3. APA attempted to have FTPs seniority numbers forfeited, benefitting the TWA-LLC Staplees who had obtained their seniority numbers later than the FTPs.
4. APA and American have agreed to give Length of Service (LOS) credits for non-American service for other pilots, but has refused to negotiate similar benefits for FTPs or their service at American Eagle. As a result, FTPs with greater American pilot seniority are paid less than TWA-LLC pilots with lesser American seniority and FTPs who have worked longer at American are paid less for the same jobs than TWA-LLC pilots who have worked less time at American. FAC ¶ 27(c).
5. APA negotiated two years of additional LOS credit for the TWA-LLC Staplees, to compensate for lack of work at American after September 11, 2001, while refusing to negotiate a similar benefit for FTPs who had similarly been unable to work at American during the same period. FAC ¶ 27(d).

FTPs repeatedly requested that APA take action to remedy the disparities in pay, LOS credit and other employment conditions at American adversely affecting FTPs, including at least four letters from May 2013 through December 2014. APA did not respond and provided no explanation or justification for the disparities in pay and benefits suffered by the FTPs. FAC ¶ 29. Several of the foregoing actions resulted in arbitration decisions finding that APA and American had violated the FTPs rights. FAC ¶ 28.

D. American's Purchase of US Airways' Assets In 2013; APA Continues to Favor the Staplees and Disfavor the FTPs in the Resulting Seniority List Integration Process.

In 2013, American purchased the assets of US Airways. This purchase resulted in proceedings to integrate the pilots' seniority lists of the airlines ("SLI") that will thereafter be

used by American for determining hiring, furlough, pay, benefits and employment opportunities at American. FAC ¶ 30. Despite assurances from APA that it would represent the interest of the FTPs in the SLI process (FAC ¶ 31), APA has instead taken actions that adversely affect the FTPs interests by placing FTPs in the lowest tiers of APA's proposed integrated seniority list. FAC ¶¶ 33, 35, 36. Other pilots, including the TWA-LLC Staplees, are not adversely affected by APA's actions and proposals. FAC ¶ 36. APA has again refused to supply information about its actions when requested or a reasonable or rational explanation for its actions. FAC ¶¶ 34, 38. APA's actions apparently based on events involving the hiring of USAir pilots after the 2007 merger of USAir and American West Airlines that have no rational relationship to the 2013 merger of American and USAir or the placement of FTPs on an integrated seniority list. FAC ¶ 38. APA's actions were intended to discriminate against the FTPs and their placement on an integrated seniority list. FAC ¶ 37.

E. American's Participation and Involvement In APA's Discrimination Against FTPs.

American was party to the agreements (a) to allow TWA-LLC Staplees to flow-down to American Eagle, after the initial agreement that they would not have flow-down rights, (b) to hire TWA-LLC Staplees ahead of FTPs into new hire classes when American began rehiring in 2007, (c) to give LOS credits to all other pilots, including TWA-LLC pilots, other than the FTPs, and (d) to give an additional two-years LOS credit to TWA-LLC Staplees but not FTPs. FAC ¶¶ 23, 27. The outcome of these various agreements was, among other things, to put the FTPs in the lower pay grades and less desirable jobs than the TWA-LLC pilots: "FTPs with greater AAL pilot seniority are paid less than TWA-LLC pilots with lesser AAL seniority and FTPs who have worked longer at AAL are paid less for the same jobs than TWA-LLC pilots who have worked less time at AAL." FAC ¶ 27(c).

American entered into the agreements with APA "knowing that these agreements would adversely affect and discriminate against FTPs and knowing that APA intended to discriminate against FTPs in such agreements." FAC ¶ 39. American participated in APA's breach of duty by "join[ing]with APA in discriminating against FTPs and in favor of other pilot groups,

including the TWA-LLC pilots, by entering into agreements to give LOS [Length of Service] credit to TWA-LLC and other pilot groups, other than FTPs, knowing that APA was hostile to the interest of FTPs and that such agreements discriminated against the FTPs and favored other pilot groups, including the TWA-LLC pilots." FAC ¶ 45.

Once the SLI process is completed, American will be "bound by and will use the resulting integrated seniority list for purposes of hiring, furlough, pay, benefits and employment opportunities at [American]." FAC ¶ 30. The FAC seeks "an injunction prohibiting APA or [American] from using any integrated seniority list arising from the SLI process." FAC ¶ 55(d).

ARGUMENT

A. Overview.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) requires that a pleading must state a plausible claim. *Twombly* does not require allegations beyond facts necessary "to permit a reasonable inference that the defendant has engaged in culpable conduct[.]" *Anderson News, LLC, et al. v. Am. Media Inc., et al.*, 680 F.3d 162, 185 (2nd Cir. 2012). A court "may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." *Ibid.*

Initially, we discuss APA's breach of its duty of fair representation. As we show, APA's breach of duty involved repeated and systematic discrimination against the FTPs, resulting in lower wages, benefits and employment opportunities for FTPs as compared to similarly-situated pilots. See FAC ¶ 27(c).

Thereafter, we discuss how American was involved in this discrimination. The discrimination could not have occurred without American's participation, including changing agreements to give TWA-LLC Staplees flow-back rights, giving TWA-LLC Staplees preferential rehiring when jobs opened up in 2007 and giving TWA-LLC Staplees additional LOS credits denied FTPs. It is implausible to believe that American was ignorant of what was taking place in front of it and the adverse impact on the FTPs that was occurring. American's liability therefor

arises from its own duty not to join in causing or perpetuating a breach of duty by APA where American knows, or should know, of APA's violation of its duty towards the FTPs. *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230, 235-236 (5th Cir. 1957). The FAC directly alleges American's knowledge of APA's discriminatory motive and its breach of duty. FAC ¶¶ 39, 45.

B. APA's Breach of its Duty of Fair Representation By Repeated Discrimination Against FTPs and Favoritism of the TWA-LLC Staplees, Including Multiple Discriminatory Agreements With American.

A union violates its duty of fair representation (DFR) when it acts arbitrarily, discriminatorily or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). These represent three separate standards, a violation of any of which establishes a DFR. *Simo v. Union Of Needletrades, Indus.*, 322 F.3d 602, 617 (9th Cir. 2003): "Whereas the arbitrariness analysis looks to the objective adequacy of the Union's conduct, the discrimination and bad faith analyses look to the subjective motivation of the Union officials." *Id.*at 618. While the union has substantial discretion in representing members, "a union can still breach the duty of fair representation if it exercised its judgment in bad faith or in a discriminatory manner." *Beck v. United Food & Commercial Wkrs., Local 99*, 506 F.3d 874, 880 (9th Cir. 2007).

A union cannot favor one union group over another for arbitrary reasons. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-799 (7th Cir. 1976); *Laborers & Hoc Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977). "In their role as employees' exclusive representatives, unions must be careful to protect the interests of *all* those whom they represent: The needs of the many do not always outweigh the needs of the few, or the one." *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1443 (9th Cir. 1989). DFR violations have been found where a union caused an employee to be discharged because other workers thought they should have received the job he received (*Laborers Loc. No. 341*, supra, 564 F.2d at 836, 840); where a union withdrew once set of grievances from arbitration because it felt that pursuing those cases weakened other members' positions before an arbitrator (*Gregg v. Chauffeurs, Teamsters & Helpers Union Local 150*, 699 F.2d 1015, 1016 (9th Cir. 1983)); where a union has a policy of

not calling union members as witnesses if their testimony might be critical of another member (*Banks v. Bethlehem Steel Corp.*, supra, 870 F.2d at 1442 (testimony that another employee started the fight for which the grievant was fired); where a union favored a politically stronger group (*Barton Brands, Ltd. v. NLRB*, supra, 529 F.2d at 798-799); and where a union favored one pilot group at the expense of another in violation of union's policies that required it to meet, mediate and arbitrate with both groups before presenting proposals to employer (*Bernard v. Air Line Pilots Assn.* 873 F.2d 213, 216-217 (9th Cir. 1989)). In the context of negotiating a seniority list, the prohibition on arbitrariness means that "a union may not juggle the seniority roster for no reason other than to advance one group of employees over another." *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992), quoted in *Addington v. US Airline Pilots Association*, Case No. 14-15757, Sl.Op. p. 37 (9th Cir. 2015).

In this case, both the FTPs and the TWA Staplees were on the AAL seniority list and both groups were equally entitled to APA's representation. FAC ¶¶ 20, 41, 50. APA, however, repeatedly favored the TWA Staplees over the FTPs.

APA systematically discriminated against the FTPs and favored the TWA-LLC pilots over many years. This included changing agreements so that TWA-LLC pilots would have flow-back rights to displace FTPs who had been held back at American Eagle, getting less senior TWA-LLC pilots hired at American ahead of more senior FTPs, trying to take away FTPs existing American seniority numbers, and negotiating for benefits for all other pilots except the FTPs. Despite repeated requests, APA has refused to provide FTPs information or explanations for APA's actions favoring other pilots. FAC ¶¶ 29, 34.

APA denied FTPs the right to participate in the SLP process, then stipulated that that time at American Eagle would not count for seniority purposes in a final integrated seniority list. FAC ¶ 33. APA's proposed integrated seniority list put American FTPs in the same category as the lowest seniority group of USAir pilots. FAC ¶ 35. APA based its placement of FTPs on the fact that they were hired after 2007—a date based on the " Constructive Notice" date that applied only to USAir pilots because it arose in the 2007 USAir/America West merger; the Constructive

Notice date for American pilots for the USAir/American merger was 2013. FAC ¶ 38. The use of a post-2007 date, however, only adversely affected FTPs, as it protected the TWA-LLC pilots for whom APA had obtained preferential rehiring in 2007 before the date APA proposed to use for the FTPs (FAC ¶ 33) and took away the additional American seniority given FTPs as remedies for APA's and American's prior violations of the Flow-Through Agreement (FAC ¶¶ 28, 35(b)).

APA's systemic mistreatment of FTPs coupled with systemic favoritism of the TWA-LLC Staplees carries the obvious implication of systemic discrimination in violation of APA's duty to represent all pilot groups without discrimination and in good faith. APA's refusal to provide explanations or information when asked carries the implication that APA has no legitimate explanations to give. APA's explanations in its SLI submissions[3] rest on irrational and arbitrary factors that adversely affect only the FTPs. That is, in the SLI process, APA uses an irrelevant "Constructive Notice" date applicable only to the earlier USAir/America West merger as a pretext to discriminate further against FTPs who APA had prevented moving to American when the jobs had opened up. The FAC alleges directly that APA acted out of hostility to the rights the FTPs had obtained under the Flow-Through Agreement—as APA desired only a flow-down not a flow-up—and because the TWA-LLC pilots are four times the number of FTPs.. FAC ¶¶ 26, 44.

C. American's Liability For Participation In APA's Breach of Duty Rests On Concrete Allegations, Not Conclusory Speculation.

An employer, like AAL, can be held jointly liable for a DFR breach where the union and the employer actively participated in the other's breach. *Bennett v. Local Union No. 66,* 958 F.2d 1429, 1440 (7th Cir. 1992). Accordingly, "the employer can be joined as a party defendant if it "'acted from a motive to discriminate or with knowledge that the [union] was discriminating.' [citation omitted]. Where the employer's action is only a consequence of the union's discriminatory conduct [citation omitted], or takes the form of joint discrimination with the

union, then plaintiffs should be allowed to join the employer and the union in one action." *O'Mara v. Erie Lackawanna R.R.*, 407 F.2d 674, 679 (2nd Cir. 1969), *aff'd sub nom. Czosek v. O'Mara*, 397 U.S. 25 (1970).

This is a long-standing rule under the Railway Labor Act (RLA). In the 1957 decision *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230, 235-236 (5th Cir. 1957), the Fifth Circuit addressed at length the employer's liability for a union's breach of duty. In *Richardson*, the railroad and the union had entered into agreements, in violation of the union's duty of fair representation, that discriminated against African-American employees "to the prejudice of their seniority rights" and "with consequent loss . . . of income and retirement benefits." *Id.* at 231. The complaint in *Richardon* also alleged that the discriminatory contract provision "was agreed upon between the Brotherhood and the Railroad without any prior notice to plaintiffs, and without affording them an opportunity to be heard[.]" *Id.* at 231.

In holding the employer jointly liable for damages, rather than limiting the employer's liability to injunctive relief, the Fifth Circuit noted that the RLA expressly required employers "to exert every reasonable effort to make and maintain agreements" concerning working conditions "in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." *Id.* at p. 235, quoting RLA Section 2 (45 U.S.C. § 152). The Fifth Circuit noted that "the Railroad, in entering into the contact, was charged with knowledge that he Brotherhood as the statutory representative of tis employees was under a duty to represent all employees for whom it acted fairly, impartially, in good faith and without hostile discrimination." *Id.*at 235. The Firth Circuit reasoned: "It takes two parties to reach an agreement, and both have a legal obligation to not make or enforce an agreement or discriminatory employment practice which they either know, or should know, is unlawful." *Id.* at 236. Accordingly, the Fifth Circuit held "the Brotherhood's obligation under the statute does not exist in vacco, unsupported by any commensurate duty on the part of the carrier." *Ibid.* Consequently, the employer "can be required to respond in

[3] That is, submissions in the SLI process, not explanations given to the FTPs.

damages for breach of its own duty not to join in causing or perpetuating a violation of the Act and that policy which it is supposed to effectuate." *Ibid.*

Richardson has since been accepted as stating the standard for imposing liability on an employer who aids and abets a union's breach of duty. See *Czosek v. O'Mara*, 397 U.S 25, 29 fn 2 (1970) (citing *Richardson* as an example of a case imposing liability on an employer if "as discharge was a consequence of the union's discriminatory conduct" or "the employer was in any other way implicated in the union's allegedly discriminatory action."); *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 331 (1969) (Harlan, J. concurring: "I believe that [*Richardson*] . . . also supports today's holding that the federal courts may grant railroad employees ancillary relief against an employer who aids and abets their union in breaching its duty of fair representation.").

The district court in *Deboles v. Trans World Airlines, Inc.*, 350 F.Supp. 1274, 1288 (E.D.Pa. 1972) applied *Richardson*'s analysis to breach of duty in the airline industry. *Deboles* concerned seniority provisions where the union and TWA had negotiated limited seniority for employees working at the Kennedy Space Center, whereas all other employees had their seniority determined from their date of employment regardless where they had worked. *Id.* at 1277. The district court noted that "[a]lthough TWA's alleged wrongful cooperation is not embodied in a contractual provision," the discrimination was "a direct result of contract negotiations." *Id.* at 1288. The district court noted: "TWA is here charged with being an active agent in effectuating the Union's breach of its duty of fair representation. Without TWA's acquiescence, retroactive system seniority could never have been withheld from plaintiffs. . . . TWA may be found, after a full hearing, to have been a pivotal and indispensable party rendering effective the Union's illegal discriminatory actions." *Ibid.*

The allegations in the FAC show exactly the kind of employer participation in APA's breach of duty falling under the holdings and standards of the foregoing cases. APA engaged in repeated discrimination against the FTPs; this discrimination could not plausibly have escaped American's notice. APA's discriminatory motive arose, in part, from its view that the Flow-Through Agreement should only have allowed a flow-down for furloughed American pilots, not

any flow-up for Eagle pilots. FAC ¶ 44. Again, it is entirely plausible that American was aware of this motive as it was a party to the Flow-Through Agreement when the agreement was negotiated.

The FAC directly alleges that American entered into the agreements with APA "knowing that these agreements would adversely affect and discriminate against FTPs and knowing that APA intended to discriminate against FTPs in such agreements." FAC ¶ 39. The other allegations offer compelling support to the inference that American knew or should have known of this discrimination. American knew TWA-LLC pilots were being favored at the FTPs expense when it renegotiated the agreement to give them flow-back rights. American knew TWA-LLC pilots were being favored over the FTPs when it hired TWA-LLC pilots with lesser seniority ahead of the FTPs with greater seniority. American knew that the FTPs were being disfavored when APA negotiated additional LOS credits for all other pilots, but not the FTPs. Indeed, at the time of the most recent agreement on LOS credits in January 2015, there had been repeated arbitration decisions finding APA and American in violation of the Flow-Through Agreement by favoring the TWA-LLC Staplees over the FTPs. FAC ¶ 28.

APA's discrimination could not have occurred without Americans' participation. As the FAC alleges, American participated in APA's breach of duty by "join[ing]with APA in discriminating against FTPs and in favor of other pilot groups, including the TWA-LLC pilots, by entering into agreements to give LOS [Length of Service] credit to TWA-LLC and other pilot groups, other than FTPs, knowing that APA was hostile to the interest of FTPs and that such agreements discriminated against the FTPs and favored other pilot groups, including the TWA-LLC pilots." FAC ¶ 45.

American asserts that the complaint must allege bad faith, hostility or discrimination by American itself, citing *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474, 493-94 (N.D. Ill. 1991), *aff'd* 981 F.2d 1524 (7th Cir. 1992). AA Mem. pp. 6-7. While the district court may have faulted the absence of evidence of discrimination or hostility by the carrier, the Seventh Circuit neither discussed nor adopted this rule. Instead, the Circuit Court concluded that there was no

breach of the union's duty at all. 981 F.2d at 1534-1535. The settled standards, discussed above, apply the test whether the employer knew, or should have known, of the union's breach of duty when entering into the agreements. Supra, at p. 10. The allegations of the FAC directly allege American's knowledge of APA breach of duty. FAC ¶¶ 39, 45.

American's argument that policy should not require it to undertake an affirmative obligations to supervise the union's bargaining conduct (AA Mem. pp. 7-8) falls equally short. American is not being charged with failing to supervise APA. It is charged with aiding and abetting APA's breach of duty when it knew (or should have known) of APA's discrimination against the FTPs and thereby violated "its own duty not to join in causing or perpetuating" a violation the duty of fair representation. See *Richardson*, supra, 242 F.2d at 236.

The compelling policy is the policy stated in the RLA to require employers "to exert every reasonable effort to make and maintain agreements. . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." *Id.* at p. 235, quoting RLA Section 2 (45 U.S.C. § 152). Agreements that create or perpetuate discriminatory conditions arising from a union's breach of duty exactly the opposite result—an increase in the likelihood of industrial strife because of such unfair discrimination. Imposing on American a duty not to enable, participate in or facilitate APA's breach of duty, where APA knows of APA's bad faith or discriminatory motive, or where the facts put APA on reasonable notice of APA's discrimination, imposes no duty to "supervise" APA's conduct, only the duty—imposed by the RLA itself—to "exert every reasonable effort" to make agreements that will avoid labor strife in the airline industry and avoid causing, aiding or perpetuating discrimination by APA in violation of its duty of fair representation. This policy is even more compelling where—as here—APA can accomplish discrimination against the FTPs only with American's repeated agreements to this discrimination.

The other cases cited by American (AA Mem. p. 8) do not add to its argument. The fact that negotiation of a collective bargaining agreement, standing alone, is not "collusion" is irrelevant. The FAC alleges far more than a simple contract negotiation. It alleges a long pattern

of discrimination against the FTPs involving multiple agreements between APA and American repeatedly disfavoring the FTPs and arbitration awards finding that APA and American have violated the FTPs rights (see FAC ¶ 28). American's effort to distinguish cases cited by the plaintiffs (AA Mem. p. 9) similarly falls short. Even under the most restrictive standards, the multiple agreements and actions favoring other pilots and disfavoring FTPs rationally supports an inference of a "combined attempt to discriminate." The cases discussed above at pp. 9-11, however, do not confine the employer's liability so narrowly.

Finally, American asserts that it has no part of the Second Claim for Relief. AA Mem. p. 2. To the contrary, in the Second Claim, the FAC alleges that, once the SLI process is completed, American will be "bound by and will use the resulting integrated seniority list for purposes of hiring, furlough, pay, benefits and employment opportunities at AAL [American]." FAC ¶ 30. In the Second Claim, the FAC seeks "an injunction prohibiting APA or AAL [American] from using any integrated seniority list arising from the SLI process." FAC ¶ 55(d).

American is joined under the Second Claim "to insure complete and meaningful relief" (*Glover v. St Louis-SA F. R. Co.*, supra, 393 U.S. at 329) on the seniority list issue. This is a proper basis to join American. *Ibid.* (holding that Railroad Adjustment Board had no power to give relief for DFR action alleging racial discriminating in job assignments "in order to end entirely abuses of the sort alleged here. The federal courts may therefore properly exercise jurisdiction over both the union and the railroad."). Accord: *Cunningham v. Erie R.R. Co.*, 266 F.2d 411, 416 (2nd Cir. 1959): "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it also has power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments." In the *Richardson* case, it was undisputed that the carrier could be a party for injunctive relief; the dispute was whether damages were also available against the carrier. *Richardson*, supra, 242 F.2d at 234-235.

CONCLUSION

The Court should deny American's motion to dismiss as the FAC properly alleges that American knew of APA's discrimination against and hostility towards the FTPs and entered into agreements with APA that discriminated against the FTPs, and favored other pilots, knowing of the APA's discrimination against and hostility towards the FTPs. The allegation in the FAC alleges facts plausibly showing, directly or by reasonable inference, that American participated in or perpetuated a breach of the duty of fair representation by co-defendant APA under circumstances where American knew, or should have known, of APA's violation of its duty of fair representation.

The Court should deny American's motion on the independent basis that American's continued participation in this case is necessary to ensure the ability of this Court to provide complete relief, including injunctive relief, if plaintiffs establish a breach of APA's duty of fair representation at trial. .

Dated: October 19, 2015. KATZENBACH LAW OFFICES

By s/ Christopher W. Katzenbach

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, GREGORY R. CORDES, DRU MARQUARDT, DOUG POULTON, STEPHAN ROBSON , and PHILIP VALENTE III, on behalf of themselves and all others similarly situated, Plaintiffs, vs. ALLIED PILOTS ASSOCIATION and AMERICAN AIRLINES, INC., Defendants.	Case No.: 3:15-cv-03125 RS [Proposed] ORDER DENYING MOTION TO DISMISS FILED BY DEFENDANT AMERICAN AIRLINES, INC. November 12, 2015 1:30 P.M. Courtroom 3, 17th Floor Judge Richard Seeborg

This matter is before the Court on the motion of defendant American Airlines, Inc. ("American") to dismiss the First Amended Complaint as to American pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Court denies the motion. The First Amended Complaint alleges facts plausibly showing, directly or by reasonable inference, that American participated in or perpetuated a breach of the duty of fair representation by co-defendant Allied Pilots Association ("APA")

under circumstances where American knew, or should have known, of APA's violation of its duty of fair representation. *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230, 235-236 (5th Cir. 1957). In addition, American's continued participation in this case is necessary to ensure the ability of this Court to provide complete relief, including injunctive relief, if plaintiffs establish a breach of APA's duty of fair representation at trial. *Glover v. St. Louis-S.F.R. Co.*, 393 U.S. 324, 229 (1969).

SO ORDERED.

Dated: November ____, 2015.

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Richard Seeborg, United States District Judge