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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 **MEMORANDUM IN OPPOSITION TO MOTION OF ALLIED PILOTS ASSOCIATION FOR SUMMARY JUDGMENT** April 21, 2016 1:30 P.M. Courtroom 3, 17th Floor Judge Richard Seeborg

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INTRODUCTION

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). 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). In the fair representation context, bad faith may be shown by "substantial evidence of fraud, deceitful action or dishonest conduct." *Ibid.* Motive and bad faith are factual issues for trial. *Banks v. Bethlehem Steel Corp.*, 870 F.2d 1438, 1144-1145 (9th Cir. 1989). The facts in this case show discriminatory conduct, arbitrary action and bad faith that preclude summary judgment.

Since 1997 when the Allied Pilots Association (APA) threatened to strike to get the regional jets for APA-represented pilots at American Airlines ("American"), APA has considered the American Eagle ("Eagle") pilots as scabs and job stealers. APA has repeatedly frustrated the efforts of Eagle pilots to flow-up to American under the Flow-Through Agreement ("FTA") and expanded the ability of other pilots—particularly the TWA-LLC Staplees—to flow-down to Eagle to take Eagle pilots' jobs. APA has repeatedly undermined the ability of the Eagle pilots who were entitled to flow-up to American—the Flow-Through Pilots ("FTPs")—to flow up to American jobs. For example,

- APA renegotiated flow-down rights for TWA-LLC pilots to expand these pilots ability to take jobs at Eagle and displace Eagle pilots. APA Exh. 10 (LaRocca Arbitration award on merits in FLO-0903) at pp. 9-10, 16-17.[1]
- APA sought to have the FTPs American seniority numbers voided even though nothing in either the FTA or the collective bargaining agreement (CBA) provided for such a result. FLO-0107 [APA Exh. 14] at pp. 7, 10, 11-12.

[1] The factual findings in these various arbitrations are admissible as collateral estoppel against APA and American. *C.D. Anderson & Co, v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987); *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985).

- APA has refused to abide by arbitration decisions favoring the FTPs. When Arbitrator LaRocco determined in May 2007 that the TWA-LLC Staplee pilots were new hire pilots so that the priority hiring for FTPs had to apply if the Staplees were offered jobs (APA Exh. 10), APA and American ignored his ruling and proceeded to hire Staplees and not FTPs to new hire positions. See APA Exh. 12 at pp. 2-3; Pltf. Exh. 4 at p. 3.[2]
- APA colluded with American and other parties to the FTA to implement a settlement that took away FTPs rights under prior arbitration awards and disguise that settlement as if it were a decision by a neutral arbitrator. Declaration of Gavin Mackenzie In Opposition to APA Motion for Summary Judgment ("Mackenzie Decl.") ¶¶ 17-19, 21-22.
- APA has refused to respond to FTPs requests for information or explanations of APA's actions. Declaration of Gregory R. Cordes In Opposition to APA Motion for Summary Judgment ("Cordes Decl.") ¶¶ .[3]

SUMMARY OF THE FACTS

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"), and the unions representing pilots at American (APA) and pilots at the American Eagle regional airlines (ALPA). Declaration of Gregory R. Cordes In Opposition to APA's Motion for Summary Judgment ("Cordes Decl.") ¶¶ 3, 4; Declaration of

[2] In *Addington v. US Airline Pilots Association*, 791 F.3d 967, 989-990 (9th Cir. 2015), the Ninth Circuit held that a union's efforts "to free [one employee group] from the consequences of the arbitration to which they were bound" was "blatantly discriminatory" and "outside the 'wide range of reasonableness'" afforded unions.

[3] Responding to union members' reasonable request for information and documents is a part of a union's duty of fair representation. *NLRB v. Carpenters Local 608*, 811 F.2d 149, 153 (2nd Cir. 1987); *Auto Workers Local 909*, 325 NLRB 859, 865 (1998).

Gavin Mackenzie In Opposition to APA's Motion for Summary Judgment ("Mackenzie Decl.") ¶¶ 2, 4; APA Exhibit . The Flow-Through Agreement was negotiated and signed in May 1997 and incorporated into the collective bargaining agreements at American and American Eagle. Cordes Decl. ¶ 2.

The Flow-Through Agreement arose from a dispute between APA and American over American's plans to fly regional jet aircraft by American Eagle carriers. Second Amended Complaint ("SAC") ¶ 24, admitted in APA Answer to Second Amended Complaint ("APA Answer") ¶ 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, admitted in APA Answer ¶ 26. On March 19, 1997, the Presidential Emergency Board ("PEB") convened under the Railway Labor Act ("RLA") rejected APA's demand that regional jets be flown by American pilots. Exhibits Submitted In Opposition To APA Motion for Summary Judgment ("Opp. Exh.") Exhibit 24 at p. 10, 17-21. 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. APA Exh. 1, Paragraphs III.A, Paragraph IV.A .

Under the Flow-Through Agreement, American Eagle pilots were 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. Mackenzie Decl. ¶¶ 4, 5, 6; APA Exh. 1, Paragraphs III.A, III.B, III.D.

B. American's Acquisition of TWA In 2001 and The Discrimination Against FTPs.

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. At some point after April 3, 2002, the TWA-LLC pilots were integrated into the AAL Pilot System Seniority list. 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"). Thereafter, the TWA-LLC Staplees were furloughed directly from TWA-LLC before they had performed any work for American. Pltf. Exh. 4, pp. 12-18, 45.

The addition of the TWA pilots resulted in a series of arbitrations as to their status. Cordes Decl. ¶ 18. These arbitrations determined that the TWA-LLC Staplees were new hire pilots who could not displace the FTPs from moving to American. Cordes Decl. ¶ 19. Notwithstanding this holding, APA and American hired the Staplees in preference to the FTPs and attempted to undermine the rights of the FTPs under the FTA and these arbitrations. Cordes Decl. ¶¶ 20-21; Mackenzie Decl. ¶¶ 15-17, 19-21, 23-24.

Similarly, the attitude of APA has been one of hostility to Eagle pilots. APA believes that the FTPs' assertion of their rights puts TWA pilots "on the street." Mackenzie Decl. ¶ 21(b)(ii) and Pltf. Exh. 9 (AA-001851). APA has refused to even consider negotiating LOS credits for FTPs. Cordes Decl. ¶ 36. APA pilots have accused the Eagle pilots of being inferior pilots, not good enough to fly for American and should never have been allowed to fly the regional jets. Cordes Decl. ¶ 14; Declaration of Phil Valente in Oppostiion to APA Motion for Summary Judgment ("Valente Decl.") ¶¶ 10, 11. APA pilots have accused Eagle pilots of being "job stealers" and "scabs". Valente Decl. ¶12. APA officials have refused to respond to questions by FTPs concerning APA's willingness to fight for FTPs interests. Valente Decl. ¶¶ 14, 15.

ARGUMENT

I. THE FLOW-THROUGH PILOTS ON THE AMERICAN SENIORITY LIST ARE PART OF THE BARGAINING UNIT REPRESENTED BY APA .

APA argues that the FTPs were not part of the bargaining unit—and APA had no duty towards them—until the FTPs began flying for American. From this premise, APA appears to contend that favoritism of the TWA-LLC pilots was legitimate and cannot show a breach of the duty of fair representation. APA errs in multiple respects.

1. APA's breach of duty occurred when FTPs were at American.

First, when APA did not seek LOS credits for FTPs in the negotiations for the 2015 CBA, including the negotiations for Letter G, the FTPs were flying for American and in the bargaining unit even under APA's argument. Accordingly, APA was acting in representing existing bargaining unit member.

As shown below, APA engaged in multiple breaches of its duty after FTPs began flying for American. APA refused to respond to the FTPs legitimate requests for information, APA refused to investigate the merits of the FTPs position, APA engaged in favoritism of other employees (the TWA-LLC Staplees and the US Air pilots) that were similarly-situated to the FTPs and APA relied on an arbitrary distinction between furloughed pilots and the FTPs that is unsupported by the contractual language and contrary to the prior arbitration awards in FLO-108 and FLO-0903.

As also shown below, APA has a long history of acting in bad faith towards FTPs and Eagle pilots generally. APA believed that American, not Eagle pilots, should have flown the regional jets and that the Eagle pilots flying regional jets were "job stealers." This attitude continued from 1997 to the present, exemplified by APA's arbitrary and discriminatory attitude that Eagle pilots were inferior to American pilots, should be thankful that they can get a job at American at all and should just shut up and take what they are given. The prior favoritism of TWA-LLC pilots is background evidence showing this pattern of discrimination and bad faith. It

is relevant for those purposes even if it occurred at times FTPs were not part of the APA bargaining unit under APA's theory of who was in the unit.

2. The bargaining unit includes pilots who had reasonable expectations of employment with American that APA frustrated by favoring TWA-LLC Staplees.

Second, as to APA's theory that the bargaining unit only includes pilots who began flying for American is contrary inconsistent with APA's own actions and contrary to the settled rule is that employees with reasonable expectations of employment are within the bargaining unit.

(a) Under APA's theory, the TWA-LLC Staplees would not be entitled to APA's representational duties.

The TWA-LLC Staplees were not active pilots at American. At best, they were the equivalent to applicants for employment. Arbitrtor LaRocco found in FLO-0903 (Pltf. Exh. 4 t p. 45; Cordes Decl. ¶ 19):

> [M]any former TWA pilots, including several pilots subject to the 1:8 ratio in Supplement CC, neither performed any active service at AA nor were trained at AA. * * * Pilots who did not commence active employment at AA in conjunction with merger are equivalent to new hires because positions are no longer being established or filled due to the acquisition.[17]

[17] The stapelees are identical to a large pool of successful applicants (for employment) since they will not obtain AA positions stemming from the TWA acquisition.

Notwithstanding this holding that is binding on APA,[4] APA has asserted that it had a duty to represent the TWA-LLC Staplees as part of its duty of fair representation and had no similar duty to the FTPs. The TWA-LLC Staplees were only on the American seniority list with contract rights (Supplement CC) to be hired by American in the future as jobs opened up. Section II.D of Supplement CC expressly recognized that the Staplees would only be hired as new hire positions materialized, providing: "After furloughed pilots (if any) have been recalled and new pilot positions become available, American will offer employment, in seniority order, to

[4] See *Addington v. US Airline Pilots Association*, supra, 791 F.3d at 989-990.

all pilots who were hired by American after April 10, 2001 but who had not been assigned to air line flying duty as of October 1, 2001."

In this sense, the Staplees are no different that FTPs. The FTPs were on the American seniority list and had contract rights under the FTA to be hired by American. It is arbitrary to assert a duty to represent the Staplees and disclaim a duty to represent FTPs where both groups are identically-situated as to their right to go to American.

APA cannot claim that the expansion of the NMB certification to include TWA-LLC affects this situation. The FTPs were already on the American seniority list when APA's certification was expanded to include TWA-LLC pilots in April 2002. APA does not claim that the NMB certification included non-flying Staplees and excluded FTPs. Indeed, the NMB certification is silent on this issue. It states only that the "appropriate craft or class is Flight Deck Crew Members" of the combined operation. 29 NMB 260 at p. 3. If, as APA contends, that craft or class certification included the Staplees who had not flown for American but had contractual rights to be hired when new hire classes opened up, than it equally included the FTPs who were on the American seniority list and also had the contractual right to move to American. It is baffling to find any logic in APA's position that Supplement CC means that it represents Staplees with American seniority numbers but Supplement W to the same CBA does not mean that APA represents the FTPs with American seniority numbers.

(b) A reasonable expectation of employment qualifies an employee as a bargaining unit member.

In *Nashville C. St. L. R. v. Railway Employees Dept. A.F.L.*, 93 F.2d 340, 342-343 (6th Cir. 1937) cert. denied 303 U.S. 649, the court held that furloughed employees with the expectation of recall were entitled to vote in any election to certify a union as their representative under the Railway Labor Act ("RLA"). The Sixth Circuit held that furloughed employees, who were maintained on the seniority list, retained an interest in labor conditions that justified including them in the voting unit in order to further the RLA's purpose that employment conditions be subject to resolution through collective bargaining (*id.* at 343):

> Those who by agreement retain their seniority rights, which entitle them to preference in reinstatement, and by such agreement not only possess rights but are subject also to obligations, have not only a future but a present interest in all negotiations which affect the hours of labor, rates of pay and working conditions governing the craft in which they have long been schooled and disciplined. Outside their craft they would fall generally into the ranks of the unskilled, and as we have seen, the craft and not a more temporary group is the statutory unit for negotiation. The very emphasis laid by the appellant upon the conflicting interests in an election between those presently working and those temporarily suspended but serves to demonstrate this present interest, and it is not without importance in this connection that the furloughed men whose votes in the election were challenged were all back at work when the case was tried below.

In *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586, 588 (2d Cir. 1941) extended this rule to cases where there was no contractual obligation to rehire, but only a past practice of doing so. The Second Circuit held: "In our opinion the mutual expectation of re-employment justified the Board in treating the employee relationship of the laidoff men as continuing." *Id.* at 588.

The reasonable expectation of employment was also critical in the Supreme Court's decision that retirees are not bargaining unit members in *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (herein *Pittsburgh Plate Glass*). Thus, in *Pittsburgh Plate Glass* the Supreme Court distinguished between "applicants for employment and registrants at hiring halls -- who have never been hired in the first place" as well as "persons who have quit or whose employers have gone out of business" and retirees on this basis of the expectation of employment. Applicants and similar persons are ""employees" embraced by the policies of the Act" because they "were members of the active work force available for hire" while a retirees is "an individual who has ceased work without expectation of further employment". *Id.* at 168. Similarly, the Supreme Court held that a bargaining unit of employees "may include persons on temporary or limited absence from work, such as employees on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return." *Id.* at 172. The Supreme Court noted that the NLRB had historically "excluded from the bargaining unit pensioners who had little expectation of further employment." *Id.* at 174-175.

Applying the "expectation of employment" test, the FTPs clearly had the expectation of employment with American. Their right to move to American was contractually guaranteed under the FTA. They were offered positions in new hire classes at American just like other new hires. FTA, Paragraph III.A. They are on the American seniority list at that time. FTA, Paragraph III.B. They were withheld from actually flying for American to benefit American and Eagle so that the FTPs training on jet equipment could be recouped. Nevertheless, they continued to accrue occupational seniority at American and credit for future vacation pay at American. All anticipated moving to American as soon as possible, even if they were flying at Eagle in the interim. Cordes Decl. ¶¶ ; Mackenzie Decl. ¶¶ ; Valente Decl. ¶¶ .

The cases cited by APA do not support its position that the FTPs were not part of the APA bargaining unit after they received American seniority numbers. In *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002), the flight attendants at Reno Air were not on American's seniority list and had no contractual rights with American to employment at American. *Bensel v. Allied Pilots Ass'n,* 387 F. 3d 298, 314 (3d Cir. 2004) likewise did not involve pilots on the American seniority list at the time of the breach of the union's duty, but only pilots who hoped to be integrated into the American seniority list. What APA fails to acknowledge is that being on the American seniority list is the key to admission to the bargaining unit and triggers rights under the applicable CBA.

APA also reads too much into *Spenlau v. CSX Transp., Inc.*, 279 F.3d 1313, 1315 (11th Cir. 2002) and *Allen v. CSX Transp., Inc.*, 325 F.3d 768, 772-74 (6th Cir. 2003). Both these cases concerned seniority lists for different crafts working for the same employer. *Allen*, supra, 225 F.3d at 771-772 ("Appellants were engineers and were not of the same class of employees as trainmen" quoting from *Spenlau*, supra, 279 F.3d at 1316). The engineers were on the trainman seniority list only to give them protection in case of an involuntary layoff. *Allen*, supra, 325 F.3d at 770. There was no contention that any of the engineers had any expectation that they would again become trainmen again.

In contrast, the FTPs are in the same class or craft as other pilots at American governed by the APA collective bargaining agreement with American. The FTA was incorporated into the APA/American CBA as Supplement W. They were the American seniority list in recognition that they were new hires at American, not as a mere protection in case of layoff. They were kept back at Eagle only for the benefit of Eagle and AMR and only temporarily. They were entitled to priority in new hire classes when the training freeze expired.

(c) Even if FTPs were not part of the bargaining unit and Staplees were, APA cannot exercise its power as bargaining agent to invade the FTPs rights under the Flow-Through Agreement.

Finally, even if these cases applied, this case would fall into the rule of *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). In *Howard*, the union claimed that it was discriminating against train porters that were in a separate bargaining unit and "argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads." *Id.* at 773. The Supreme Court rejected that argument: "The Federal Act [RLA] thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers. And courts can protect those threatened by such an unlawful use of power granted by a federal act." *Id.* at 774. The Court added: "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." *Ibid.* In *Allen*, the court recognized that the *Howard* rule would apply if "UTU negotiated the 1993 agreement in order to force CSX to eliminate the jobs of engineers and replace them with trainmen," but concluded that the allegations in *Allen* did not make such a claim. *Id.*, supra, 325 F.3d at 775.

In this case, however, the evidence is that APA did in fact negotiate with American to eliminate the jobs of FTPs and replace FTPs with TWA-LLC Staplees. APA renegotiated flow-down rights to allow TWA-LLC pilots to take jobs at Eagle and displace Eagle pilots (APA Exh. 10 at pp. 9-10, 16-17), sought to have the FTPs American seniority numbers voided (APA Exh. 14 at pp. 7, 10, 11-12), refused to abide by arbitration decisions holding that FTPs were entitled

to the positions in new hire classes that American thereafter gave to the Staplees (APA Exh. 12 at pp. 2-3; Pltf. Exh. 4 at p. 3) and colluded to implement a settlement that took away FTPs rights under prior arbitration awards and disguise that settlement as if it were a decision by a neutral arbitrator (Mackenzie Decl. ¶¶ 17-19, 21-22). Accordingly, this case would fall squarely under *Howard*'s rule that "Bargaining agents . . . must execute their trust without lawless invasions of the rights of other workers" (343 U.S. at 774), even if the FTPs were outside the bargaining unit and the Staplees with within the unit.

II. THE CLAIMS ARE TIMELY.

APA asserts that plaintiffs' claims are untimely. They are not.

A. Claims Arising From Negotiation of Letter G.

The claims arising from the Negotiation of the extra two years LOS credit in Letter G did not accrue until the contract incorporating Letter G was effective. Until then, it was possible that Letter G would not be adopted or it might be changed. *Ramey v. Dist. III, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 278-280 (2nd Cir. 2004). In *Ramey*, the Court explained: "We have never held that a breach occurs when a union announces an intention, even if it does so unequivocally, to advocate against the interests of its members in the future. Rather, we have held that the breach occurs when the union acts against the interests of its members." *Id.* at 278. Accordingly, "the statute of limitations ordinarily does not begin to run, and the cause of action does not accrue, until the date of the actual breach; that is, until the date on which performance is due." *Id.* at 279.

The Ninth Circuit has explained as well: "which have found DFR violations based on contract negotiation only after a contract has been agreed upon. [Citations omitted]. Indeed, the Supreme Court case that clarified that the DFR was applicable during contract negotiations articulated its holding in terms that imply a claim can be brought only after negotiations are complete and a "final product" has been reached. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991)." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1182-1183 (9th Cir. 2010) (*Addington I*).

For the claims arising under Letter g, that date was January 30, 2015. APA Exh. 2, pp. 1. 42. The Complaint was filed less than six months after that date. As to the other LOS credit issues, APA's failure to respond to plaintiffs letters or provide information as to these issues precludes the running of the statute of limitations before the Complaint was filed.

B. Other LOS Claims.

Letter G was part of the 2015 CBA. However, APA does not identify any document or contract provision that shows the negotiation or application of other LOS credits for other pilots. When plaintiffs wrote to APA to ask about these other LOS credits, APA never responded. Until APA's motion, APA never provided an explanation for its actions in not seeking LOS credits for the FTPs. Cordes Decl. ¶¶ 34, 39.

The "timeliness of the action is generally measured from . . . when the employee knows or should have known of *the last action taken by the union* which constitutes the alleged breach of its duty of fair representation." *Watkins v. Communications Workers of Am., Local 2336*, 736 F.Supp. 1156, 1159 (D.D.C. 1990) (emphasis supplied). Until that point, the employees are "entitled. . . to trust in the abilities of [their] representative" and to "reasonably believe that the Union [is] proceeding in good faith" until events prove otherwise. *Gharty v. St. Joyn's Queens Hosp.*, 869 F.2d 160, 165 (2nd Cir. 1989). Indeed, so long as the Union has held out a "ray of hope" that it has not abandoned the employee's interests, the limitations period does not accrue until that ray of hope is extinguished. *Bensel v. Allied Pilots Assn.*, 387 F.3d 298, 305 (3rd Cir. 2004):

> If, however, a union purports to continue to represent an employee in pursuing relief, the employee's duty of fair representation claim against the union will not accrue so long as the union proffers 'rays of hope' that the union can 'remedy the cause of the employee's dissatisfaction.' *Childs v. Penn. Fed'n Brotherhood of Maintenance Way Employees*, 831 F.2d 429, 434 (3rd Cir. 1987).

APA's silence in response to plaintiffs' letters left plaintiffs uncertain as to the basis for the APA's actions, when it had obtained LOS credits or what the basis for the LOS credits had been. APA's silence let plaintiffs in doubt whether or not APA would represent their interests in

seeking LOS credits in the upcoming negotiations. Dispute the many letters sent to APA asked APA to negotiate LOS credits for FTPs in the same way it had apparently negotiated LOS credits for other pilot groups, APA never said it would not do so and never explained why it would not do so. At least until APA took a firm position to the contrary, plaintiffs and the FTPs could legitimately expect that APA would take their position and interests into account, even if APA was not responding to their letters. Again, when the 2015 CBA was executed, it was apparent that APA had not negotiated LOS credits for the FTPs, either under Letter G or otherwise. A claim for breach of duty did not arise before then, because before then plaintiffs would not have known that APA "had taken an adversarial position" against their claim for LOS credits. See *Ramey v. Dist. III, Int'l Ass'n of Machinists & Aerospace Workers*, supra, 378 F.3d at 279-280. Indeed, APA's adversarial position as to LOS credits was not fully apparent until APA responded to this lawsuit.

III. THERE ARE TRIABLE FACTUAL ISSUES WHETHER APA ACTED ARBITRARILY, DISCRIMINATORILY OR IN BAD FAITH, IN VIOLATION OF ITS DUTY OF FAIR REPRESENTATION.

A. Duty of Fair Representation Standards.

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). "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id*. at 178. Since its inception, "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 182.

The arbitrary, discriminatory and bad faith standards 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 violates its duty of fair representation by favoring one union group over another for arbitrary or discriminatory 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*, 791 F.3d 967, 984 (9th Cir. 2015).

The DFR also requires that "a union must conduct some minimal investigation of grievances brought to its attention." *Tenorio v. N.L.R.B.*, 680 F.2d 598, 601 (9th Cir. 1982). "[T]he duty of fair representation requires that, *before* assessing the merits of a grievance, a union must have an ample basis upon which to make such an assessment." *Id.* at 602. A union breaches its duty when it "either could not or would not make an informed judgment regarding the merits of individual claims." *Banks v. Bethlelhem Steel Corp.*, supra, 870 F.2d at 1443. While both *Banks* and *Tenorio* involved individual grievance, there is no reason to think that a union's obligation to make informed decisions is limited to individual grievances. Such an obligation applies to decisions affecting groups of employees as much as individuals. It is an aspect of the union's duty not to "ignore[] [an employee's]complaint" or "processe[] the grievance in a perfunctory manner." *Vaca v. Sipes*, supra, 386 U.S. at 194.

The DFR also includes the obligation of a union to respond to union members' reasonable request for information affecting employment. *NLRB v. Carpenters Local 608*, 811 F.2d 149, 153 (2nd Cir. 1987); *Auto Workers Local 909*, 325 NLRB 859, 865 (1998). Thus, "inherent in a union's duty of fair representation is an obligation to deal fairly with an employee's request for information his relative position on the out-of-work register for purposes of job referral through an exclusive hiring hall." *NLRB v. Local 139, International Union of Operating Engineers*, 796 F.2d 985, 993 (7th Cir. 1986). While this duty has most often involved job-referrals in hiring halls, there is no reason to think that this duty is limited to the hiring hall situation but is rather part of the union's broader duty to deal fairly with employees in regard to their employment interests.

The Ninth Circuit recently held that a union's duty of fair representation included respecting the outcome of binding labor arbitrations. In *Addington*, the union, upset with the outcome of an arbitration decision on seniority list placement that favored a minority group of the airline's pilots, embarked on a campaign to ignore and get around that decision. *Addington v. US Airline Pilots Association*, supra, 791 F.3d at 988-989. The Ninth Circuit held that a union's efforts "to free [one employee group] from the consequences of the arbitration to which they

were bound" was "blatantly discriminatory" and "outside the 'wide range of reasonableness'" afforded unions. *Id.* at 989-990.

B. There Are Triable Factual Issues Whether APA Acted Arbitrarily, Discriminatorily Or In Bad Faith.

1. The Evidence Shows A Pattern Of Bad Faith and Discrimination By APA Against The FTPs.

The facts show that the APA favored the TWA-LLC Staplees over the FTPs repeatedly. This favoritism was done in a dishonest and deceitful way. "[S]ubstantial evidence of fraud, deceitful action, or dishonest conduct," shows a breach of duty. *Buzzard v. Local Lodge 1040,* 480 F.2d 35, 40 (9th Cir. 1973). In particular:

APA renegotiated flow-down rights for TWA-LLC pilots to expand these pilots ability to take jobs at Eagle and displace Eagle pilots. APA Exh. 10 (LaRocca Arbitration award on merits in FLO-0903) at pp. 9-10, 16-17. While the flow-down rights might have applied to a TWA pilot that came to American and was flying at American, the Staplees never flew for American. Cordes Decl. ¶19. Pilots who never actively flew at American and were not laid off from American do not fall under the definition of a furlough. See Cordes Decl. ¶ 42. More importantly, APA's assertion that the agreement to allow flow-down by TWA pilots was in the context of "concessionary bargaining" with American (see Brown Decl. ¶ 16) simply shows that APA (and American) are willing to is willing to undertake a "lawless invasions of the rights of other workers" (*Brotherhood of Railroad Trainmen v. Howard,* supra, 343 U.S. at 174). While the FTA signed in 1997 contemplated the flow-down of American pilots placed on furlough, it never contemplated the addition of over a thousand new pilots to American's seniority list for whom American had no jobs when they were hired. See Pltf. Exh. 4 at p. 45; Cordes Decl. ¶19. To give these new pilots jobs at Eagle and displace Eagle pilots simply shows APA's distain for Eagle pilots and their work.

APA sought to have the FTPs American seniority numbers voided even though nothing in either the FTA or the collective bargaining agreement (CBA) provided for such a result. FLO-0107 [APA Exh. 14] at pp. 7, 10, 11-12; Cordes Decl. ¶ 21. The APA/American CAB

specifically addresses how seniority numbers are lost, and expiration of the FTA is not one of those reasons. Mackenzie Decl. ¶ 16. Again, the inference is that APA will do anything to help the Staplees and nothing to protect the rights of the FTPs, to the point of trying to obtain results that are contrary to the applicable CBA.

APA has refused to abide by arbitration decisions favoring the FTPs. When Arbitrator LaRocco determined in May 2007 that the TWA-LLC Staplee pilots were new hire pilots so that the priority hiring for FTPs had to apply if the Staplees were offered jobs (APA Exh. 10), APA and American ignored his ruling and proceeded to hire Staplees and not FTPs to new hire positions. See APA Exh. 12 at pp. 2-3; Pltf. Exh. 4 at p. 3; Cordes Decl. ¶ 20. This is exactly the conduct that the Ninth Circuit has condemned as an effort "to free [one employee group] from the consequences of the arbitration to which they were bound" that is "blatantly discriminatory" and "outside the 'wide range of reasonableness'" afforded unions. *Addington v. US Airline Pilots Association*, supra, 791 F.3d at 989-990. APA has been blatant in its attitude towards the FTPs under this award. After this award, it has stated: "Former TWA pilots were not 'new hires' in any meaningful sense, and yet their recall rights have been subordinated to AE pilots under Supp. W," and "[e]very AE pilot who transfers early to AA, before real new hiring begins, does so to the express disadvantage of hundreds of both former TWA pilots and the legacy AA pilots at the bottom of the AA list, all of whom remain on the street." Mackenzie Decl. ¶ 21(b)(ii) and Pltf. Exh. 9 (AA-001851).

APA colluded with American and other parties to the FTA to implement a settlement that took away FTPs rights under prior arbitration awards and disguise that settlement as if it were a decision by a neutral arbitrator. Mackenzie Decl. ¶¶ 15--19, 20-22, 23-24. This was an effort to to cut back the number of FTPs who would be able to move to American (*id.* at ¶¶ 15-19, 23-24) and undermine the fundamental rights of the FTPs to a fair arbitration. *Id.* at ¶¶ 20-22. The fundamental requirements of due process are "adequate notice, a hearing on the evidence and an impartial decision by the arbitrator." *Int'l Bhd. Of Elec. Workers v. CSX Transp. Inc.*, 446 F.3d 714, 720 (7th Cir. 2006). Fundamental to arbitration and the deference given arbitration by the

courts is the principal that the parties have bargained for the arbitrator's judgment. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc*., 484 U.S. 29, 37-38 (1987). That principal is eviscerated if an arbitrator's award is not based on his own honest judgment but is, instead, based on off-the-record evidence or information as to how the parties secretly want him to rule. See *Totem Marine Tug & Barge, Inc. v. North American Towing*, 607 F.2d 649, 652-653 (5th Cir. 1979) (decision vacated where arbitrator received *ex parte* information concerning remedy). It is deceitful and fraudulent for Arbitrator Nicolau, with APA and the other parties' connivance, to assert that the decision "does not represent the 'agreement' of any of the four parties" (see APA Exh. 10 at p. 10) when, in fact, it represents just such an agreement.

APA has refused to respond to FTPs requests for information or explanations of APA's actions. Cordes Decl. ¶¶ 34, 39. As discussed above, such a refusal violates a union's duty of fair representation. *NLRB v. Carpenters Local 608*, supra, 811 F.2d at 153. But, whether or not an independent violation, it represents a further factual basis for finding bad faith.

As to the Letter G LOS credits, APA has given these credits to the TWA-LLC Staplees that were furloughed before ever flying for American. Cordes Decl. ¶ 37. APA has allowed other pilot groups to present information to the APA Board why they should get these LOS credits and has taken action that seems to be leading to giving other pilots these benefits. Cordes Decl. ¶¶ 49, 50 and Pltf. Exhs. 19, 20. FTPs have never been offered this opportunity. Cordes Decl. ¶¶ 39, 48.

In addition, the attitude of APA has been one of hostility to Eagle pilots. APA believes that the FTPs' assertion of their rights puts TWA pilots "on the street." Mackenzie Decl. ¶ 21(b)(ii) and Pltf. Exh. 9 (AA-001851). APA has refused to even consider negotiating LOS credits for FTPs. Cordes Decl. ¶ 36. APA pilots have accused the Eagle pilots of being inferior pilots, not good enough to fly for American and should never have been allowed to fly the regional jets. Cordes Decl. ¶ 14; Valente Decl. ¶¶ 10, 11. APA pilots have accused Eagle pilots of being "job stealers" and "scabs". Valente Decl. ¶12. APA officials have refused to respond to

questions by FTPs concerning APA's willingness to fight for FTPs interests. Valente Decl. ¶¶ 14, 15.

2. APA's justifications for its actions are arbitrary.

In this case, APA's justifies not giving LOS credits to FTPs because they were not "furloughed" pilots who lost work or did not come to American through a merger. APA Mem. pp. 13-17. These explanations are arbitrary.

First, simply calling TWA-LLC Staplees as "furloughed" pilots is not an explanation why they should get LOS credits. Even if this were an apt description of the Staplees, who lost jobs because TWA went bankrupt, not because they were furloughed in a reduction in force (see Cordes Decl. ¶ 19), it is merely descriptive. It is like saying someone is left-handed.

On the actual facts, both Staplees and FTPs were in the identical situation. They could not move to American because American did not have jobs and was laying off other pilots. Cordes Decl. ¶ 41. Both FTPs and TWA pilots (including Staplees) were flying at Eagle while waiting for jobs to open up at American. *Ibid.* The definition of "furlough" in the contract applied equally to both Staplees and FTPs: Either it was inapplicable to both or applicable to both under possible constructions of its language. Cordes Decl. ¶¶ 42, 43. Both groups were identically situated in that their right to move to American depended on the availability of new jobs opening up and new pilot positions becoming available. Cordes Decl. ¶ 44.

Second, while the implication of the APA's argument is that the LOS credits are to compensate for unemployment, in fact unemployment is not a criterion for the credits. Letter G has no such requirement. Pltf. Exh. 17. TWA pilots flying at Eagle received these credits. Cordes Decl. ¶ 41.

Third, the past awards of LOS credits were in different situations, before the acquisition of TWA and the layoffs generated by 9/11. Cordes Decl. ¶ 45. APA, however, was not willing to meet with FTPs to discuss these matters and the new situation created by the acquisition of TWA and the event of 9/11.

Finally, the APA's explanation that LOS credits have been applied in prior mergers does not show why they are inapplicable here. Again, APA's failure to offer this explanation in response to the letters plaintiffs sent and failure to discuss this matter with FTPs undermines any claim that this distinction is meaningful. Rather, APA is just pointing to a factual distinction without any explanation or basis for claiming that distinction is meaningful in the context of the situation with the FTPs. Merely because other situations have involve mergers does not mean that APA can ignore the different situation presented by the FTPs and refuse to explore with the FTPs the possibility of addressing this issue in bargaining.

3. The evidence would support a causal connection between APA's breach of duty and damages.

APA argues that Plaintiffs cannot show a causal connection between a breach of APA's duty and damages, because American might not agree to give LOS credits to FTPs even if sought. APA Mem. pp. 13, 17. This also presents a triable factual issue.

LOS credits repeated negotiated for pilots at American. They have been negotiated at least three time in Letter CC and Letter CC(2) and in Letter G. APA Exhs. 45, 46 and Pltf. Exh. 17. See also Brown Decl. ¶ 18. Keeping LOS during period a pilot is unable to work while on furlough is common in other major airlines. Brown Decl. ¶ 19. Nothing in the negotiations over Letter G that suggests that American would not have included FTPs in it. Brown Decl. ¶¶ 20, 21. In fact, it seems implausible that American would agree to give LOS credit to thousands of new employees from TWA and US Airways (Letter G applies to both groups) and not to the far smaller group of FTPs.

APA has offered no evidence that shows that American was opposed to giving FTPs LOS credits or that APA's presenting the issue in bargaining would have been futile. Compare *Spellacy v. Airline Pilots Ass'n Int'l*, 156 F.3d 120, 130 (2d Cir. 1998) where "Pan Am informed the MEC that, even if the MEC opposed the short course plan, Pan Am 'would . . . move[] ahead' without the union's agreement." The fact that American has repeatedly ceded to APA demands for LOS credits for other and larger employee groups would allow a jury to conclude,

in this case, that APA's failure to present the issue to American caused FTPs not to receive these LOS benefits.

IV. THE ISSUES AS TO THE SECURITY LIST INTEGRATION PROCESS ARE NOT MOOT AND ARE RIPE.

APA argues (Mem. p. 17 et seq.) that the issues as to the Seniority List Integration (SLI) process are moot—since it withdrew from the stipulation that Eagle time would not be counted for longevity—or unripe until the arbitration panel rules. APA had not shown that the issue of Eagle time is moot, even if the offending stipulation has been withdrawn. As to ripeness, the damage that APA has caused by not urging the inclusion of Eagle time in any longevity factor has occurred. While the full measure of injury may not be known until the arbitration decision is made, that is not a reason to dismiss this claim before that decision is rendered.

When APA entered into the stipulation not to count Eagle time, the injury from that stipulation had occurred. Withdrawing from that stipulation, however, does not moot the underlying issue. A case is not moot if the challenged conduct has a reasonable probability of reoccurring. See *Williams v. Alioto*, 549 F.2d 136, 143 n.8 (9th Cir. 1977) ("The focus is on whether the same issues, arising from a repetition of a similar law or action, are likely to recur."); *Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975). Asa the party asserting mootness, APA has the "heavy burden" of persuading the court that the challenged conduct cannot reasonably be expected to start up again. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000).

APA has not shown that it has not or will not continue to assert that Eagle time should be excluded from longevity in fashioning an integrated seniority list. Withdrawing from a stipulation does not prevent APA from making such arguments. Since APA can reassert this argument at any time, the issue is not moot.

As to ripeness, the failure to present evidence supporting the interests of FTPs that longevity should include Eagle time is ripe, as the time for presenting this evidence has occurred when the hearings were conducted. What remains is the uncertainty caused by the fact that the

arbitration decision has not yet been made. This is not a ripeness question, but an issue going t the scope of the remedy that might be issued.

While the arbitration decision may, if longevity is not a factor, resolve the issues here, there is not certainty that the failure to present any evidence will in fact not have resulted in harm at the arbitration. It is therefore premature to say that no harm can accrue from APA's failure to present evidence. At this point, before APA's argument could show no harm, the arbitration award would need to issue. Until that point, APA cannot show that no harm occurred from APA's failure to present evidence.

CONCLUSION

For the forgoing reasons, APA's motion for summary judgment should be denied.

Dated: March 31, 2016.

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