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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*, Plaintiffs, v. ALLIED PILOTS ASSOCIATION, *et al.*, Defendants.	Case No. 3:15-cv-03125-RS **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT ALLIED PILOTS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT** Fed. R. Civ. P. 56 Date: April 21, 2016 Time: 1:30 p.m. Courtroom: 3 - 17th Floor Judge: Hon. Richard Seeborg

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INTRODUCTION

In our opening brief, Defendant Allied Pilots Association ("APA") showed that (1) most of Claim One of Plaintiffs' Second Amended Complaint ("Complaint") for breach of the duty of fair representation is time-barred; (2) most of Claim One also fails because, at the time of the incidents alleged, APA owed no duty of fair representation to Plaintiffs or the members of the putative class affected by the challenged actions; (3) the remainder of Claim One fails because no reasonable jury could conclude that APA breached its duty of fair representation or that any such breach caused harm to Plaintiffs; (4) Claim Two of the Complaint fails because some of the allegations on which it is predicated are moot and the remainder are unripe; and (5) no reasonable jury could conclude that the Association acted arbitrarily, discriminatorily, or in bad faith in the arbitration at issue.

In response, Plaintiffs have abandoned all of the allegations of Claim One other than those relating to the negotiation of Letter G and other unspecified allegations regarding negotiation of length of service ("LOS") credit for other pilot groups. As to those few allegations, Plaintiffs fail to demonstrate that they have a viable claim. Plaintiffs' statute of limitations argument as to the "other LOS claims" requires them to stretch beyond the breaking point an out-of-circuit doctrine never adopted in the Ninth Circuit. And while Plaintiffs contend that APA owed the Eagle Flow-Through Pilots a duty of fair representation, and did not owe such a duty to the TWA-LLC furloughees, that argument is wrong. It ignores a crucial distinction between those two pilot groups: the National Mediation Board ("NMB"), the federal agency with jurisdiction to determine representation rights in the airline industry,[1] certified American Airlines, Inc. ("American") and TWA-LLC as a "single transportation system," thereby extending APA's representation to the TWA-LLC pilots (even those on furlough). In contrast, American and American Eagle ("Eagle") have always been separate transportation systems, with the Eagle pilots (including those waiting for jobs at American) exclusively represented by the Air Line Pilots Association ("ALPA"). Plaintiffs also present a variety of misguided and unsupported arguments as to the merits of Claim One, refuted in detail below.

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[1] *See McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1170 n.1 (9th Cir. 2002).

Plaintiffs virtually abandon Claim Two, devoting it only a little over a page of discussion. They utterly fail to demonstrate that the challenged conduct (a long-withdrawn and replaced stipulation and proposal in the seniority list integration ("SLI") arbitration procedure) is likely to recur, an impossible task because the record in that proceeding has closed. They also fail to demonstrate the existence of any harm from the current SLI proposal by the American pilot group, present no evidence that that proposal – with which they *agree* – is discriminatory or was made in bad faith, and do not even attempt to rebut APA's showing that its arbitration strategy decisions have a reasoned explanation and therefore are not arbitrary.

When the Court sifts through the smokescreen created by Plaintiffs' Opposition, it becomes clear that their real dispute is with the terms of the Flow-Through Agreement that ALPA negotiated on their behalf in 1997 and that expired in 2008. It is plain that they have always felt mistreated by that agreement, and by the various arbitrations that occurred under it. Indeed, their supporting declaration from Gavin Mackenzie reads as if from another case, as it has no relation to the claims Plaintiffs are pursuing here. Plaintiffs have simply waited far too long to attack the Flow-Through Agreement and its various arbitration awards, and have no legal basis for their real complaint about APA: that its bargaining priorities do not include renegotiating that long-expired agreement.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED ON PLAINTIFFS' FIRST CLAIM

A. Plaintiffs' First Claim Is Time-Barred As To All Allegations Not Related To Letter G.

Plaintiffs' Opposition argues for the timeliness of two categories of claims: (1) "claims arising from … Letter G," Opp. at 11:11, and (2) "[o]ther LOS [length of service] [c]laims," *id*. at 12:5. Plaintiffs have therefore abandoned any claim encompassed within Claim One that does not relate to Letter G or length of service, such as most of Plaintiffs' allegations of discrimination in favor of former TWA pilots. *See* Complaint ¶ 52(a)-(b) (raising claims of discrimination unrelated to length of service); MSJ at 9:7-18 (showing these claims to be untimely).

APA has not sought summary judgment on the timeliness of Plaintiffs' Letter G allegations. *See* MSJ at 12 n.13. We thus focus here on the "[o]ther LOS [c]laims." Unfortunately, Plaintiffs fail to identify these claims in their Opposition, stating only that they relate to "the negotiation or application

of other LOS credits for other pilots," Opp. at 12:7, but failing to point to any particular negotiation, agreement, or "other pilots" at issue. We assume these claims relate to the fact that pilots arriving at American via merger with other carriers retained their years of service from their prior carrier, while Flow-Through Pilots did not retain their years of service from Eagle. *See* Complaint ¶ 52(d).

This claim is untimely based on clear and undisputed facts. The Flow-Through Agreement, which established that Plaintiffs would not retain length of service from Eagle, was executed in 1997. At that time, American had a longstanding policy of recognizing pre-merger length of service for pilots arriving via merger. And, in any event, the most recent merger and grant of length of service credit occurred in 2013, well outside the limitations period. *See* MSJ at 3:20 – 4:2. Plaintiffs neither challenge these facts nor argue that they were unaware of them until January 2015. On the contrary, they admit that they complained about the alleged disparity in letters to the APA Board of Directors beginning in May 2013. *See* Cordes Decl. ¶¶ 24-28, 30.

Plaintiffs nevertheless contend that these claims re-accrued upon the execution of the most recent collective bargaining agreement, the "2015 CBA," because that CBA did not redress the discrimination perceived by Plaintiffs. Opp. at 13:6-10. Plaintiffs' theory would render the statute of limitations meaningless because it would allow a plaintiff to delay indefinitely after suffering an alleged adverse act, then complain that the union failed to redress the past wrong. Indeed, the 2015 CBA was not the first CBA executed by APA since the alleged disparity occurred, and almost certainly will not be the last. Plaintiffs cannot seriously claim that each new CBA gives them a new chance to challenge a longstanding policy. On the contrary, the Ninth Circuit has squarely held that when a union is engaged in bargaining that could conceivably result in the mitigation of harm from a prior act, such negotiations do not toll the statute of limitations for a duty of fair representation claim. *See Allen v. United Food & Commercial Workers Int'l Union*, 43 F.3d 424, 428 (9th Cir. 1994). If such negotiations cannot toll the limitations clock, they surely cannot restart it entirely. *Accord Christiansen v. APV Crepaco, Inc.*, 178 F. 3d 910, 916 (7th Cir. 1999) (holding that "subsequent inactivity" after alleged breach of duty of fair representation does not restart limitations clock).

Plaintiffs attempt to sidestep this problem by arguing that APA's failure to respond to their letters in the run-up to the 2015 CBA provided "rays of hope" that it would "seek[] LOS credits in the

upcoming negotiations." Opp. at 12:11 – 13:12. But "the 'rays of hope' doctrine is confined to the Third Circuit"; "no court outside that circuit has adopted the doctrine;" multiple courts have rejected it, *Merritt v. Int'l Ass'n of Machinists*, 2008 WL 5784439, at *12 (E.D. Mich. Sept. 22, 2008); *accord Scerba v. Allied Pilots Ass'n*, 2013 WL 6481583, at *10 (S.D.N.Y. Dec. 10, 2013), *aff'd*, 589 F. App'x 554 (2d Cir. 2014); and it directly contradicts Ninth Circuit precedent such as *Allen*.[2]

Even if the Ninth Circuit had adopted the doctrine – which it has not – Plaintiffs' argument would require a monumental expansion of it. As noted in the Third Circuit decision cited by Plaintiffs, "clearly there comes a point when a union can no longer be said to proffer rays of hope …, and the rays of hope are extinguished." *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 308 (3d Cir. 2004). In *Bensel*, "rays of hope" existed for one year after the challenged act, while the union pursued an arbitration claim that could have remedied the alleged harm. *See id.* at 303, 307-08.

Here, Plaintiffs would use the "rays of hope" theory to extend the statute of limitations by *17 years* since the 1997 execution of the Flow-Through Agreement (and 13 years since the TWA merger). *See* McDaniels Decl. ¶¶ 29, 34. During that period, APA had negotiated multiple CBAs (including the 2003 CBA and 2012 CBA, *see* ECF Nos. 49-4 and 49-7, APA MSJ Exhs. 4 & 7), without addressing the alleged disparity, all while undertaking a series of actions that Plaintiffs perceived, albeit incorrectly, as hostile and unlawful. *See* Complaint ¶¶ 44-48, 52-26, 79. On these facts, even the Third Circuit's novel "rays of hope" doctrine cannot justify Plaintiffs' delay in filing this lawsuit.

B. Other Than The Letter G Allegations, Plaintiffs' First Claim Is Predicated On Allegations Regarding Conduct That Occurred At A Time When APA Did Not Represent Plaintiffs And Did Not Owe Them A Duty Of Fair Representation.

Our opening brief showed that, except as to the allegations regarding Letter G, Plaintiffs' first claim fails on the merits because APA did not owe them a duty of fair representation at the time the alleged underlying conduct occurred. MSJ at 10:12 – 12:6. We also showed that that alleged conduct cannot be used to evidence animus towards the Flow-Through Pilots because, at the time that conduct occurred, not only did APA not represent Plaintiffs but moreover undertook that conduct (to the extent

[2] A Westlaw search of Ninth Circuit cases (district and circuit), performed on April 4, 2016 revealed no duty of fair representation cases using the phrase "rays of hope" or "ray of hope."

it occurred at all) in the fulfillment of its duty of fair representation to the pilots it *did* represent, including the TWA-LLC furloughees. *Id*. at 15:15 – 16:15. Plaintiffs' response is predicated on two erroneous propositions: that, at the time in question, APA represented the Flow-Through Pilots and did not represent the TWA-LLC furloughees, and therefore owed a duty of fair representation to the former and not the latter. The governing law dictates otherwise.

First, Plaintiffs contend that APA represented the Flow-Through Pilots, and therefore owed them a duty of fair representation, because the Flow-Through Agreement (including the provision under which they obtained numbers on the American pilot seniority list) gave them an expectation of employment at American. Opp. at 7:19 – 9:9. However, neither *Nashville C. St. L. R. v. Ry. Employees Dep't*, 93 F.2d 340 (6th Cir. 1937), nor *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586 (2d Cir. 1941) (both cited in Opp. at 7-8), supports the broad proposition offered by Plaintiffs that a union represents and owes a duty of fair representation to any person with a "reasonable expectation of employment" in the bargaining unit. Opp. at 7:19. Nor in the ensuing 75 years have these decisions ever been cited for that proposition. Rather, they support only the narrow and unremarkable proposition that a reasonable expectation of *reinstatement* qualifies an employee as a bargaining unit member, i.e., that workers *already employed* by an employer in a bargaining unit and represented by a union in that unit do not *lose* their status as represented employees when they are laid off or furloughed.[3] In contrast to the furloughed or laid off employees, Plaintiffs had never worked for American or TWA-LLC at the time of the events underlying their non-Letter G claims; rather, they worked for Eagle, where they were represented by ALPA, not APA.

[3] Plaintiffs also find no support in *Allied Chemical Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). *See* Opp. at 8:13-27. There, the Court held that retirees are not "employees" within the meaning of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, but noted that applicants for employment are "employees" under the NLRA, *see* 404 U.S. at 168. The Railway Labor Act ("RLA") defines "employee" differently, as those actually "in the service of a carrier," 45 U.S.C. § 151, Fifth, excluding even those in training to fly for an airline though on the airline's payroll. *See Air Line Pilots Ass'n v. United Air Lines*, 802 F. 2d 886, 911 (7th Cir. 1986). Even if *Pittsburgh Plate Glass* applied to the RLA, the Court did *not* opine (much less hold) that applicants are members of the bargaining unit into which they seek to be hired, are represented by the union that represents that bargaining unit, or are owed a duty of fair representation by that union.

Second, as we showed in our opening brief, the case law holds that a union does not represent, and does not owe a duty of fair representation to, workers who are not yet members of the bargaining unit that the union represents, especially where (as here) those workers are members of another bargaining unit represented by another union. *See* MSJ at 10:17 – 12:6. Plaintiffs attempt to evade this rule by invoking their placeholder numbers on the American pilot seniority list to argue that they were members of the American bargaining unit even before they worked for American. *See* Opp. at 9:1 – 10:6. But that argument is mistaken. In both *Spenlau v. CSX Transp., Inc.*, 279 F. 3d 1313, 1314-16 (11th Cir. 2002) and *Allen v. CSX Transp., Inc.*, 325 F.3d 768, 770, 772-74 (6th Cir. 2003), the Sixth and Eleventh Circuits held that the defendant union did not represent and did not owe a duty of fair representation to plaintiff employees who were outside the bargaining unit represented by the union, notwithstanding that those employees possessed numbers on the bargaining unit seniority list, continued to accrue seniority on that list while working outside of the bargaining unit, and enjoyed a contractual right to return to bargaining unit positions if furloughed. Contrary to Plaintiffs' argument, the *Spenlau* and *Allen* plaintiffs' contractual right to return to their bargaining unit positions in the event they were furloughed from their non-bargaining unit positions certainly gave them "an[] expectation that they would again become [bargaining unit employees]," Opp. at 9:25-26, because the specificity of that right – linked as it was it to the particular circumstance of a furlough – clearly indicates that those employees' return to the bargaining unit was within the parties' contemplation. Moreover, Plaintiffs' attempts to distinguish *McNamara-Blad*, 275 F.3d 1165, and *Bensel*, 387 F. 3d 298, on the ground that the extra-bargaining unit employees at issue in those cases did not yet have placeholder numbers on the bargaining unit's seniority list, *see* Opp. at 9:10-18, seizes on a meaningless distinction. It was clear in those cases that those employees would shortly be merged into the bargaining unit represented by the union.

Third, Plaintiffs' argument that APA did *not* represent the TWA-LLC furloughees, and therefore did not owe them a duty of fair representation, Opp. at 6:8 – 7:18, is equally erroneous. Plaintiffs' argument is grounded on the assertion that those employees never actually worked for American, but rather for TWA-LLC, before they were furloughed, *id.*, which Plaintiffs contend makes them indistinguishable from the Eagle pilots who were waiting to "flow-up" to American, *id*. at 7:3-6.

However, Plaintiffs' argument ignores the dispositive factual difference that the NMB conclusively determined that American and TWA-LLC operated a single transportation system, meaning that for representation purposes they constituted a single entity whose entire pilot group (including the TWA-LLC pilots) was represented by APA. *See* Duncan MSJ Decl., Docket No. 47, at ¶ 10.[4] Plaintiffs object that the NMB's certification of APA as the representative of the TWA-LLC pilots did not expressly provide that APA would represent TWA-LLC pilots on furlough. *See* Opp. at 7:7-18. But the legal authority on which Plaintiffs rely makes clear that those employees' furlough status is irrelevant to APA's status as their representative. Previously-employed workers do not lose their representation rights merely as a consequence of being laid off or furloughed as long as they have a reasonable expectation of recall. *See* Opp. at 7:20 – 8:12. Plaintiffs admit that the TWA-LLC furloughees had such an expectation. *See* Opp. at 6:22 – 7:2; APA MSJ Exh. 49-16 at § 11(D).

In short, APA represented the TWA-LLC furloughees because they were employees of TWA-LLC, a carrier whose pilots APA represented by order of the NMB, and their furlough did not affect APA's representational status because they enjoyed a contractual right to *reinstatement*. In contrast, APA did *not* represent the Flow-Through Pilots, who were employees of Eagle, a separate airline whose pilots were represented by ALPA. Indisputably, ALPA negotiated and enforced on their behalf the terms of their employment with Eagle – which included the Flow-Through Agreement and the interests they had thereunder. *See Allen*, 325 F.3d at 772 ("The [Railway Labor] Act contemplates that unions represent *people* skilled in a particular craft, not those people's partial rights or interests"; and "a union would face a conflict of interest if it was required to represent not only the members of its own craft, but also certain interests of those belonging to another craft.") (emphasis in original). To

[4] Plaintiffs' reliance on Arbitrator LaRocco's decision in grievance FLO-0903, *see* Opp. at 6:10-20, is misplaced. Arbitrator LaRocco was construing the terms of the Flow-Through Agreement, not addressing the *statutory* issue under the Railway Labor Act whether APA represented the TWA-LCC furloughees and owed them a duty of fair representation (questions which were not presented in that arbitration). Moreover, he would have had no authority to overrule the NMB's finding, even if he had purported to do so (which he did not). The Flow-Through Agreement and the arbitrations conducted thereunder are silent, and therefore irrelevant, as to whether APA represented the TWA-LLC furloughees and owed them a duty of fair representation.

effectuate federal labor policy, the RLA creates, and the courts have enforced, a "bright-line rule" limiting representation rights and the duty of fair representation to bargaining units and unit members.[5]

Finally, Plaintiffs' make an unavailing argument under *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952), that APA owed them a duty not to adversely impact their employment rights with American, even if it did not represent them and did not owe them a duty of fair representation. Opp. at 10:7 – 11:7. Plaintiffs recognize that *Howard* is limited to the situation in which the defendant union attempts to eliminate the extra-unit employees' jobs entirely, to give those jobs to bargaining unit employees, Opp. at 10:20-23, but still try to shoe-horn their situation into that narrow opening, *id*. at 10:20 – 11:7. Specifically, Plaintiffs argue that APA engaged in negotiations to permit TWA-LLC pilots to "flow down" to Eagle and displace pilots from their positions at Eagle; attempted through arbitration to void the seniority numbers of Flow-Through Pilots who had not commenced work for American by the time the Flow-Through Agreement expired in 1998; refused to abide by arbitration decisions conducted under the Flow-Through Agreement granting positions at American to certain Flow-Through Pilots; and colluded to implement a settlement through an arbitration award that took away Flow-Through Pilots' rights under a prior arbitration agreement. Opp. at 10:24 – 11:7. Plaintiffs' argument fails for at least three reasons.

First, the alleged conduct on which Plaintiffs rely for this argument relates to neither of the claims at issue. Their claims concern APA's negotiation of additional LOS credit in Letter G in January 2015 (and perhaps, as claimed in their Opposition, some unspecified "other LOS claims"), and potential harm to the Flow-Through Pilots' positions on the American pilots seniority list occurring in the SLI arbitration. Neither claim seeks a remedy for the alleged conduct Plaintiffs cite in their Opposition at 10:24 – 11:7 to support their *Howard* argument, and all of that conduct is time-barred in any event. In contrast, the *Howard* plaintiffs sought a remedy for the defendant union's conduct in

[5] To be sure, and as we noted in our opening brief, APA did represent and did owe a duty of fair representation to those Flow-Through Pilots who were hired by American prior to the hiring freeze that began after September 11, 2001. But those Pre-9/11 Flow-Through Pilots were not affected by the APA conduct challenged by Plaintiffs in this case. *See* MSJ at 11 n.12. Moreover, even if Plaintiffs' "other LOS claims" could even arguably encompass those Pre-9/11 Flow-Through Pilots, those claims present nothing more than another attempt to renegotiate the Flow-Through Agreement.

eliminating their jobs entirely and giving those jobs to members of the bargaining unit represented by the union. *See Howard*, 343 U.S. at 770.

Second, none of the alleged conduct falls within the narrow *Howard* exception. The alleged injuries to Plaintiffs' LOS credit and relative seniority rights for which Plaintiffs seek a remedy in this case do not rise anywhere near the level of the complete elimination of their jobs. To the contrary, those alleged injuries fit comfortably within the Supreme Court's subsequent clarification of *Howard* in *Pittsburgh Plate Glass* that *Howard* "obviously does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20; *accord McNamara-Blad*, 275 F.3d at 1172. Nor does the alleged conduct Plaintiffs cite in their Opposition at 10:24 – 11:7 rise to the *Howard* level of the complete elimination of the extra-unit employees' jobs and the transfer of those jobs to bargaining unit employees.

Third, just as this Court found with regard to *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230 (5th Cir. 1957), "the case arose in very different factual circumstances, and is not controlling law here." Docket No. 37, at 4:17-18, 20-21. Both *Richardson* and *Howard* involved race discrimination for which no remedy then existed under the civil rights laws, and the duty of fair representation was adapted by the courts to fill that gap. With the passage of Title VII in 1964, no further adaptation is necessary and the courts have closely cabined such decisions. *See, e.g., Pittsburgh Plate Glass*, 404 U.S. at 181 n.20 (noting that "[t]he reach and rationale of *Howard* is a matter of some conjecture"). The present case involves no allegations of racial discrimination and *Howard* is simply inapposite.

C. Plaintiffs Have No Evidence That APA Acted Arbitrarily, Discriminatorily, Or In Bad Faith as to the Allegations of Claim One.

Even setting aside the points above, Plaintiffs have failed to produce sufficient evidence to permit a reasonable jury to find for them on the merits of Claim One.

1. APA did not act arbitrarily. To prevail on the "arbitrariness" prong of the duty of fair representation standard, Plaintiffs must prove that APA's "behavior [was] so far outside a wide range of reasonableness as to be irrational." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). Plaintiffs' Opposition confirms that they cannot satisfy this very high bar.

Apparently referring to their Letter G claim, Plaintiffs first argue that Flow-Through Pilots were "in the identical situation" of pilots furloughed from TWA-LLC. *See* Opp. at 19:11. The difference between the groups, however, could not be plainer: pilots in the latter group were forced out of their employment, and pilots in the former group were not. No matter how much Plaintiffs dislike APA's decision to recognize the distinction, it has a rational basis, and APA acted rationally in seeking to mitigate the harm of employment loss. Moreover, because American and TWA-LLC were certified as a single transportation system by the NMB, APA had a rational basis to believe it had a duty to represent the pilots furloughed from TWA-LLC – as confirmed by the cases cited in Plaintiffs' Opposition. *See* Opp. at 7:20 – 8:12; *see also supra* at Section I(B).[6]

Plaintiffs next note that Letter G credit was not limited to pilots unemployed during their furlough. Opp. at 19:19-22. But it is rational to acknowledge the harm associated with an unwanted and abrupt change in jobs, whether or not accompanied by unemployment – a unique harm never suffered by the Flow-Through Pilots. Plaintiffs' argument also ignores the administrative burden of verifying the employment status of every eligible pilot during periods as much as 13 years in the past (*i.e.*, after September 11, 2001), a task APA had good reason to avoid.

Plaintiffs' third point is that APA did not "meet with the [Flow-Through Pilots] to discuss these matters and the new situation created by the acquisition of TWA and the events of 9/11." Opp. at 19:25-26. This claim is not in the Complaint; it is untimely because the cited events occurred more than 14 years before this case was filed; and there is no evidence Plaintiffs requested such a meeting.

Finally, Plaintiffs challenge the rationality of the distinction between pilots arriving via mergers – who historically have been allowed to retain their pre-merger length of service – and pilots coming to American via the Flow-Through Agreement. Opp. at 20:1-8. This claim is also untimely. *See supra* at Section I(A). In any event, pilots arriving via merger were brought to American through no choice of their own, with American essentially serving as a continuation of their prior employer. One can

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[6] Plaintiffs' argument that the former TWA furloughees were not actually furloughed, *see* Cordes Decl. ¶ 42, is bizarre. There is no dispute these pilots lost their employment due to a reduction in force. Moreover, even if Plaintiffs' hypertechnical reading of the CBA were correct, it would not diminish the rational basis for mitigating the harm of employment loss.

reasonably deem it unfair to make them forfeit the length of service they had accrued at their prior airline. Flow-Through Pilots, by contrast, voluntarily chose to come to American from Eagle, which continues to operate as a separate airline, with full knowledge (from the Flow-Through Agreement) that they would not retain their service credit from Eagle. *See* Docket No. 49-1 (APA MSJ Exh. 1) at ¶ III.C ("A CJ Captain's … length of service for pay purposes … will be based on the date such pilot is entered on the AA payroll."). Drawing a distinction between the two groups is certainly not irrational.

2. APA did not act discriminatorily. Plaintiffs also fail to present evidence that APA acted with "discriminatory intent." *Simo v. Union of Needletrades, Sw. Dist. Council*, 322 F.3d 602, 618 (9th Cir. 2003). Plaintiffs do not even purport to offer direct evidence that APA's decisions regarding Letter G or length of service had a discriminatory motive. Instead, they suggest it can be inferred from past acts supposedly disfavoring the Flow-Through Pilots. These arguments fail.

Plaintiffs first try to establish animus by citing instances in which APA "favored the TWA-LLC Staplees over the [Flow-Through Pilots]." Opp. at 16:6. However, APA was merely fulfilling its duty to represent the pilots within its bargaining unit, including the former TWA pilots, while leaving the representation of Flow-Through Pilots to their own union, ALPA. *See supra* at Section I(B).

In the same vein, Plaintiffs assert that APA "refused to abide by arbitration decisions favoring the [Flow-Through Pilots]," Opp. at 17:5, when it "hire[d] [former TWA pilots] and not [Flow-Through Pilots] to new hire positions," *id.* at 17:8-9. But APA does not "hire" pilots; American does. Moreover, Plaintiffs cite only a single arbitration decision, from the dispute known as FLO-0903, and identify no violation of the award. The award did not bar APA or American from "hir[ing]" former TWA pilots, but rather ordered that 154 Eagle pilots receive placeholder seniority numbers under the Flow-Through Agreement, *see* ECF No. 49-10 (APA MSJ Exh. 10), at 22, 32, which undisputedly occurred. While Plaintiffs may wish that APA had taken additional action to their benefit based on the award, it had no duty to do so, but did owe a duty to the TWA-LLC furloughees.

Plaintiffs then hypothesize a conspiracy involving "deceitful and fraudulent" conduct by Arbitrator George Nicolau, allegedly occurring "with APA and the other parties' connivance." Opp. at 18:7. Plaintiffs fail to mention that one of the "other parties" was ALPA – Plaintiffs' bargaining representative at the time, and the appropriate target for Plaintiffs' imaginative accusations. While an

off-the-record discussion did occur during the arbitration (with the consent of Plaintiffs' representative, ALPA), Plaintiffs have no competent evidence that anything improper occurred. In a prior case brought by Flow-Through Pilots, a district court found that Arbitrator "Nicolau issued a thoughtful, thorough, and detailed remedy opinion that evinced his consideration of all Parties' concerns." *MacKenzie v. Air Line Pilots Ass'n Int'l*, 2011 WL 5178270, *4 (N.D. Tex. Oct. 31, 2011), *appeal dismissed*, 598 F. App'x 223, 225 (5th Cir. 2014). To support their contrary view, Plaintiffs provide a declaration offering unbridled speculation, not admissible at trial, and to which APA hereby objects. *See* Mackenzie Decl. ¶¶ 19-25; Fed. R. Evid. 602; Civil Local Rule 7-3(c). "To survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts," not just show that the alleged "set of events could conceivably have occurred." *Cafasso v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011). Plaintiffs fall far short of that standard here.

Plaintiffs also point to comments allegedly denigrating Flow-Through Pilots. Opp. at 18:23-26. These do not constitute evidence of animus by APA, however, as none was made by an APA officer, director, or anyone else involved in the challenged decisions, but instead by rank-and-file pilots. And Plaintiffs' specific examples all occurred more than a decade before they filed this suit. *See* Valente Decl. ¶ 12 (1997 and 1999); Cordes Decl. ¶ 14 ("after American acquired TWA," *i.e.* in 2001). Nasty comments "'not tied directly'" to the adverse action suffered by a plaintiff are "'stray remarks,'" "insufficient to create a triable issue of fact." *Magsanoc v. Coast Hotels & Casinos, Inc.*, 293 F. App'x 454, 455 (9th Cir. 2008) (quoting *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir.1993)).

In Plaintiffs' entire discussion of discrimination, they point to only one event within the limitations period: APA's decision to receive a presentation from "other pilot groups" – actually just a single group, the former MidAtlantic pilots – and then seek length of service credit for that group under Letter G. *See* Opp. at 18:15-19 (citing Cordes Decl. ¶¶ 49, 50).[7] Plaintiffs have provided no

[7] MidAtlantic Airways ("MidAtlantic") was a division of US Airways created in 2003, when that airline and ALPA (then the collective bargaining representative of its pilots) agreed that US Airways would create a new operation to fly regional jets, which could be flown by pilots furloughed from US Airways. Duncan MSJ Decl., Docket No. 47, at ¶ 24 & APA MSJ Exh. 17. MidAtlantic was initially intended to operate as a wholly-owned subsidiary of US Airways, but it ultimately was formed as a division within US Airways and operated on the US Airways operating certificate issued by the Federal Aviation Administration. Duncan MSJ Decl. at ¶ 24 & APA SJ Exh. 17 at 3. Following the *(Footnote continued)*

evidence that they ever requested such a meeting, unlike the former MidAtlantic pilots. *See* Roghair Reply Decl. at ¶ 7. And APA requested Letter G credit for former MidAtlantic pilots because, unlike Plaintiffs, those pilots had actually been furloughed by their carrier. *See supra* at n.7. This cannot support a finding of discrimination because APA's decision related to the "legitimate union objective[]" of mitigating the harm of job dislocation. *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007) (internal quotations omitted).

3. APA did not act in bad faith. The Opposition does not separately discuss bad faith but combines it with Plaintiffs' argument on discrimination, rebutted above. Plaintiffs identify only one particular action as alleged bad faith: APA's failure to respond to certain letters. *See* Opp. at 18:10-11. But Plaintiffs do not allege "fraud, deceitful action, or dishonest conduct" related to the letters. *Beck*, 506 F.3d at 880. And the only case Plaintiffs cite involves the distinct situation of a "request for job referral information" to discover a possible pattern of discrimination, *N.L.R.B. v. Carpenters Local 608*, 811 F.2d 149, 152 (2d Cir. 1987), not a request for explanations of long-past decisions when the relevant materials (e.g., contractual provisions) were readily available to the pilots.

D. Plaintiffs Have Failed To Meet Their Burden Of Introducing Evidence Of Causation.

In our opening brief, we showed that Plaintiffs bear the burden of proving causation by introducing evidence that if APA had attempted to bargain additional LOS credit on their behalf, American would have acceded to such a proposal. *See* MSJ at 13:4-10 & n.14. This heavy burden is necessitated by the federal labor policy favoring the stability of labor agreements, lest "'the bargaining process . . . be under constant siege in the courts.'" *Id*. at 13 n.14 (quoting *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992)). In response, Plaintiffs have introduced no such evidence. Instead, they argue without supporting authority that it is *APA's* burden to introduce evidence that American would *not* have so agreed. Opp. at 20:22-23. The law, however, is to the

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merger between American and US Airways, APA requested American to extend credit under Letter G to pilots who were hired directly by the MidAtlantic division but who were subsequently furloughed by MidAtlantic. Reply Decl. of Neil Roghair, filed herewith, at ¶¶ 6-8. American refused APA's request, asserting that the members of this group of MidAtlantic furloughees "were never furloughed from US Airways Mainline service and therefore are not entitled to the Length of Service Adjustment." *Id*. at ¶ 8 & APA SJ Exh. 53.

contrary. *See e.g.*, *Ackley*, 958 F.2d at 1472; *Bishop v. Air Line Pilots Ass'n, Int'l*, 159 L.R.R.M 2005, 1998 WL 474076 *16 – *18 (N.D. Cal. Aug. 4, 1998), *aff'd mem.*, 211 F.3d. 1272 (9th Cir. 2000).

Plaintiffs also argue that American's extension of LOS credit to *other* pilot groups in *other* situations (in which other pilot groups came to American through mergers, such as the TWA pilots), constitutes evidence that American would have done so for the Eagle Flow-Through Pilots, if requested. Opp. at 20:14 – 21:2. But the two situations are not similar. *See supra* at Section I(C)(1). To the extent that they can be compared at all, the equivalent of merger terms in the Eagle situation was the Flow-Through Agreement, in which the Eagle pilots were expressly *not* granted LOS credit for their time at Eagle. Again, Plaintiffs are attempting to require renegotiation of the long-expired Flow-Through Agreement by continually demanding that APA negotiate additional LOS credit for them. The most telling evidence on this issue is the absence of LOS credit in the Flow-Through Agreement, and Plaintiffs have simply failed to meet their evidentiary burden on the causation element.[8]

II. SUMMARY JUDGMENT SHOULD BE GRANTED ON PLAINTIFFS' SECOND CLAIM

In our opening brief, we showed that the first portion of Plaintiffs' second claim – predicated on a stipulation ("Stipulation") between the parties to the SLI arbitration and on the original proposal ("Proposal") submitted by the American Airlines Pilots Seniority Integration Committee ("AAPSIC") – was mooted by the withdrawal of both and the introduction of subsequent stipulations and proposals that lack the challenged provisions. MSJ at 17:11 – 20:11. In response, Plaintiffs present no evidence controverting that evidence, nor any evidence that they incurred any injury during the brief pendency of the withdrawn Stipulation or Proposal. Rather, they argue that "the challenged conduct has a reasonable probability of recurring" because APA could "reassert . . . at any time" the position

[8] Additional evidence as to American's attitude toward LOS credit, although it is not APA's burden to present, is provided by the situation of the former MidAtlantic pilots, who Plaintiffs assert received better treatment from APA than the Flow-Through Pilots. *See* Opp. at 18:15-17 ("APA has … taken action that seems to be leading to giving other pilots" – namely, MidAtlantic pilots – "these benefits"); *see also supra* at n.7. American's refusal to extend Letter G credit to a pilot group that (like the Flow-Through Pilots) it does not consider to have flown for an American merger partner – even though that group (unlike the Flow-Through Pilots) was actually furloughed – rebuts Plaintiffs' (already insufficient) inferential argument that American might have agreed to extend LOS credit to the far larger group of Flow-Through Pilots, *see* Roghair Reply Decl. at ¶ 9, if APA had so requested.

allegedly advanced in the Stipulation and the Proposal "that Eagle time should be excluded from longevity in fashioning an integrated seniority list." Opp. at 21:21-24. But the evidentiary record in the SLI arbitration is closed and it is therefore too late to introduce new stipulations or proposals in that proceeding. *See* Duncan Reply Decl. at ¶ 4. Moreover, AAPSIC has no intention of asserting the challenged position in the SLI arbitration, even if the evidentiary record were not closed. *Id*. at ¶ 5. There is no "reasonable probability" that the challenged conduct will reoccur, merely Plaintiffs' surmise. "[S]uch speculative contingencies afford no basis for [this Court's] passing on the substantive issues the appellants would have [it] decide . . . ." *Hall v. Beals*, 396 U.S. 45, 49 (1969).

The remainder of Plaintiffs' second claim concerns AAPSIC's decision not to assert a "fallback" position in the SLI arbitration that Plaintiffs' longevity at Eagle should be considered in the seniority integration, in case the SLI arbitrators reject AAPSIC's primary position against use of longevity (with which Plaintiffs agree). In our opening brief, we showed that that dispute is unripe because no claim arising from the SLI arbitration can ripen unless and until the SLI arbitrators issue an award that disadvantages Plaintiffs in some cognizable way. MSJ at 20:12 – 23:8. In response, Plaintiffs acknowledge that "the [SLI] arbitration decision may, if longevity is not a factor, resolve the issues here," Opp. at 22:3, but argue without citing any supporting authority that the uncertainty as to whether they will be adversely affected bears only on "the scope of the remedy that might be issued," and "is not a ripeness question," *id*. at 22:1-2. Aside from lacking any precedential support, this argument is contrary to the Ninth Circuit's governing decision in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), as discussed in our opening brief, MSJ at 20:19 – 21:23.

Finally, Plaintiffs do not respond at all to our showing that if the second portion of their second claim were ripe, it would fail on the merits because no reasonable jury could conclude that APA acted arbitrarily, discriminatorily, or in bad faith in the SLI arbitration. *See* MSJ at 23:9 – 25:18. Plaintiffs' failure to controvert that argument constitutes a concession as to its merit, and summary judgment should therefore be granted as to the second portion of Plaintiffs' second claim on that basis alone.

CONCLUSION

For the reasons discussed above and in our opening brief, the Court should grant APA's summary judgment motion and enter final judgment in favor of APA and against Plaintiffs.

Dated: April 7, 2016.

Respectfully submitted,

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