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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 persons similarly situated,

Plaintiffs,

v.

ALLIED PILOTS ASSOCIATION; and AMERICAN AIRLINES, INC.,

Defendants.

Case No. 3:15-cv-03125-RS

DEFENDANT AMERICAN AIRLINES, INC.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT ONE OF THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)

Hearing Date:	March 17, 2016
Time:	1:30 P.M.
Place:	Courtroom 3, 17th Fl.
Judge:	Hon. Richard Seeborg

PRELIMINARY STATEMENT

This Court granted American's[1] FAC Motion based on its conclusion that the "detailed allegations of the [FAC]" were insufficient to state a claim that American had colluded in Co-Defendant APA's alleged breach of APA's DFR towards the Plaintiffs-FTPs. The Court allowed Plaintiffs to file a SAC, while expressing skepticism that an opportunity to amend would save Count One from dismissal as to American. (Order [ECF No. 37] at 6.) This skepticism is borne out in the Plaintiffs' SAC and SAC Opposition (ECF Nos. 38 and 41), which largely repeat the allegations and arguments contained in Plaintiffs' FAC and FAC Opposition.

As in their FAC Opposition, Plaintiffs' contention that a hodgepodge of purported legal theories can be applied to establish an employer's liability for a union's breach of its DFR fails in light of the well-established and sound conclusion that an employer can only be potentially held liable for a union's breach of the union's DFR where the employer itself engaged in independent discriminatory conduct vis-à-vis the plaintiffs. This Court has already made clear that allegations of an employer's knowledge of a union's discriminatory intent are insufficient to establish collusion in the union's DFR breach. The relevant case law has not changed in the 2+ months since this Court's prior Order, and Plaintiffs' argument that the Court should re-evaluate its prior ruling based on an "aiding and abetting" standard from the Restatement (Second) of Torts finds no support in the judicial decisions or the RLA. Therefore, Plaintiffs' effort to save Count One from

[1] This Reply uses the following short-form references: American Airlines, Inc. ("American" or "Company"); Allied Pilots Association ("APA"); American Eagle, Inc. ("American Eagle"); Air Line Pilots Association ("ALPA"); First Amended Complaint ("FAC"); Second Amended Complaint ("SAC"); American's Motion to Dismiss Count One of the FAC ("FAC Motion"); Plaintiffs' Opposition to FAC Motion ("FAC Opposition"); American's Motion to Dismiss Count One of the SAC ("SAC Motion"); Plaintiffs' Opposition to SAC Motion ("SAC Opposition"); Order Granting Motion to Dismiss, With Leave to Amend ("Order"); Flow-Through Pilots ("FTPs"); duty of fair representation ("DFR"); Railway Labor Act ("RLA"); and collective bargaining agreement ("CBA").

dismissal as to American turns on whether the SAC contains new and sufficient factual allegations.

The Plaintiffs' SAC Opposition, however, does not direct the Court to any specific allegations which were absent in the FAC and which should cause this Court to reconsider its dismissal of Count One as to American. While the SAC does include a handful of new and/or revised allegations as to American, these either add immaterial details to allegations of standard collective bargaining negotiations that were previously held to be insufficient or raise previously-litigated "minor disputes" that have already been addressed pursuant to the procedures mandated by the RLA. And, regardless, none of these allegations state a claim for collusion by American, because none of them allege that American acted out of bad faith, discrimination, or hostility towards the FTPs.

Because Plaintiffs have not stated a claim against American for collusion in APA's alleged breach of DFR, the claim asserted against American in Count One of the SAC should be dismissed in its entirety with prejudice.[2]

ARGUMENT

I. PLAINTIFFS' ATTEMPTS TO REDEFINE THE CONTROLLING LEGAL STANDARD FOR EMPLOYER COLLUSION IN A UNION'S ALLEGED DFR BREACH HAVE ALREADY BEEN REJECTED BY THIS COURT.

In their FAC Opposition (ECF No. 32), Plaintiffs posited a variety of theories under which an employer supposedly could be held liable for a union's breach of its DFR even though the employer had not itself engaged in any discriminatory conduct.[3] In

[2] As noted in the Order, American does not object to being joined to Count Two of the SAC for the limited purpose of effectuating the remedy proposed by Plaintiffs. (*See* Order at 2 n.1.) But to be clear, Plaintiffs' challenge to the seniority-integration process in Count Two is meritless, no viable claim has been or could be asserted against American with respect to the seniority-integration process, and Plaintiffs are entitled to no relief whatsoever.

[3] The Plaintiffs' proffered formulations included situations where the employer: "aid[ed] and abet[ted] a union's breach of duty" (FAC Opp. at 11); "actively participated in the [union's] breach" (*id.* at 9); was "an active agent in effectuating the Union's breach" (*id.* at 11); "acted . . . with knowledge that the [union] was discriminating" (*id.* at 9); "knew, or should have known, of the union's breach of duty when entering into [] agreements" (*id.* at 13); acted "only [as] a consequence of the union's discriminatory conduct" (*id.* at 9); and acted in "the form of joint discrimination" with the union. (*Id.*)

granting American's prior motion to dismiss, the Court stated that the "detailed allegations of the [FAC], and the nature of the arguments [Plaintiffs] offered in opposition to the present motion ***strongly suggests*** that [Plaintiffs'] attempt to hold American liable in damages under the first claim for relief fails ***because this order rejects the legal premise of the claim***, rather than because there are facts supporting liability that exist, but which they did not plead." (Order at 6) (emphasis added).

The Court's observations have proved to be well-founded, as Plaintiffs in their SAC Opposition have done little more than repackage the same hodgepodge of purported legal standards for employer liability that were raised before. (*See* SAC Opp. at 9-12.) But this Court already rejected Plaintiffs' theories in its prior decision, and the law has not changed since the Order was issued on December 17, 2015. When determining if an employer can be held liable for a union's breach of its own duty of fair representation, "conduct that rises to the level of 'collusion' almost certainly suffices" – but "acced[ing] to the demands of the Union, even with knowledge of facts from which it might be inferred that the Union was not fulfilling its duty of fair representation to all of its constituents," does not. (Order at 5.)

In their SAC Opposition, Plaintiffs concede that, under the Court's prior Order as well as the *Rakestraw* decision discussed therein, there must be an adequate allegation of collusion between American and the APA in the APA's alleged breach of DFR, but then they inexplicably argue that collusion should be defined in accordance with an "aiding and abetting standard" from the ***Restatement (Second) of Torts.*** (*See* SAC Opp. at 9-10, 14.) However, the Supreme Court has made clear that, absent some manifestation of Congressional intent, there is no implied private cause of action for aiding and abetting another party's violation of a federal statute. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180-185 (1994).[4] Plaintiffs cite no

[4] With respect to the "aiding and abetting" standard set forth in Section 876 of the Restatement (Second) of Torts, and invoked by Plaintiffs, the Supreme Court has observed that

provision of the RLA creating aiding and abetting liability for a union's breach of DFR, and there is none. As the Supreme Court has noted, when "'Congress wishe [s] to create such [secondary] liability, it ha[s] little trouble doing so.'" *Id.* at 184. Accordingly, courts "should presume that Congress does not create a cause of action for aiding and abetting unless it specifically says so in the text." *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1090 (N.D. Cal. 2015).

The controlling legal standard for potentially holding American liable for the APA's alleged breach of DFR – namely, "collusion," as applied in the Court's prior Order as well as in *Rakestraw v. United Airlines, Inc*., 765 F. Supp. 474, 493-94 (N.D. Ill. 1991), *aff'd in relevant part, rev'd in part*, 981 F.2d 1524 (7th Cir. 1992) – requires independent discriminatory conduct on the part of the employer. *Rakestraw* applied that requirement, concluding that although the carrier was well-aware of the union's animosity towards the plaintiffs, and although the carrier acted with that knowledge in accepting union proposals that negatively impacted the plaintiffs' seniority, the plaintiffs had not established that the carrier could be held liable for the union's DFR breach because the carrier itself had not acted with "hostility or contempt" toward the plaintiffs. 765 F. Supp. at 493-494. *See also* Order at 5 (*Rakestraw* "does support the notion that merely agreeing to a union's contractual demands, even with knowledge that the union may not be advocating for all its members fairly, is not a sufficient basis for imposing liability on an employer."). Nothing in Plaintiffs' SAC Opposition undermines the applicability of the legal standard set forth in *Rakestraw* and this Court's Order.[5]

"[t]he doctrine has been at best uncertain in application," where "the leading cases applying this doctrine are statutory securities cases, with the common-law precedents 'largely confined to isolated acts of adolescents in rural society.'" *Id.* at 181 (citation omitted).

[5] Plaintiffs claim that two cases cited without discussion in *Rakestraw* suggest that *Rakestraw* did not "intend[] a new standard for employer liability." (SAC Opp. at 13 [citing *United Indep. Flight Officers v. United Air Lines*, 572 F. Supp. 1494 (N.D. Ill. 1983) ("*UIFO*"), and *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974)].) It is irrelevant whether the collusion standard applied in *Rakestraw* was "new," and mistaken for Plaintiffs to argue that these two decisions support their position. In *UIFO*, the court rejected a collusion claim that – stripped of other conclusory allegations of wrongdoing – was based on the carrier's "mere

II. THE SAC DOES NOT CONTAIN ALLEGATIONS OF INDEPENDENT DISCRIMINATORY CONDUCT BY AMERICAN.

In order to avoid dismissal, the SAC must contain allegations, which were absent in the FAC, that state a claim for collusion against American. In their SAC Opposition, Plaintiffs do not identify any such allegations and, in any event, none of the SAC's allegations support a claim that American itself acted out of hostility or a discriminatory motive towards the FTPs.[6]

With respect to American, the SAC and SAC Opposition focus on a pair of arbitration decisions that were issued by RLA Boards of Adjustment in 2007 and 2009: FLO-0903 and FLO-0108.[7] Importantly, however, although Plaintiffs assert that American joined APA in discriminating against the FTPs in the context of these two arbitration decisions, they make no allegation that a discriminatory intent ***by American*** was the basis for American's conduct. Moreover, Plaintiffs' specific allegations represent nothing more than an impermissible attempt to re-litigate "minor disputes" which have already been extensively litigated and addressed through the defined channels prescribed in the RLA.

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participation in collective bargaining negotiations with [the union], in which plaintiffs' proposals were not realized." 572 F. Supp. at 1509. In *Jones*, there was "discrimination in seniority based on nothing else but union membership" and the court concluded that the carrier was "the immediate cause of [the employees'] injury" after the carrier moved them down on the seniority list, breached certain CBAs, wrongly applied another CBA based on a "tacit understanding" with the union, and wrongfully discharged employees. 495 F.2d at 797-798. Both decisions are consistent with *Rakestraw*'s holding that liability requires independent discriminatory conduct by the employer.

[6] As in the SAC Motion, American here only addresses Plaintiffs' allegations and arguments that are new and/or revised relative to the FAC. American otherwise incorporates by reference its briefing with respect to the FAC Motion. (*See* ECF Nos. 28, 33.)

[7] Plaintiffs' allegations regarding the 2003 flow-down agreement for TWA pilots and the 2015 agreement regarding length of service credits for furloughees are materially indistinct from the allegations in the FAC (*compare* FAC ¶¶ 22-24, 27 *with* SAC ¶¶ 47, 52), and, in any event, allege nothing more than an employer "acceding to union demands" as part of the collective bargaining process. *See* Order at 5.

First, Plaintiffs' allegation that American "ignored" a May 2007 ruling by Arbitrator John LaRocco in FLO-0903, because the Company continued hiring former TWA pilots after his ruling, is flatly contradicted by the arbitration decisions in question.[8] In FLO-0903, Arbitrator LaRocco held that certain TWA pilots were "equivalent to new hires," but he expressly declined to resolve the question of whether his ruling entitled American Eagle pilots (such as the FTPs) to equivalent new hire positions in American training classes, stating that he lacked jurisdiction to make such a determination. *See* SAC Motion Ex. B at 30-32 (ECF No. 42-2) ("Nothing in the stipulated issue or the grievance even remotely suggests that the remedy encompasses reordering the [American] seniority list or moving the [Commuter Jet] Captain to immediate [American] employment."); *see also* SAC Motion Ex. C at 2 (ECF No. 42-3) ("[Arbitrator LaRocco] refused to answer the 'new hire class slots' question, saying he had no jurisdiction to do so . . ."). Indeed, this procedural fact was stated clearly by the Fifth Circuit in a decision cited by Plaintiffs. *See MacKenzie v. Air Line Pilots Ass'n Int'l*, 598 F. App'x 223, 225 (5th Cir. 2014), *cert. denied* 135 S. Ct. 2896 ("The arbitrator declined to resolve the issue of whether [American] Eagle pilots were entitled to positions in training classes at American instead of the TWA pilots designated as new hires, concluding that he lacked jurisdiction to provide the appropriate answer.") (cited in SAC Opp. at 20). Plaintiffs' tactical decision in the SAC Opposition to ignore the indisputable reality of Arbitrator LaRocco's ruling in FLO-0903, and to instead repeatedly claim that American (and APA) "ignored" that ruling, is disingenuous at best and, in any event, provides no support for their claim of collusion by American.

Second, Plaintiffs allege that American engaged in "secret off-the-record discussions" with Arbitrator George Nicolau and the other parties to the FLO-0108

[8] Plaintiffs do not contest that these arbitration decisions were properly attached to the SAC Motion, without converting the Motion into a motion for summary judgment. (*See* SAC Motion at 6, n.3.)

arbitration, and that, as a result of those alleged discussions, Arbitrator Nicolau presented provisions of a settlement between the parties "as if they were the result of a neutral arbitration." (SAC Opp. at 5, 16.) As with FLO-0903, FLO-0108 involved a "minor dispute," and was therefore submitted to Arbitrator Nicolau pursuant to the "mandatory, exclusive and comprehensive" jurisdiction of an RLA Board of Adjustment. (SAC Motion at 7.) Not only does the RLA set forth the exclusive mechanism for challenging a Board of Adjustment's award, *see* 45 U.S.C. §§ 153, First (p) & (q), 184, but a group of FTPs actually tried – and failed – to challenge Arbitrator Nicolau's award in accordance with those procedures.[9] In *MacKenzie*, plaintiffs filed suit in federal district court, seeking to set aside Arbitrator Nicolau's remedy decision on the ground that he acted outside the scope of his jurisdiction in fashioning the remedy. *See MacKenzie v. Air Line Pilots Ass'n Int'l*, No. 3:10-CV-2043-P, 2011 WL 5178270, at *2 (N.D. Tex. Oct. 31, 2011). The district court rejected the plaintiffs' challenge, finding that "Nicolau issued a thoughtful, thorough, and detailed remedy opinion that evinced his consideration of all Parties' concerns and demonstrated his efforts to accurately identify the issues and resolve the Parties' disputes." *MacKenzie*, 2011 WL 5178270 at *4. The Fifth Circuit ultimately dismissed plaintiffs' appeal, finding, *sua sponte*, that plaintiffs lacked standing to challenge the arbitration award, because their claim was brought individually, rather than by ALPA, the plaintiffs' certified bargaining agent. 598 F. App'x at 225-226.[10] Plaintiffs' cannot here re-litigate a "minor dispute" simply because they disagree with a Board of Adjustment's ruling, or because their request for review was "rebuffed by the Fifth Circuit." (SAC Opp. at 20.) Plaintiffs' allegations regarding FLO-0108 do not support an inference of discriminatory conduct by American vis-à-vis the FTPs, and therefore do not state a claim for collusion against American.

[9] Plaintiffs in *Mackenzie* were two FTPs who brought their claims individually and on behalf of similarly situated pilots. *See* 598 F. App'x at 224.

[10] In fact, ALPA, along with American and American Eagle, was a party to the motion to dismiss the FTPs' challenge to Arbitrator Nicolau's award. *MacKenzie*, 2011 WL 5178270 at *1.

CONCLUSION

For the foregoing reasons, Defendant American Airlines, Inc. respectfully requests that this Court dismiss with prejudice Count One of the Second Amended Complaint as to American.

Dated: February 29, 2016.

Respectfully submitted,

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