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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 **OPPOSITION TO SECOND MOTION TO DISMISS FILED BY DEFENDANT AMERICAN AIRLINES, INC.** March 17, 2016 1:30 P.M. Courtroom 3, 17th Floor Judge Richard Seeborg

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INTRODUCTION

On this motion, American Airlines ("American") contends that the First Claim for Relief in the Second Amended Complaint ("SAC") fails to do more that allege that American merely acceded to the contractual demands of the Allied Pilots Association ("APA") that discriminated against the Flow-Through Pilots ("FTPs"). AA Mem. pp. 3-4. The SAC does much more than allege that American merely acceded to the APA's bargaining demands. American facilitated APA's discrimination knowing of APA's breach of duty.

The long pattern of discrimination against the FTPs is more than enough to show that American knew that APA was discriminating against the FTPs. The allegations of the Second Amended Complaint allege facts showing that American was an active participant in effecting the discrimination against FTPs. American did not simply accede to APA's discriminatory demands, but joined with APA the discrimination against the FTPs. Some of American's acts involved negotiating agreements that directly harmed the FTPs and abrogated their rights under the APA/American collective bargaining agreement and the Flow-Through Agreement. Other of American's acts involved more tacit agreements or assistance—such as ignoring the May 2007 arbitration decision giving FTPs rights to new hire positions and undermining a remedy for American's refusal to hire FTPs by off-the-record manipulation of the arbitration process that again adversely changed the FTPs contractual rights.

These allegations demonstrate the elements necessary to show American's liability as colluding with or aiding and abetting the APA's breach of duty.

MATERIAL ALLEGATIONS IN THE SECOND 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). SAC ¶¶ 4, 5, 6, 28, 31. The Flow-Through Agreement also allowed furloughed American pilots to flow-back to American Eagle while furloughed from American. SAC ¶32. The Flow-Through Agreement was negotiated and signed in May 1997 and incorporated into the collective bargaining agreements at American and American Eagle. SAC ¶¶ 6, 27, 30.

The Flow-Through Agreement followed a dispute between APA and American over American's plans to fly regional jet aircraft by American Eagle carriers. SAC ¶ 24. In this dispute, APA demanded that all regional jet aircraft be flown by American pilots. APA asserted that this was a crucial issue of job security for the pilots APA represented at American because it feared that jets flown by American Eagle pilots would replace aircraft being flow by American pilots represented by APA. SAC ¶ 26. On March 19, 1997, the Presidential Emergency Board ("PEB") convened under the Railway Labor Act ("RLA") (SAC ¶ 25) rejected APA's demand that regional jets be flown by American pilots. The PEB decision did not provide any furlough or other protection for American pilots. SAC ¶ 27. The Flow-Through Agreement was entered into about six-weeks later. It provided for American pilots to take jobs at American Eagle in the event of a furlough at American and for American Eagle pilots to more up to American when American hired new pilots. SAC ¶¶ 27, 28, 32.

Under the Flow-Through Agreement, American Eagle pilots were initially entitled to one out of every two positions in new hire classes at American. The American Eagle pilot obtained an American seniority number when they were offered a position in a new hire class whether or not they were able to attend the new hire class. When the pilot could not attend the new hire class because of a training freeze or other operational reason, they received priority for the new hire class once the training freeze or other operational reason expired. SAC ¶ 31.

[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." SAC ¶ 6.

Also under the Flow-Through Agreement, a "pilot furloughed from [American] may displace a CJ Captain at an AMR Eagle, Inc. carrier" subject to certain limitations. SAC ¶ 32. When the Flow-Through Agreement was negotiated, an at all times thereafter, the American-APA collective bargaining agreement defined furlough as a "removal of a pilot from active duty as a pilot. . . due to a reduction in force. . .". SAC ¶¶ 18, 35.

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. The TWA-LLC pilots were employees of TWA-LLC. SAC ¶ 39. At some point after April 3, 2002, the TWA-LLC pilots were integrated into the AAL Pilot System Seniority list and received AAL Occupational seniority numbers. Approximately 1067 TWA-LLC pilots were integrated into the AAL Pilot System Seniority list interspersed with AAL pilots at a ratio of approximately 1:8. The remaining approximately 1225 TWA-LLC pilots were placed at the bottom of the AAL Pilot System Seniority list (herein referred to as the "TWA-LLC Staplees"). SAC ¶ 40. Thereafter, the TWA-LLC Staplees were furloughed directly from TWA-LLC before they had performed any work for American. SAC ¶ 42.

C. American's Participation In Discrimination Against The FTPs.

Prior to September 2001, approximately 513 American Eagle pilots had had obtained AAL Occupational seniority numbers and were on the AAL Pilot System Seniority list (herein the "FTPs"). SAC ¶¶ 5, 36. Of these pilots, about 124 had transferred to and begun flying for American while the remainder had been held back at American Eagle because of American Eagle's operational needs. SCA ¶¶ 37, 38.

All pilots who were on the American pilot seniority list were represented by APA for purposes of employment conditions at American. This included the FTPs and the TWA-LLC Staplees once they were placed on the American seniority list. SAC ¶¶ 43, 73.

After September 2001, American stopped hiring pilots and began layoffs. American did not conduct new hire training classes until June 6, 2007. SAC ¶¶ 41, 49.

APA engaged in a pattern of repeated discrimination against the FTPs by favoring other groups and advancing the interests of other pilot groups over the interests of the FTPs, contrary to the interests of the FTPs and without taking account of the interests of the FTPs. SAC ¶¶ 51-56. As a result, FTPs with greater AAL 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. SAC ¶ 52(d) at p. 17. In the most recent collective bargaining agreement, American pilots who had been furloughed received an extra two years of seniority. Although the TWA-LLC Staplees did not qualify for this benefit because they were not furloughed American pilots, they got this benefit. The FTPs did not and APA did not attempt to get this benefit for the FTPs. SAC ¶ 52(e) at p. 18. FTPs requested APA to take action to rectify or remedy this discrimination, but APA did not respond these requests and did not provide any explanation or justification for its actions or the disparities in pay and benefits suffered by the FTPs. SAC ¶ 57.

American participated in the APA's discrimination, knowing that APA was hostile to the FTPs' interests, was discriminating against the FTPs and was favoring other pilot groups, including the TWA-LLC pilots. SAC ¶¶ 78, 79. Specifically:

1. In November 2001, American and APA had agreed that the TWA-LLC pilots would not have the ability to flow-down under provisions of the Flow-Through Agreement. SAC ¶ 44. In 2003, after furloughs at American had started, American and APA revised this agreement to allow the TWA-LLC pilots to flow-down to American Eagle and displace FTPs from their jobs. FAC ¶¶ 45, 46. The effect of this agreement was to change the terms of the Flow-Through Agreement so that the flow-down provisions would apply to TWA-LLC pilots even if TWA-LLC pilots (such as the TWA-LLC Staplees) were not furloughed American

pilots as that term was used in the APA/American collective bargaining agreement. SAC ¶¶ 47, 52(a).

2. On May 11, 2007, Arbitrator John B. LaRocco, in Case No. FL0-0903, ruled that the TWA-LLC Staplees were new-hire pilots for purposes of the Flow-Through Agreement. He ruled "Pilots who did not commence active employment at AA in conjunction with the merger are equivalent to new hires" (AA Motion to Dismiss, Exh. A at p. 45 of decision) and this included the TWA-LLC Staplees (*id.* at p. 45 fn. 17, and p. 46). See SAC ¶ 52(b)(i). Although American was a party to the arbitration that resulted in this ruling (SAC ¶ 52(b)(ii)), American and APA continued to hire TWA-LLC Staplees into new hire position ahead of FTPs. SAC ¶ 52(b)(iii). APA did nothing to protect the FTPs rights to these jobs. SAC ¶ 52(b)(iv).
3. American agreed to include the TWA-LLC Staplees in the extra service credits for "furloughed" American pilots, even though the TWA-LLC Staplees did not meet the definition of a furloughed American pilot. SAC ¶¶ 52(d), 52(e).
4. Arbitrations under the Flow-Through agreement held that American had breached the agreement by hiring TWA-LLC Staplees in preference to FTPs for new hire classes starting in 2007. SAC ¶ 53. See Exhibits C and D to American's Motion To Dismiss (Arbitration in FLO-0108).
5. Thereafter, American participated with APA in off-the-record discussions that resulted in changing the rights of FTPs to move to American and having these changes presented as if they were the result of a neutral arbitration. SAC ¶¶ 54, 55.[2] American agreed to this arrangement to avoid claims that APA breached its duty of fair representation and that American had breached its obligations under

[2] The changes to the Flow-Through Agreement included requiring 286 FTPs (out of 527 FTPs) to execute an irrevocable choice whether to take a position at American before any such position was available for them and requiring future flow-up to Ameican to be based solely on American seniority numbers rather than the one-for-two or priority hiring under the Flow-Through Agreement. SAC ¶¶ 54, 55.

the Flow-Through Agreement and the APA/American collective bargaining agreement. SAC ¶¶ 55, 56.[3]

American's favoritism of the TWA-LLC pilots, and particularly the Staplees, violated its contractual obligations under the APA/American collective bargaining agreement and its duties as stated in arbitration decisions. SAC ¶79. The Flow-Through Agreement was itself part of the APA/American contract as Supplement W. SAC ¶ 30. Additionally, Section 24.F of the contract prohibited any pilot covered by the contract "to accrue rights in abrogation of the terms of this agreement." SAC ¶¶ 20, 55. American's actions favoring the TWA-LLC Staplees allowed those pilots to accrue rights under the collective bargaining agreement in abrogation of the terms of the Flow-Through Agreement that had given the FTPs rights to new hire positions at American, abrogated the limitations on displacement of FTPs in a flow-down to American pilots who had been laid-off in a reduction in force by threating TWA-LLC Staplees as if they were furloughed American pilots and abrogated limitations on additional service credits to furloughed pilots by including the TWA-LLC Staplees in those credits, although they were not furloughed from American. See SAC ¶¶ 52, 54, 55, 79.

ARGUMENT

A. American Colluded With APA By Aiding and Abetting Its Discrimination Against The FTPs.

1. Summary of APA's discrimination and breach of the duty of fair representation.

APA's liability under its duty of fair representation turns on its bad faith, hostility and discrimination against the FTPs, and particularly its favoritism of the TWA-LLC Staplees over the interests of the FTPs. 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*

[3] The Flow-Through Agreement was itself part of the APA/American contract as Supplement W (SAC ¶ 30) and the Section 24.F of the contract additionally prohibited any pilot covered by the contract "to accrue rights in abrogation of the terms of this agreement." SAC ¶¶ 20, 55. American's actions favoring the TWA-LLC Staplees

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*, 731 F.3d 967, 984 (9th Cir. 2015).

Both the FTPs and the TWA-LLC Staplees were on the American seniority list. SAC ¶¶ 36, 38, 39, 40. Apart from an initial group of FTPs who had begun flying for American before September 2001 (SAC ¶37), the FTPs and the TWA-LLC Staplees had not been employed by or flow equipment for American; the FTPs were held back at American Eagle for operational reasons (SAC ¶ 38) and the TWA-LLC Staplees "were furloughed from TWA-LLC" and "[p]rior to being put on furlough, the TWA-LLC Staplees did not perform any work for AAL." SAC ¶

42. Both groups were equally entitled to APA's representation as to employment relations with American. SAC ¶¶ 43, 73.

APA's actions repeatedly favored the TWA-LLC Staplees and disfavored the FTPs. SAC ¶¶ 41-48, 52-56, 61-66. In repeated cases, APA undermined the contractual rights of the FTPs. For example, (a) APA negotiated agreements with American to treat TWA-LLC Staplees as if they were furloughed American pilots for purposes of the flow-down provisions of the Flow-Through Agreement and for extra service credits when the TWA-LLC Staplees were not furloughed pilots under the contract's definition of a furlough, (b) APA arranged with American to hire TWA-LLC Staplees ahead of FTPs contrary to the hiring provisions of the Flow-Through Agreement, notwithstanding arbitration decisions before such hiring that the hiring priority of the Flow-Through Agreement applied to the hiring of TWA-LLC Staplees, (c) APA tried to have the FTPs seniority numbers rescinded and (d) APA conducted secret negotiations to undermine a remedy for American's violation of the Flow-Through Agreement in hiring TWA-LLC Staplees ahead of FTPs and again change the terms of the Flow-Through Agreement adversely to the FTPs. APA refused to explain its actions to the FTPs when they asked for explanations or provided arbitrary and unreasonable explanations. SAC ¶¶ 57, 67-68, 70-71.

APA has always been hostile to the idea that American Eagle pilots would be flying regional jets because APA thought that threatened the jobs of American pilots. SAC ¶¶ 21, 24, 26, 27. APA has been hostile to the FTPs because the FTPs are less numerous than the TWA-LLC pilots, because APA wanted all jet aircraft to be flown by APA-represented pilots at American and because APA was biased in favor of mainline pilots and against regional airline pilots. SAC ¶ 76. APA also favored the TWA-LLC pilots because they had voted to have APA represent them while the American Eagle pilots had voted for ALPA rather than APA. SAC ¶ 77.

2. An Employer may be liable for a union's discrimination by aiding and abetting discrimination or participating in a union's discrimination.

When the Supreme Court first recognized a duty of fair representation in *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944), the Court held that the employer could not escape responsibility merely because the union had negotiated a discriminatory contract. The Court stated: "No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. … It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' [Citations omitted.]" *Id.* at 203-204.

(a) The standard for aiding and abetting liability requires knowledge of the union's wrongful conduct and substantial assistance to it.

Because the duty of fair representation arises under federal law, courts look to federal common law to determine issues of joint liability. See *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 n. 15 (7th Cir. 1998). Federal law has long recognized civil liability for aiders and abettors. In *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264-265 (9th Cir. 1996), the Ninth Circuit recognized that the aiding and abetting liability would apply to persons "who assist others in direct trademark infringement." *Id.* at 264. In finding such liability, the Ninth Circuit has looked to the Restatement (Second) of Torts for the appropriate standards. *Id.* at 265, citing *Hard Rock Café Licensing Corp. v. Concession Servs.*, 955 F.2d 1143, 1149 (7th Cir. 1992) and *Hard Rock*'s citation to Restatement).

The *Restatement (Second) of Torts*, Section 876 "Persons Acting In Concert," provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> * * *
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

The comments on "substantial assistance" under the *Reinstatement* note that assistance may be "so slight" as not to constitute substantial assistance. "The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered." Comment on Clause (b). Illustration 9 provides an example of such "slight" assistance negating liability: "A is employed by B to carry messages to B's workmen. B directs A to tell B's workmen to tear down a fence that B believes to be on his own land but that in fact, as A knows, is on the land of C. A delivers the message and the workmen tear down the fence. Since A was a servant used merely as a means of communication, his assistance is so slight that he is not liable to C." As discussed below, American's assistance in this case was far greater than such "slight" assistance illustrated in the Restatement.

Courts have described the "substantial assistance" element of aiding and abetting as requiring "the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Cromer Fin. Ltd. v. Berger,* 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001); *Neilson v. Union Bank of California,* 290 F.Supp.2d 1101, 1118, 1129-1130 (C.D.Cal. 2003) (substantial assistance requires that the defendants' actions be a "substantial factor" in causing the plaintiff's injury.). Ordinary business transactions can satisfy the substantial assistance element of an aiding and abetting claim if the party actually knew those transactions were assisting the commission of a specific tort. *In re First Alliance Mortgage Co.*, 471 F.3d 977, 995 (9th Cir. 2006).

(b) Under RLA decisions, an employer's knowing participation in a union's discrimination establishes liability.

Federal courts have applied similar standards for employer liability for a union's breach of the duty of fair representation. An employer, "can be joined as a party defendant if it "'acted . . . 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). In the 1957 decision in *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 *Richardson* 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 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) (allegations that union and employer "have been acting in concert . . . to set up schemes and contrivances to bar Negros from promotion wholly because of race.") and ibid (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.").[4]

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.*

[4] The allegations in *Glover* that the Supreme Court held were sufficient to show that the railroad was acting in concert with the union were: "In order to avoid calling out Negro plaintiffs to work as Carmen and to avoid promoting Negro plaintiffs to Carmen, in accordance with a tacit understanding between defendants and a subrosa agreement between the Frisco and certain officials of the Brotherhood has for a considerable period of time used so-called 'apprentices' to do the work of Carmen instead of calling out plaintiffs to so do said work as required by the Collective Bargaining Agreement as properly and customarily interpreted[.]" *Id.* at 325.

3. *Rakestraw* does not require a different standard for an employer's liability for colluding with a union.

American again asserts that the complaint must allege bad faith, hostility or discrimination by American towards the FTPs (AA Mem. pp. 4, 9) citing *Rakestraw v. United Airlines, Inc*., 765 F. Supp. 474, 493-94 (N.D. Ill. 1991), *aff'd on other grounds* 981 F.2d 1524 (7th Cir. 1992). American reads too much into *Rakestraw*, particularly as *Rakestraw* arose in the context of a full trial on the merits and decision by the court as trier of fact. 765 F.Supp. at 477.

All *Rakestraw* holds is that "Plaintiffs have failed to establish by a preponderance of the evidence that United acted in bad faith or discriminated against plaintiffs in accepting ALPA's proposal." The court noted that the airline ultimately acquiesced in the union's demands after resisting them for years and that that change "was not the result of hostility or contempt" for the complaining employees. *Id.* at 493-494. Rather, the airline "agreed to adjust the seniority of the [employees] a result of ALPA's increased leverage in negotiating the issue over the years." *Id.* at 494. The court made these findings and conclusions as a trier of fact.

The cases *Rakestraw* cites for employer liability for colluding in a union's breach of its duty of fair representation (*id.* at 493) do not indicate that *Rakestraw* intended a new standard for employer liability. In *Jones v. Trans World Airlines, Inc*., 495 F.2d 790, 798 (2d Cir. 1974), the Second Circuit described TWA culpability arising from its knowing agreement to contracts harming the employees in violation of the union's duty and the employee's contract rights:

> TWA shares the IAM's responsibility for the injury suffered by the appellant employees. It was the immediate cause of their injury. It displaced their names downward on the seniority roster. It participated in the negotiation of a seniority agreement that resulted in laying off four passenger relations agents in violation of seniority rights accrued under the pre-1970 contracts. It interpreted the 1970 contract, a document fair on its face, according to a tacit understanding with the IAM and so demoted and laid off the appellants. It delayed in informing the appellants of their precarious positions to the prejudice of their ability to preserve their seniority by joining the IAM before TWA announced that their jobs were vacant.

In *United Indep. Flight Officers v. United Air Lines*, 572 F. Supp. 1494, 1508 (N.D.Ill. 1983), the district court noted the general rule that an employer may be liable for colluding with the union,

but concluded that the union had not breached its duty of fair representation (*ibid.*), that the airlines "mere participation in collective bargaining negotiations with ALPA, in which plaintiffs' proposals were not realized, is not sufficient to hold United liable" and that the employees "have not demonstrated a factual basis upon which to infer the existence of collusion between United and ALPA". *Id.* at 1509. In the present case, the opposite inference is compelling: American colluded with APA through a series of agreements, tacit understandings or other actions that repeatedly discriminated against the FTPs in favor of the TWA-LLC Staplees and repeatedly changed or undermined the FTPs rights under both the Flow-Through Agreement and the terms of the APA/American collective bargaining agreement.

In sum, *Rakestraw* does not support American's argument that "collusion" in a union's breach of duty requires the employer to itself have bad faith, hostility or discriminatory motives towards the affected employees. Rather, collusion means a knowing that the union is breaching its duty and providing assistance to facilitate that breach. That is the aiding and abetting standard normally applied under federal common law and in the Restatement. That is also within the more-specific standard applied in cases under the RLA discussed above.

B. The Facts Alleged Show American's Liability For Colluding With or Aiding and Abetting APA's Discrimination.

1. The allegations show American's knowledge of APA's discrimination.

The first element of aiding and abetting or colluding liability is American's knowledge of APA's breach of duty. Knowledge is an element of aiding and abetting liability under the Restatement and under the cases arising under the RLA. The cases under the RLA go somewhat further, as they would apply both an actual knowledge and constructive knowledge standard. *Richardson v. Texas & N.O. R. Co.*, supra, 242 F.2d at 236 ("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."). That difference is not material here, as the facts show American's knowledge of APA's breach of duty. The complaint specifically alleges: "At all material times, AAL has known that that APA was hostile to the interest of FTPs and that APA and AAL were

discriminating against the FTPs and favoring other pilot groups, including the TWA-LLC pilots." SAC ¶ 78.

This is not a mere conclusion, but an allegation of fact. Moreover, the other facts alleged would permit a trier of fact to find that American knew that APA was breaching its duty of fair representation by discriminating against the FTPs.

1. APA has always been hostile to the idea that American Eagle pilots would be flying regional jets because APA thought that threatened the jobs of American pilots. SAC ¶¶ 21-27.
2. When American changed the agreement in 2003 to allow the TWA-LLC pilots to flow-down to American Eagle and displace FTPs from their jobs, American knew it was acting to harm the FTPs interests. This agreement changed the terms of the contract adversely to the FTPs. Under the contract (including the Flow-Through Agreement), flow-down rights applied only to (a) active American pilots who (b) were furloughed due to a reduction in force. The definition of "furlough" contained both requirements. SAC ¶ 18. The flow-down provisions of the Flow-Through Agreement applied only to pilots "furloughed from AA". SAC ¶ 32. The TWA-LLC Staplees who then took advantage of the flow-down provisions were never active American pilots and were laid off from TWA-LLC, not American, because of the merger and not a reduction in force at American.
3. After the May 11, 2007, ruling by Arbitrator. LaRocco, in Case No. FL0-0903 that the TWA-LLC Staplees were new-hire pilots for purposes of the Flow-Through Agreement, American ignored this ruling and proceeded to hire only TWA-LLC Staplees ahead of FTPs for the subsequent new hire positions. Again, it knew it was hiring TWA-LLC Staplees for positions that the arbitrator held should go to FTPs and that APA was ignoring the rights of the FTPs the arbitration had established.

4. After arbitrators concluded that American had violated the Flow-Through Agreement by hiring TWA-LLC Staplees in preference to FTPs, American participated with APA in secret off-the-record discussions that resulted in changing the rights of FTPs to move to American, undermining a full remedy for FTPs who had been discriminated against in favor of TWA-LLC Staplees who had benefitted from this discrimination and having these changes presented as if these were the result of a neutral arbitration. SAC ¶¶ 54, 55.[5] American agreed to this manipulation of the arbitration process in order to protect APA from duty of fair representation claims and to protect itself from breach of contract claims. SAC ¶¶ 55, 56. Again, American knew that APA was again disfavoring the FTPs by changing the terms of the Flow-Through Agreement adversely to their interests and by cutting back on the remedy for the FTPs who had been discriminated against to protect the interest of TWA-LLC Staplees.
5. In extending extra service credits for "furloughed" American pilots, American again knew that the FTPs were left out of this credit but the TWA-LLC Staplees were included. American knew that TWA-LLC Staplees did not meet the definition of a furloughed American pilot because (as noted previously) the TWA-LLC Staplees had never been active American pilots and had not been furloughed from American as part of a reduction in force. SAC ¶¶ 52(d), 52(e).

[5] The changes to the Flow-Through Agreement included requiring 286 FTPs (out of 527 FTPs) to execute an irrevocable choice whether to take a position at American before any such position was available for them, requiring future flow-up to American to be based solely on American seniority numbers rather than the one-for-two or priority hiring under the Flow-Through Agreement. SAC ¶¶ 54, 55. Nothing in the Flow-Through Agreement required irrevocable elections for only the most senior FTPs—a completely arbitrary requirement—and the Flow-Through Agreement had express provisions for hiring FTPs for new hire classes either on a two-for-one or priority basis, not on American seniority.

2. The allegations show American's substantial assistance to APA's discrimination beyond merely acceding to APA's bargaining demands.

The facts alleged in the complaint show substantial assistance to APA's breach of duty and discrimination against the FTPs. This assistance is not simply acceding to APA's negotiating demands as American argues. American's collusion with APA consisted of American's agreement to alter existing agreements, to ignore the requirements of arbitration decisions, to undermine remedies for violation of the FTPs rights and to give benefits to TWA-LLC Staplees they were not entitled to receive under the contractual language while denying these benefits to the FTPs. While some conduct occurred in a collective bargaining context, other conduct did not. For example, the hiring of TWA-LLC Staplees ahead of FTPs did not involve any collective bargaining context, but involved ignoring the FTPs' right to these jobs that arbitration decisions had established. Similarly, undermining the remedy for FTPs discriminated against in hiring did not involve collective bargaining, but collusion to undermine the contractual rights the FTPs had and a remedy for violation of those rights that they were entitled to receive.

American changed agreements to allow TWA-LLC pilots to displace FTPs at American Eagle contrary to the contractual definition of what constituted a furloughed American pilot. This agreement only helped the TWA-LLC pilots and only harmed the FTPs by abrogating the FTPs rights. This agreement was contrary to the existing contracts. The flow-down rights under the Flow-Through Agreement applied only to a "pilot furloughed from [American]" (SAC ¶ 32) which meant under the APA/American collective bargaining agree at the time this was negotiated, a pilot who was "remov[ed]. . . from active duty as a pilot with the Company without prejudice, due to a reduction in force" (SAC ¶ 18). The TWA-LLC Staplees did not meet this definition because they had been active American pilots and had not been furloughed from American as part of a reduction in force. SAC ¶¶ 52(d), 52(e).

American hired TWA-LLC Staplees ahead of FTPs for jobs in 2007 and later. The May 2007 arbitration ruling held that the FTPs were entitled to be hired for these positions under the

terms of the Flow-Through Agreement giving FTPs one-for-two or preferential hiring for these positions. See SAC ¶31. Whether American hired the TWA-LLC Staplees with an express or only a tacit understanding with APA, it was substantial assistance to APA's discrimination against the FTPs and favoritism of the TWA-LLC Staplees. This was, again, the kind of employer assistance that implicated the employer in the union's breach of duty. See *Jones v. Trans World Airlines*, supra, 495 F.2d at 798 (finding employer participation in breach of union's duty by employer's agreement to change employees' seniority rights that had vested under a prior contact).

American joined with APA in the secret off-the-record meeting on the remedy for its discrimination. This secret meeting developed a "remedy" that undermined a full remedy for the FTPs who had been discriminated against and altered FTPs rights under the Flow-Through Agreement in an arbitrary way to the FTPs detriment. Requiring only the 286 most-senior FTPs (out of 527) to execute irrevocable decisions whether or not to flow-up to American is entirely arbitrary and has the only apparent purpose of cutting down the number of FTPs entitled to flow-up to American by disqualifying those FTPs who would not sign. Basing future flow-ups on American seniority changes the one-for-two or priority flow-up required under the Flow-Through Agreement to a seniority-based flow-up. Allowing laid off TWA-LLC Staplees who were hired in preference to FTPs to go back to American before the FTPs who were discriminated against simply favors the TWA-LLC Staplees at the expense of the FTPs. Neither American nor APA had a right to manipulate an arbitration to undermine the rights the FTPs had under prior decision or under the Flow-Through Agreement.

American entered into contracts that gave service credits for TWA-LLC Staplees for time they were unable to work at American. The TWA-LLC Staplees, either by an express agreement with APA or a tacit agreement, were treated as if they were furloughed American pilots and therefore entitled to the service credits for furloughed pilots. As discussed above, the TWA-LLC Staplees did not meet the contractual definition of a furloughed American pilot because they had never been active American pilots. The FTPs did not get these credits, although FTPs had also

been unable to work at American during the same period of time and, like the TWA-LLC Staplees, had not been active American pilots for purposes of the contractual definition of being a furloughed pilot.

This behavior goes far beyond merely acceding to APA's negotiating demands. Rather, APA's negotiating demands were all based on a known policy and pattern of discrimination against the FTPs and favoritism of the TWA-LLC pilots.

APA and American used the negotiating process to undermine the rights of FTPs under the Flow-Through Agreement and prior arbitration awards. This is beyond arms-length bargaining. *Jones v. Trans World Airlines*, supra, 495 F.2d at 798.

American and APA used off-the-record discussions with the arbitrator in FLO-0108 to undermine the FTPs' rights established in arbitration decisions. This is beyond any legitimate collective bargaining. As the Circuit court in *Chambers v. Local Union No. 639*, 578 F.2d 375, 383 (D.C.Cir. 1978) explained, a union and employer have no right to alter a grievance result to undermine the employees' rights established in that grievance: "[T]he April 9, 1973 grievance decision meant what it said, that it had a clear basis in the contract for deciding that Tuxedo employees could exercise company seniority and bump *into* Grand Union jobs, and that the union resisted that grievance decision and improperly attempted to use the second grievance as a vehicle for overturning the earlier decision. It had no right to do this. Both the company, as well as the union, were bound by the decision on the first grievance, and the rights of the employees which were finally adjudicated in that grievance must be respected."

The most recent discrimination in service credits is part and parcel of this long-standing pattern. Once again, American and APA reached an agreement or understanding that FTPs would be excluded from this benefit but TWA-LLC Staplees would be included. Once again, this discrimination was accomplished by an express or tacit understanding where TWA-LLC Staplees would be considered as "furloughed" American pilots to qualify for the extra service credits even though the TWA-LLC Staplees did not meet the definition of a furloughed pilot in

the contract. FTPs, on the other hand, who were equally unable to work at American during this period, were denied similar credits.

C. American's Contention That Plaintiffs Are Trying To Re-litigate Arbitration Decisions Misses The Point That These Decisions Are Evidence of the Pattern Of Discrimination Against the FTPs By American and APA.

American argues that plaintiffs are trying to re-litigate arbitration decisions. AA Mem. pp. 6-9. Plaintiffs' use of these decisions is not an effort to re-litigate them, but to use these decisions as evidence of the pattern of discrimination by American and APA against the FTPs and to favor the TWA-LLC Staplees.

The significance of the May 2007 liability decision in FLO-0903 is that APA and American ignored the decision that TWA-LLC Staplees were equivalent to new hire pilots for purposes of the operation of the Flow-Through Agreement. This meant that the FTPs were entitled to either one-our-of-two new class places or (if the FTPs had been held back at American Eagle) priority for new hire classes. SEC ¶ 31. Instead, American and APA agreed to hire the TWA-LLC Staplees in preference to the FTPs. SAC 52(b).

Similarly, the secret meeting as to the remedy in FLO-0108 (SAC ¶¶ 54-56) is not an effort re-litigate the remedy—plaintiffs were not even parties to this arbitration and had no ability to litigate this remedy at all—but to present evidence of facts showing APA and American's collusion in undermining a remedy for harm to the FTPs in a way that took away the FTPs existing rights and favored the TWA-LLC Staplees.

American suggests that plaintiffs should have directly challenged Nicolau's remedy decision in FLO-0108 (AA Mem. p. 8:17-20). In fact, the FTPs attempted to do exactly that. They were rebuffed by the Fifth Circuit holding that the FTPs lacked standing to challenge Nicolau's award directly. *Mackenzie v. Air Line Pilots Ass'n*, 598 Fed. Appx. 223, 2014 U.S. App. LEXIS 2438 (5th Cir. 2014 No. 11-11098), cert. denied 135 S. Ct. 2896. American was a party to that appeal and represented by counsel in it. *Id.* at p. 223.

CONCLUSION

The Court should deny American's motion to dismiss. The SAC properly alleges that American knew of APA's breach of its duty of fair representation and colluded with by giving APA substantial assistance in APA's breach of duty. The SAC alleges far more than American merely acceding to APA's legitimate bargaining demands. American acted contrary to the terms of its bargaining agreements, the Flow-Through Agreement and arbitration decisions. American's actions consistently favored the TWA-LLC Staplees and disfavored the FTPs and undermined the FTPs rights to a degree that a trier of fact could properly conclude that American was not merely acceding to legitimate union bargaining demands, but knowingly joining in APA's discrimination against the FTPs..

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