Pages 1 - 70

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Richard Seeborg, Judge

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION,	)	
Plaintiff,	)	
VS.	)	**NO. CV 15-3125-RS**
ALLIED PILOTS ASSOCIATION, ET AL.,	)	
Defendants.	)	

San Francisco, California
Thursday, April 21, 2016

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

KATZENBACH LAW OFFICES
912 Lootens Place - Second Floor
San Rafael, CA 94901
BY: CHRISTOPHER W. KATZENBACH, ESQUIRE

For Defendant Allied Pilots Association:

JAMES & HOFFMAN, P.C.
1130 Connecticut Avenue, NW - Suite 950
Washington, DC 20036
BY: EDGAR N. JAMES, ESQUIRE
DANIEL M. ROSENTHAL, ESQUIRE

ALTSHULER BERZON, LLP
177 Post Street - Suite 300
San Francisco, CA 94108
BY: JEFFREY B. DEMAIN, ESQUIRE

Reported By: Pamela A. Batalo, CSR No. 3593, RMR, FCRR
Official Reporter

APPEARANCES CONTINUED:

For Defendant American Airlines:
O'MELVENY & MEYERS, LLP
Two Embarcadero Center - 28th Floor
San Francisco, CA 94111
BY: CHRIS A. HOLLINGER, ESQUIRE

Thursday - April 21, 2016 **1:30 p.m.**

P R O C E E D I N G S

---000---

THE CLERK: CV 15-3125, American Airlines Flow-Thru Pilots Coalition, et al., vs. Allied Pilots Association.

Counsel, please state your appearances.

MR. KATZENBACH: Chris Katzenbach for the plaintiffs, Your Honor. Good afternoon.

THE COURT: Good afternoon.

MR. ROSENTHAL: Daniel Rosenthal for the Allied Pilots Association.

MR. DEMAIN: Jeffrey Demain for the Allied Pilots Association.

MR. JAMES: Edgar James for the Allied Pilots Association.

MR. HOLLINGER: Chris Hollinger for American Airlines, but I will just be observing.

MR. KATZENBACH: For the record, I have with me my clients,two of my clients, Mr. Cordes and Mr. Robson.

THE COURT: Good afternoon.

This matter is on for the motion by the defendants for Allied Pilots Association motion for summary judgment and then plaintiffs' motion is for class certification.

I have spent some time with what you submitted to me, and let me just give you some of my reactions and then perhaps that

can assist you in terms of targeting your discussion with me.

First of all, with respect to the motion for summary judgment, let me talk first with respect to the first claim for relief. As I understand it, it's -- it's in two parts, in a sense, and the second part would be the Letter G claims, and let me put those aside for a moment and come back to them.

As to the other claims, under the first claim for relief in the Second Amended Complaint, the arguments from the moving party is that those claims are time barred, and I recognize that plaintiffs have pointed me to the Third Circuit case law that is characterized, as I understand it, as the *ray of hope* theory.

But the long and short of it is I do think the defendants do have the better argument on the statute of limitations issue, that the claims, other than the Letter G claims, do suffer from a time bar.

I also know that -- recognize the union is making the argument that -- the additional argument that they contend the plaintiffs were not represented and so therefore there was no duty of fair representation owed, and then there is some back and forth arguments on that issue, and we can certainly discuss that. I think the time bar is the bigger problem.

With respect to the Letter G claims, those don't have a time-bar issue, and I suppose rather than going through a discussion of that, I will tell you that I think it's a close

call, and I'll be interested in argument in particular on the Letter G claims because I think there are, from what I can see, arguments going both ways, and I will want to hear from you on that issue.

With respect to the second claim for relief, the first element of that claim seems to pertain to a stipulation and proposal that was submitted by the union in the arbitration proceeding regarding the integration of -- seniority-wise for American and US Airways pilots. What appeared to me to be the case was that the plaintiffs -- and Mr. Katzenbach can talk to me about this -- support the new stipulation, and so I do have a mootness question with respect to that.

The second element seems to implicate more a ripeness concern and that goes to the current position concerning longevity and whether or not that should be a factor in integrating the seniority list, this issue in arbitration.

It seemed -- from the papers it appeared that the plaintiffs agree that it should not be, the longevity issue as a factor, but they seem to argue that the union should advocate to include American Eagle pilots if longevity becomes a factor, and so there is some ripeness issues, I think, on that claim.

The upshot is my tentative view on the second claim for relief is that it would be inclined that the motion for summary judgment is well taken, but that the grant would have to be without prejudice because these claims could live again,

depending upon how things shook out.

With respect to the class certification motion, in the event that there are some claims -- in particular I'm thinking of the Letter G claims -- if they do survive, I don't really see the defendants arguing against certification. Indeed, I see the defendants arguing that I should certify first and then grant their motion for summary judgment.

That is problematic to me because even if you were to go down that path, I think you would have to give notice to the class and they should have an opportunity to opt out or -- I don't think it practically makes sense to certify first if the motion for summary judgment is going to be a grant. We can talk about that.

But, in any event, I'm inclined to think that if there are claims that do survive summary judgment, that class certification is an appropriate mechanism at this point in time.

I did issue an order on the papers with respect to the airline, and I assume you've all seen that. I know American Airlines at the moment, if I understand you correctly, stays in as a nominal, if you will, defendant for purposes of the implementation of any injunctive relief that might flow in the second claim for relief, but I understand that is the posture that the airline is in at the moment.

So those being my tentative comments, why don't I look to

you first, Mr. Katzenbach, on the motion for summary judgment and then go from there.

MR. KATZENBACH: Okay, Your Honor. Let me see if I can address the points.

THE COURT: Take it in any order you want. I give out my preliminary comments because I think -- lawyers tell me it's sometimes helpful to -- even if they're not happy with how I'm thinking about it, they want to know how I'm thinking about it. I wasn't intending to set an agenda. Go ahead any way you think --

MR. KATZENBACH: Let me start with addressing -- I'll get to the Letter G in a second, but I would like to address the timeliness of the other LOS credits because it -- because what I think really -- what is going on here is the sort of perennial problem with DFR cases; in other words, where is the Goldilocks moment. In other words, you have to know enough to know the union has breached its duty of fair representation, and then you have to sue, but at what point do you know that. Sometimes it's easy; right? Sometimes it's impossible to know.

The LOS credits issue, the -- it seems to me this. That we wrote a number of letters to which we got no response. So at that point -- at some point, their argument basically means -- I think says well, you heard we weren't ever -- we didn't respond to you. You sort of knew that something had happened with other people, so you sued us at some point in

there, in that period of time.

But I guess the problem it comes to is it's not good enough to say for statute of limitations purposes well, at some point, you should have known. At some point, you have to know, and when the union won't tell you what its reasoning is, how do you know the union is breaching its duty of fair representation?

THE COURT: I suppose my concern, though, is going along the path of this Third Circuit *ray of hope* notion, if that is a viable concept, it would pretty much do away with statute of limitations because you'd always be able to say there is this kind of uncertainty so there's no end to it.

And so I see your point, but I think that then it can be, you know, turned back around and say the danger of it is that you never have an end.

MR. KATZENBACH: Well, I don't -- I think the rays of hope -- I mean, I think the *ray of hope* is simply a really nice phrase.

THE COURT: It's an interesting phrase.

MR. KATZENBACH: But I don't think it's an inconsistent phrase or an unusual one. The Ninth Circuit in other cases have talked about when the union takes a clearly adversarial position, when the union lets you know that they're not going to do something.

And I guess my position on this would be that silence will

never be enough. That this is something when the ball is in the union's court, you can't just simply let it bounce around there forever and then say well, you should have realized we were never going to return your serve.

That the union has to say something, and the importance of that can't be overestimated because the only way you can assess whether you have a -- whether the union is acting reasonably within its discretion or not is when you know what the reason the union -- what the union is saying to you.

And that becomes particularly important in negotiations because, for example, if you imagine how this would work out in a sort of situation where the union cared about my clients, they would write back to my clients and say, we got your letter and here is why we're not going to give you what you want. And my clients would then have the opportunity to look at that and respond to it and say well, you know, what do you mean here, what do you mean there, why -- why -- is -- is your -- is your contention -- is your contention just an arbitrary distinction or is it a contention of substance?

And one of the problems that you get is that without the union's response in that way, my clients are left in a position where you don't really know what to do. How do you bring a lawsuit in good faith when you don't really know what the other side's position is?

If I were to come to this Court and say we don't know what

the union's reasons were, but we're suing them anyway and maybe we will find out something in discovery and then when they say something in discovery, we say that's just the lawyer's after-the-fact justification, and the Court may or may not say yeah, but what was the union's position at the time, and then the Court would be faced with exactly the same situation my clients end up getting faced with, is you don't really know what their position is.

And if you look at it from a labor relations perspective, just simply a perspective which says the union has a great deal of discretion, the union has to balance interests, all those things that the unions cite to you and are appropriately considered, that cannot play out in a meaningful way, if what -- if the union never said anything.

In other words, the whole notion of a duty of fair representation and a concept of representing people and balancing rights supposes under its underling that you were in fact interacting with the employees you're representing. And that's not just a hypothetical thing, because if you look at this from the grievance arbitration perspective where this most typically comes up in the *Tenorio* case, if the union simply never responded to the guy and calls back and says congratulations, we got the company to agree that they might rehire you in the future. You're not blackballed. And the guy says but I never did any of the things they accused me of and

you never talked to my witnesses or asked me about this, right, it seems to me the Ninth Circuit says yeah, it's a duty of fair representation. They had to do some form of minimal representation.

Well, if you look at it in the context of collective bargaining and say that the duties are the same in general and have some of the same qualities, then it seems to me that before they can take a position that benefits others and harms a discrete and identifiable group, that they have some sort of interaction and dialogue --

THE COURT: If you don't get a definitive response, isn't that the moment that you -- you said well, how could we at that point in good faith come in and bring a case? Why couldn't you? I mean, your argument would be they owe you a definitive positive response, and you say if they don't respond that way, they are -- it's a breach of the duty of fair representation.

Why can you take this notion that well, as long as we haven't gotten the final definitive word, it remains open, if you will?

MR. KATZENBACH: I think that's a good point, Your Honor, and I think -- but I think you have to look at it in the context that my clients in these letters are saying we know you are going to be garnering a contract. We'd like you to advocate for us. Contract bargaining is not like a two-day

affair.

THE COURT: I understand. This is a complicated situation. I understand.

MR. KATZENBACH: And so that, you know, we have to ask in advance because basically my clients have this sort of practical need to allow enough time for a process to occur.

So I guess what I'm saying is that if I were looking at this from -- at what point do you know the union didn't stand up for you? I would say the earliest point you could really know for that is when you see when the contract is ratified and it doesn't contain anything that protects you. At that point if the union hasn't responded to you by then, then you can look at the contract and say okay, the union hasn't responded. Maybe now we have enough reason.

Even that is slightly problematic because when the contract is silent --

THE COURT: You're making an inference --

MR. KATZENBACH: You're making an inference that they somehow rejected it for some reason that you don't know. But I'm saying that it seems to me hard to say that before that point you know.

And, I mean, this -- and I don't mean to repeat myself, but Goldilocks moments in these cases are difficult to determine as you can see from the second cause of action.

THE COURT: I understand your point.

Let me before, we go on to the Letter G issue, rather than having you address all of them, Mr. Katzenbach, let me hear -- you can stay up here. That's fine. If I can hear from the union, then while it's fresh in my mind, we can address it.

MR. ROSENTHAL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. ROSENTHAL: So from our perspective, we don't see much of a Goldilocks moment problem here. We think that in 1997 there was an agreement negotiated that spelled out very clearly how length of service would work for these pilots. And that's in the record, Exhibit 1, and it says their length of service will start when they come to American and join the American payroll.

THE COURT: Isn't there evidence that indicates there was -- there's inquiry from the plaintiffs continuing, inquiry of sorts, and then there's no, you know, we -- you're wrong, we disagree with you, no, we don't have any duty to you, what have you. There's no response along those lines in any particular point, is there?

MR. ROSENTHAL: Well, actually we have in the record several letters that API did send to these pilots. There are Exhibit 15, and then Exhibits 35 through 39 are letters that were exchanged between them. So --

THE COURT: Do you think those letters reflect -- I'll go back again and look at them. You think when I look at those

letters it will be clear that you're rejecting the plaintiffs' contentions such that it triggers the running of the statute?

MR. ROSENTHAL: Well, I don't think that could -- that could possibly be the test because -- so let's say we have this rule in place where a wrong has been done. A party can inquire as to whether the union is going to correct that wrong, and that's going to restart the statute of limitations.

And let's say we respond -- the union responded and said no, we're not going to correct that. I don't see why that is the sort of definitive moment. Why couldn't they then send another letter three years later and say well, why don't you consider this issue again?

To me the idea that the plaintiff could, you know, just simply keep inquiring about issues that have been settled for quite a long time really, as you said, kind of does away with the statute of limitations entirely.

THE COURT: It's a very short statute; right? It's like six months --

MR. ROSENTHAL: It's a six-month statute, and I think that's not a coincidence because I think courts have recognized a policy of wanting to resolve these sorts of issues quickly, workplace issues. You don't want them to sort of fester in the workplace and cause a lot of tension.

So it is intentional that there is a six-month statute of limitations and that these matters are meant to be resolved

quickly.

And I also want to comment on the idea that, you know, the CBA, when that came out, that was the trigger. As we've pointed out in our briefs, there were a number of CBAs along the way. There was one in 2012, for example. There was one in 2003. There was the 1997 agreement which started all of this. There will be one probably in a few years from now and a few years after that. And all of those could potentially be a possibility for someone to complain that the CBA has not corrected some problem that's in the past. And the statute of limitations can't work that way.

And there's also no authority that we know of for this notion that there's sort of this interactive process that a union has to explain all of its actions at all times and, you know, work through these things in that sort of interactive way.

I think the fact is they very easily could have filed this claim six months after the 1997 agreement, frankly. It wouldn't have been against APA because it's undisputed that at that time APA didn't represent them. It would have been against ALPA, and that would have been a perfectly viable claim to say this is not a fair system.

They could have also filed it after the TWA acquisition because they perceive a lot of unfairness stemming from that acquisition and the fact that those pilots were given this

credit. That was a known issue.

THE COURT: Do you think -- as Mr. Katzenbach points out, it was a fair point, the problems that I was indicating that I had on the second claim for relief between the rightness of the mootness issue, in a sense, that does point out the dilemma that the plaintiffs have about the timing of these issues.

So why isn't that sort of a problem that, you know, that if they go too early, it's not ripe. If they go too late, it's moot. I mean, they're kind of caught, aren't they?

MR. ROSENTHAL: I think they're actually -- this situation is quite different from the situation where there's an arbitration going on. This is the negotiation of a contract.

So I understand the concern the contacts have in arbitration and it's something that is not -- a lot of DFR cases involve grievance arbitration so it's not a sort of strange occurrence, but this, frankly, is a very different situation.

THE COURT: Okay.

Any comment on this point, Mr. Katzenbach? And then we'll go to the next one.

MR. KATZENBACH: I do. First, they refer to the '97 agreement. That's the Flow-Thru Agreement, and I point out that that expired, so whatever its terms weren't precluded from

renegotiating afterwards.

But the more important point is that we raised these issues when it appeared that they were negotiating this pay credits, credits for pay purposes in connection with the US Air merger in particular. You know, as -- it seems to me that we're -- you're starting to give it to a new group of employees, that that triggers a new question. It's not the same situation.

As to the TWA pilots, candidly I'm not surely exactly what the deal is for them because if you look at supplement CC, it actually doesn't refer to getting pay -- classification seniority for purposes of pay for them, only occupational seniority. So it's not clear to me when, if ever, there was an agreement on the TWA pilots.

But the more important issue is this: They raise a -- they raise an interesting point, a point that has some merit. They say well, you people can't just revive the statute of limitations. That's a fine point. So I guess what I would say is this, right?

Obviously new circumstances require new -- sort of trigger new events. In other words, you may not have discriminated -- you may have had -- one discrimination doesn't mean you had a good reason for a second discrimination.

More importantly perhaps is that if the union really wants to avoid things, say something and give an explanation. They

say there is no interactive process. Well, *Tenorio* says the opposite, at least in the grievance context. I see no difference here.

So if the union wants to start a statute of limitations running, then it gives an answer in response to the letters. It seems to me this is the most straightforward and candidly the fairest and most consistent with a duty of fair representation.

You know, they seem to have a number of arguments that it sort of -- that we should have known earlier. I see no evidence that they produced that we should have known anything earlier because we knew nothing of their position and they don't suggest that we did.

I think the letters they are referring to were all written after this Complaint was -- were all written after -- after this Complaint was filed, I think. And I don't think -- or in any event, none of them I think respond directly to this issue. I think the only issue they've raised is that *we didn't represent you* issue which we've addressed at length.

And so it seems to me that we're not asking for very much in saying that the statute of limitations has to -- the union, in order to start a statute of limitations running, has to actually do something. And that every case where courts have said statutes starts, unions have done something. They have taken that adversarial position. Not a statement well, we

might be -- not a statement that says we intend to do something, but rather -- as the Ninth Circuit -- but I -- the Ninth Circuit and I think the Second -- but rather they did something. They actually -- you know, it wasn't that we're never going to represent you in bargaining. They went there and didn't represent them in bargaining. It's the *didn't* date that causes the start.

So why is it unfair? Why is it difficult? Why is it a problem to say that the union has to return the ball and that will start -- and if that is -- if that turns out to be the demonstrative event, that starts it, but if the union doesn't return the ball, then it doesn't start until at least something else happens, and that sort of strikes me as the fair and simple reason that if you -- that otherwise -- otherwise it doesn't happen.

I would add -- and if I have to, if the Court will permit -- that to the extent they seem to be saying *you should have known sooner*, then it raises it seems to me a factual issue for trial, to be candid. That's an issue they can argue to a jury.

THE COURT: You reminded me that -- staying on the first claim for relief, that there is the additional argument that the defendants make with respect to representation, whether or not they were representing you. So why don't you go ahead and start on that, Mr. Katzenbach, and then --

MR. KATZENBACH: I will, Your Honor.

THE COURT: -- I will hear from the defense.

MR. KATZENBACH: It seems to me that the -- that the problem that they have with this argument is they really cannot meaningfully distinguish between a representation -- there's representation of the Staplees and their failure to represent the Flow-Thru Pilots.

Now, it's undoubtedly true that the negotiation of the Flow-Thru Agreement created some representational problems that probably were not foreseen at the time; in other words, it is a situation where both unions probably ended up with some duties to people they might not have initially thought. But that happens. It's not the job of the union to pick one side or the other. It's the job of the union to say if we have obligations to two sets of groups, we have to find a fair way to resolve them. That's not what happened here.

THE COURT: Most of the cases that I think you cited, when you go back and look at them, involve restatement issues where there was some -- there wasn't the same situation we have here where at least the argument is there was no prior representation and it only occurs down the line.

MR. KATZENBACH: Well, they do make a reinstatement -- a sort of a reinstatement argument in a couple points in their brief, but let's look at that. First of all, TWA Staplees weren't being stated into anything. They had never flown for

American --

THE COURT: No. But they point me to the NMB conclusion that TWA and American represent one transportation system.

MR. KATZENBACH: Right. But once you're on the American seniority list, which is all the TWA people were, you were in the same position as a Flow-Thru Pilot. Flow-Thru Pilot had done everything that was normally necessary to sort of get hired by American. They had been selected for a new-hire class. They were already under that NMB certification, the existing one. It didn't have to be expanded to include them. Just like the NMB certification doesn't apply to the TWA pilots that fly for Eagle, that flowed down and flew for eagle. So --

THE COURT: But Eagle is a separate system. It's a regional arrangement, isn't it? It's not part of the American system.

MR. KATZENBACH: No. They're commonly owned by AMR, Inc. Both American and Eagle are both jointly owned -- subsidiaries of AMR, Inc.

THE COURT: At the time I understand when TWA and American joined together, they become one system, and American Eagle remains separate, even if there's some common ownership.

MR. KATZENBACH: Right. But the -- well, that's an interesting -- that is somewhat an interesting question, but I

think that if you look at --

THE COURT: I'm old enough to remember fondly TWA, so I can --

MR. KATZENBACH: I can remember PanAm.

THE COURT: I can remember PanAm as well.

MR. KATZENBACH: And, in fact, I'm old enough to have flown on a TWA Constellation out to the West Coast.

THE COURT: I remember watching those planes. Go ahead.

MR. KATZENBACH: Okay. The TWA Staplees had no reinstatement right because -- they had a contract right under the Letter CC to get new jobs as they came available. The Flow-Thru Pilots had a contract right under Supplement W, and we all know that W is ahead of CC so that means our rights are superior. The -- to get jobs at American.

They were both on the seniority list. These were bona fide seniority numbers. They weren't placeholders. There was no provision in the Flow-Thru Agreement or under the CBA for anyone to lose these numbers. They existed. They existed just like other seniority numbers and could be triggered just like other seniority numbers.

If anything, the Flow-Thru Pilots had a slightly better qualification because they had actually gotten accepted into a new-hire class, and more importantly, they were being held back not because of their own desires, but for the interests of the

company. In that sense, they were perhaps most possibly analogous to people on sort of administrative leave of absence for the benefit of the company.

They were -- but anyway, that they had a defined -- one of their arguments is that their hope of getting to American was only some -- some time in the vast future, but not under the agreement. The agreement limited the holdback to two years at most. And even then -- that was only for the initial classes. Because once you had two years of pilot flying, you wouldn't even have that holdback.

And most -- so as the agreement envisioned, you would actually move -- it actually envisioned almost no holdbacks after a couple of years of captain flying, that people would be moving much more quickly but for 9/11.

And in that sense, the TWA Staplees are in exactly the same position, that they aren't getting jobs at American because American doesn't have jobs for them, and the reason American doesn't have jobs for them is because of 911.

So I find that argument about reinstatement versus not reinstatement -- TWA pilots aren't being reinstated to anything. If anything, it's the Flow-Thru Pilots that are being reinstated to the jobs they had actually qualified for at American to by getting hired to --

THE COURT: I guess my question was a little different than that. I was making reference to the cases you cite to me

that I think in those cases the circumstances were reinstatement circumstances.

MR. KATZENBACH: They were definitely -- they were definitely furlough-type cases, I believe. And what all -- and candidly, what all this shows is the relationship that the -- involved in this case is unique, but that doesn't mean it doesn't flow -- that the rights and duties don't flow from the same concepts.

I mean, after all, before the first furlough case -- and I guess that was a 37 decision, something like that -- that there weren't any furlough cases either. But the theory of that furlough case was that these furloughed transportation employees had an interest in the job because they had a reasonable expectation of getting back -- getting, you know, back to work for them. And so did the Flow-Thru Pilots. The Flow-Thru Pilots who had been accepted in a higher class and were being held back from that had a reasonable expectation of that holdback ending and moving up to American and not just reasonable. It was contractually guaranteed, much like furlough cases.

So when you take just a step back and say the word *furlough* has a meaning to it, it's not just saying left-handedness. It has a meaning in terms of employment relations. These guys are not guys on the street. These guys are guys with contract and real rights who have met their

obligations and taken their risks and done what they need to do to get there, and so these are not just random -- this is not just an expectation in the air. This is a concrete and definite expectation, and I think that that is more than enough to meet the requirements of the law.

And I think that, you know -- that that is, I think, the key to this. And, you know, without -- and what's unusual here in terms of the bargaining agreement argument -- I think I need to address this one point -- is what is odd is they don't point to anything in the contract which defines the bargaining in a way that would exclude my clients.

We have included, by the way, the entire recognition section in part of our exhibits. And the reason for doing that was to point out -- so that I could stand here and say there is nothing. There is nothing in that that says anything that suggests that my clients are not part of that bargaining. They haven't carved out that bargaining unit in a definition that would include the TWA Staplees and exclude my clients in a rational manner. So this isn't a case where they even have bargaining in a definition.

As to the single transportation system and the NMB certification, neither of those I think are dispositive. They simply mean that APA became -- that the two entities became linked, but my clients were already part of that by becoming on the seniority list. They were already part of the AA system.

And they had exactly the same rights that -- as -- as the Staplees had.

And I think -- I just do not see that these are meaningful distinctions that the other side is attempting to draw that have any sort of labor relations meaning. And, again, that's the other point, is what's the labor relations meaning here. Why are my clients not vitally interested in the terms and conditions of employment at AA just like the TWA Staplees would be? Why does my guy, sitting next to a TWA Staplee, have less rights to that job when it ever opens up than the guy sitting in the chair next to him?

That is our sort of blunt feeling on that.

THE COURT: Let, me on that issue, hear from the defense.

MR. ROSENTHAL: There is a lot of points to make about that. I did want to say just one or two more very brief things to respond to the timeliness argument that Mr. Katzenbach said when I was done.

In terms of -- he said there may be a triable issue as to when they knew about these things. First of all, Plaintiffs' Exhibit 11 is a letter from several Flow-Thru Pilots, including Mr. Cordes and it complains specifically about the disparity with TWA pilots. It complaints specifically about the US Air pilots getting their length of service from US Air.

The US Air acquisition, by the way, was executed on

December 13, 2013. All of these things long before the six-month period.

And Mr. Katzenbach said APA has to do something to start this. The fact is APA did something when it negotiated these agreements, the 1997 Flow-Thru agreement. When it took these actions that led to the arbitrations that they complain about throughout their Complaint.

And their complainant sets out this whole history of APA, you know, slighting them in all these ways, and for them to say that they, despite all of that, thought that APA was, after 17 years, going to change this rule that had been in place for 17 years, it seems fairly incredible.

Now, on the scope of the representation issue, the distinction is pretty simple. One group of pilots had flown -- had actually flown in service for American or for a company that was deemed part of American's transportation system. That is the former TWA pilots and all the other pilots that had actually flown at American.

The plaintiffs in this case had not ever flown in service for American. And that is the distinction that is in the cases we cite, *McNamara-Blad*, the Ninth Circuit case, which said American can't possibly have been representing these Reno flight attendants during the time when they were still in their Reno uniforms flying Reno aircraft.

The *Bensel* case and the case we cited in our reply brief,

the Seventh Circuit case, Footnote 3 of our reply brief, said even pilots who are in training to come to an airline, until they actually fly for the airline, they're not part of the bargaining unit and they're not represented. That's a very clear bright-line rule and it's necessary for a union to have a bright-line rule to know exactly who it represents and who it doesn't represent.

Now, the other --

THE COURT: This notion just, so I understand it, of when -- of a unified or unitary transportation system, when the TWA pilots are still flying for TWA before the merger of American and TWA, your contention is that even during that period, they are represented in some fashion by the union because ultimately it becomes one transportation system?

MR. ROSENTHAL: No. Our position is that as of April 3, 2002, which is when the NMB issued its ruling, at that time APA assumed a duty to represent the pilots who are flying actively at TWA-LLC and those who had been furloughed with reinstatement rights, as established by the cases that Mr. Katzenbach cites.

But the other really --

THE COURT: Your argument with respect to the Eagle pilots is that they remained separate and apart, really to the present day; right?

MR. ROSENTHAL: Up -- right up until they -- well,

Eagle remains a separate airline, and these particular pilots remain flying at Eagle up until they started flying for American.

The one critical point about that is that when they were flying at Eagle, they had an exclusive bargaining representative. That was ALPA. And to the extent they had an interest in coming to American, that was a benefit that ALPA had negotiated for them. It was part of their collective bargaining agreement at Eagle and it was one of their terms and conditions of employment at Eagle that they had this right, this contingent right to come up to American. And they had a representative during that entire time. If you look at the arbitrations Mr. Katzenbach cites as evidence of this animus towards his clients, once again, they had a representative there, ALPA. And APA --

THE COURT: By definition because they had that, you could not be their representative, under your theory?

MR. ROSENTHAL: Well, I think as long as they were flying at Eagle and pursuing their rights under the Flow-Thru Agreement which was negotiated for them by ALPA, they were represented by ALPA.

And there's really no authority cited and no authority that we know of that having a seniority number is the thing that makes you part of a bargaining unit. In fact, the former TWA pilots had seniority numbers under Supplement CC, and even

that agreement was negotiated before they became part of a single bargaining unit.

The other thing I wanted to mention is that Mr. Katzenbach said that he -- he portrayed this as a very concrete right to come to American. They only had to wait at most two years. I wanted to point out that that's not accurate.

How it worked was they had to wait at least two years and then they could come up when there was an opening at American, however long it took for there to be an opening. And that was a contingent right. There was no guarantee that there would be an opening.

Whereas the former TWA pilots also had a right to return to American, but they actually had flown for TWA-LLC and were furloughed from it, which was deemed part of the same transportation system as American.

So we think that it's a pretty clear distinction. It's a distinction that the cases bear out, and as I said, it's important to have a clear bright-line rule here because unions need to know exactly who they represent and who they don't represent, specifically to avoid these sorts of conflict where there's an internal conflict of interest within the union about which group do we really represent here

THE COURT: I know that you'd have plenty to say on this and we could be on it for a long time, but let's move to the Letter G claims.

And, Mr. Katzenbach, do you want to start out?

MR. KATZENBACH: Yes, Your Honor.

It seems to us that apart from step one -- of course we never got any explanation from them for anything -- that they are drawing a distinction between pilots who were furloughed from some mainline carrier and pilots who were not furloughed.

Well, okay, they make that distinction, but the question is what's the meaning for that. I mean, it isn't enough to simply say, as I keep saying, left-handed. You have to know that this is a baseball game.

And you're -- you know, that -- so that the problem here is what factor do they even assert justifies this? The argument that I've heard here is that somehow there's a distinction between being furloughed -- being -- it's not an out-of-work situation because it has nothing to do without of work. It's not you're more familiar with equipment because it has nothing to could with that. It's not that you've been an employee of ours for years and years and therefore we're awarding you because, no, all the US Air pilots get it. The TWA Staplees get it.

And so what exactly is -- so the distinction they seem to be coming to is simply a distinction based on the use of the word *furlough* which of course has no meaning and more importantly is -- in the context of this case, what they really mean is somebody who wasn't getting a job at AA because of

economic conditions.

Well, my clients were not getting their jobs at AA because of economic conditions. And so if you go back and just step back one step from this and say okay, the word has to have a meaning, my clients fall with it. As Mr. Cordes says looking at the actual language of the contract, either no one was a furloughed employee because no one had flying or they conceivably fell into the rule that they were prevented from flying because of some layoff, in which case both groups --

THE COURT: Isn't it part of their argument that they negotiate for the benefit for a certain group -- it happens to be furloughed pilots -- and how can that then be equated to a breach of the duty of fair representation because rightly or wrongly whether or not a distinction -- it's a distinction with a difference, furlough versus non-furlough.

If they do -- just negotiate a benefit -- for whatever reason, one group, the other side of the table agrees to provide this benefit, why -- how can that then be translated into a breach of the duty of fair representation?

MR. KATZENBACH: Well, in several different ways. First of all, the breach of the duty of fair representation prevents arbitrary agreements. So, for example, no, you couldn't negotiate benefits for left-handed workers and not right-handed ones. So that there's a level of arbitrariness.

THE COURT: So truly it rises or falls, in your mind,

between whether or not the furlough designation is meaningless for purposes of differentiating between employees.

MR. KATZENBACH: No -- well, under the arbitrary -- the three-prong -- the arbitrary prong of the -- yes. But in this case, the fact that even if that distinction had some -- could -- could just sort of limp its way across the arbitrary line, we also have the issues of bad faith and discrimination so that, you know, in this case, you're not looking at a situation that -- where this agreement is being negotiated in isolation. You're looking at a long history of hostility. Now, whether --

THE COURT: So you're saying you've got to put this particular issue in context and it's your pattern of disfavoring your clients vis-à-vis these others.

MR. KATZENBACH: And, you know, their effort to, for example, suggest that, you know, that they can do this for -- because there's a meaningful distinction between TWA, I would point out -- and it comes a little bit back to that. And I would point out that their argument slips a little bit because what they're really saying is TWA employees who flew for TWA before there was this certification -- now, we're not arguing about TWA pilots who flew after this joint certification. The Staplees didn't.

So we're saying -- so that saying that you can somehow go back and say -- you're different because you flew at another

airline that went bankrupt, that you had furlough rights from that airline, but that's not much good for you because that -- the -- you have no collective bargaining agreement there. You have no job to go to --

THE COURT: Kind of grandfathering these folks.

MR. KATZENBACH: Maybe, but there is no -- that doesn't have anything to do with representational duties and it doesn't have anything to do with the argument they've just made.

So I guess what I come back to this is we look at this as a consistent pattern of behavior. And coupled with a pattern that is not only coupled with nonresponsiveness, but also coupled with, you know, act of hostility. And we've -- you know, that whatever -- for example, you might say -- just to pick an example.

Before LaRocco says no, no, the TWA are new hires and Flow-Thru Pilots have a right to these jobs, where does APA get the right to undermine that decision? Where do they get to do that? Where does it say part of your duty of fair representation, that you get to basically try to destroy the contract rights or contract obligations that these other pilot groups had?

And, remember, the Supplement W was part of the APA contract as well as the ALPA contract. And while this may have created some -- you know, some confusions here, I don't think

that it changed the fact that these people had representational rights.

Where does, for example, it say that, in the Nicolau award, they can engage in a pattern of deception. And it's not just speculation as they argue. Nicolau writes and says, ***This is my decision. It's not part of an agreement***. Right? The evidence, we've shown, is that they not only wrote to each other saying this is our agreement, but they had notes of this agreement before Nicolau's decision issued.

You know, I'm -- and -- you know, they suggest that perhaps that should have been raised in the -- they imply maybe that should have been raised in the ***MacKenzie*** case that was in the Texas District Court, and I would point out that Mr. MacKenzie points out in his declaration that he never received the March 30th transcript until December 2013, which was two years after the district court had ruled. It was part of the -- so that it obviously wasn't something that the district court in blessing Nicolau could have, you know, known about. So in giving that absolution, it wouldn't have worked.

In terms of -- so Letter G really comes down to a situation where we believe that at the time of course they're clearly represented employees, and that the effort and distinction that they're trying to draw is, one, that it's premised on a history of bad faith, that it's premised on a history of hostility, and we don't believe that they are stray

remarks; we believe they are evidence.

And that this is -- that -- when you flow it all through together, this is what we have. And candidly, the duty of fairness has to stand for something, and that's where I guess in the most abstract way, it has to say that the union has to act more honorably towards its members than it did in this case. And I'm not asking for a high standard. I'm literally asking for a standard.

THE COURT: Okay. Counsel.

MR. ROSENTHAL: Well, the standard is, on the arbitrary prong, whether what APA did was irrational basically and on the discriminatory prong, whether it was so unrelated to the legitimate union objectives that it was invidious discrimination. And I do think this --

THE COURT: We're analyzing this, just as you talk about discrimination for a moment -- do we analyze it under the old well-known employment type of shifting burdens analysis? You know, McDonnell Douglas and that sort of thing? Is that how I would look at this question?

MR. ROSENTHAL: Well --

THE COURT: Do the plaintiffs present a prima facie showing and then you present a legitimate business reason and all that sort of thing? Is that the construct for me?

MR. ROSENTHAL: I think something like that. Courts have not used that construct in DFR cases, as far as I know. I

think the standard here is a little more differential because of the recognition that unions need to exercise their duties without courts looking over their shoulders, and the cases, I think, ***ALPA vs. O'Neill*** and others bear that out, that this is probably a more differential situation than a typical employment discrimination case.

But I think those same concepts have some application here, and I do think -- and I'll try to touch on that as well when I get to the discrimination point.

I do think that, as Your Honor suggested, a lot of this really does come down to the question of whether there's a -- whether the furloughed pilots versus not-furloughed pilots is a rational distinction. And Mr. Katzenbach says *furlough* has no meaning. It actually has a really simple meaning. It means that an employee was forced out of their job. It's really that simple.

If an employee has been forced out of their job, they've been furloughed. If they haven't, then they haven't been furloughed. It's not about whether his clients were waiting for a job at American; so therefore that's the same as being furloughed. It's not because that's not what *furloughed* means. It means you've been forced out of your job.

THE COURT: I guess the question is not so much does it have a meaning. I think we all understand that it does. It's the question of whether or not it's a distinction with a

difference, whether that is a proper term to use to characterize what you've just described.

But as I'm hearing plaintiffs argue, it's that's fine, we can identify a discrete group who have been furloughed and we all understand who those people are, but why should they benefit vis-à-vis others who are not so characterized?

MR. ROSENTHAL: Right.

THE COURT: Is what I'm hearing them say.

MR. ROSENTHAL: Yes. Understood.

And I think that stating its meaning as someone who has been forced out of their jobs starts to suggest an answer to that, which is that there is a harm to being forced out of your job, a variety of harms. You have to look for a new job, you have to rearrange your life to accommodate that new job.

In many cases, there is going to be a period of unemployment between your jobs. Even if there is no period of unemployment, it is still a difficult thing. And that is something that all of these pilots who got the Letter G credit experienced. Every single one of them.

And it's something that the plaintiffs did not experience. They experienced something different, which is that they were at Eagle. They wanted to come up to American. 9/11 happened and then there was the dispute over how the TWA pilots should be treated, and during that time they were waiting at Eagle. But it's not the same harm.

And as further evidence of that, we pointed out in our briefs that American's -- probably three other major airlines -- in other words, the pilots -- American pilots' peers at their other major airlines, they all get credit for their time on furlough.

So it's not something that APA created because it wanted to screw the Flow-Thru Pilots. It is something that exists as a recognized issue. It's also in the cases they cited in their brief about the scope of the duty. They talk about sort of the importance of furlough and why that's a unique harm.

I want to hone in a little more on the arbitrary and discriminatory points, but I also want to make sure that we also talk about causation a little bit because I think that's important.

So on the arbitrary prong, I think what I have said so far explains why we think it was rational to draw this distinction. And we think it is certainly within the wide range of reasonableness that is afforded to unions.

On the discriminatory prong, I think we all understand that there is no direct evidence here that Letter G was somehow motivated by animus towards the -- these pilots. That it was -- they have an inferential argument that based on a history of what they perceive as mistreatment, that shows that APA was hostile to them. And there are several problems with that. One is that -- and it relates to the scope of the duty

question. So really their argument on this depends --

THE COURT: Just so it's clear, we all agree at this point there is no question they're represented by the defendants.

MR. ROSENTHAL: Correct. Yes. Yes.

So the question is, however, during this pattern that plaintiffs point to, whether they were represented by APA because if they weren't and if APA did represent the former TWA pilots, it had an obligation to do exactly what it did, which was advocate for the interests of those former TWA pilots. So there is really no inference that can be --

THE COURT: Is that fair? I mean, even if I am to conclude that conduct, either for limitations purposes or absence of representation purposes are not cognizable claims, can't that be evidence? If there is evidence of -- and I'm not suggesting there is right now. But let's just say that there -- the record would reflect that even prior to the point that you say representation occurs, that there is animosity between these groups, and then at a certain moment in time, the defendant becomes the representative.

Isn't it -- I mean, you can argue, you know, it doesn't indicate that, you can't make the inference they're suggesting you can make. But just from an evidentiary standpoint, wouldn't it be potentially available evidence? If there was a record of hostility or animosity between the groups and then at

a certain point, the defendants become the representative, you could point to that and infer some things, couldn't you?

MR. ROSENTHAL: Well, I'm not sure that you could in this case because what --

THE COURT: My question was more not so much in this case, but just as a general proposition, even if conduct is outside the limitations period, you certainly can consider it.

MR. ROSENTHAL: Yes.

THE COURT: But I understand you're saying something more than that, which is you can't make inferences because if you overlay the idea that we weren't the representative, then what's the relevance of it? Is that what you're saying?

MR. ROSENTHAL: No. I think -- and no quarrel with the idea that evidence prior to the limitations period could be relevant.

What we're saying is that the hostility they describe is really simply the fact that APA took positions adverse to them where their interests conflicted with those of the former TWA pilots.

THE COURT: Because at that point you weren't -- according to you, you weren't representing the Flow-Thru Pilots.

MR. ROSENTHAL: Correct. If you rule as a matter of law that we're right about that, then I do not see how a jury could say that APA, by discharging its legal duty to take those

positions in favor of the pilots it did represent --

THE COURT: How about if my ruling is based on statute of limitations and not on the alternative argument?

MR. ROSENTHAL: Well, then, you might have to -- I think you've maybe pointed out why you're going to have to tackle this issue one way or the other because it really is crucial to assessing APA's motives here.

The other point I wanted to make about that were that this so-called record of hostility, it has -- there are some other sort of weaknesses in that evidence that limit whether it's sufficient to allow a jury to find discrimination.

First of all, the time period that it took place. This is all things that happened -- the most recent arbitration which they dislike was 2010. The comments were as long ago as 1997. So could a jury rely on evidence that far in the past to say that in 2015, APA was hostile to them and that that motivated this.

The comments that they point to are not by decision-makers in APA, and the positions taken by APA, as I said, were in furtherance of its duty of representation, and they're also not these crazy, extreme positions. APA did lose some of the arbitrations. It won some. There were some split decisions. But this is not a case where the positions APA was taking were these wild, crazy positions, and I think that's borne out in the arbitration decisions.

And I think even if a jury could take all of that and say we still think that in 2015 there was some hostility there, I think they would still have to confront the fact that the Letter G makes a -- establishes a benefit that's very sort of rational and understandable. So it is, in this sense, kind of like the McDonnell Douglas framework where you have, I think -- this would be the parallel of a case where an employer had an ironclad legitimate basis for its action, and if there was some evidence of animus in the record, I don't think it would be enough to overcome that.

And as I mentioned before, I did want to also say in addition to the fact that they can't show a breach of the duty of fair representation for these reasons, they would also have -- they have to be able to show that if a breach took place, that it actually caused an injury to them.

And in the *Ackley* case, which we cited in our brief, both of our briefs, the Ninth Circuit set the standard that they basically have to be able to produce some evidence that the company would have gone along with the proposal by APA to include -- basically what they're saying is a proposal that would have been like Letter G, but it would have been expanded to also extend to Flow-Thru Pilots, even though they weren't furloughed. That is the proposal that they seem to wish that APA would have made. And there's really -- they --

THE COURT: How do you -- you're referring to the case

law in the circuit. But how do you prove that up? It's just an interesting question. I mean, do you, through -- I would suspect it would be subject to so many speculative objections.

If you're saying to me -- this is talking about you'd be deposing, for example, the airline and saying *would you have agreed to this, would you have done this*? Pretty tough road because I think most of it would not be admissible evidence.

MR. ROSENTHAL: Yeah, well, two points about that.

First of all, I think you're right, it is a tough road. And in the *Ackley* case, Judge Reinhardt acknowledges that and he says that that's as it should be because these sort of claims about should a union have negotiated this or that should be hard to bring and the causation standard is tough for that reason.

The second thing is I think you're right that --

THE COURT: But you're saying one element of the causation analysis, which is a fair point, is to say, you know, even if you see a breach of duty, you, the plaintiff, would have to show that -- the burden in that point, in your view, is on the plaintiff to show that the airline in this instance would have -- would not have provided the benefit in any circumstance. So they're the ones that would have to prove that, not the defendants having to show oh, you know, it doesn't matter. They wouldn't have given it anyway.

MR. ROSENTHAL: I think what *Ackley* says is that the

plaintiffs have to produce some evidence that the company would have agreed to the proposal.

The other point I wanted to make -- actually, two other points. One is their Complaint is laced with these allegations about how the company was hostile to them and didn't want to help them out in any way. So I think they've --

THE COURT: The company or the union?

MR. ROSENTHAL: Both. But I'm right now talking about the company. My point is that their Complaint sort of undermines this idea --

THE COURT: I see what you're saying.

MR. ROSENTHAL: -- that the company would have agreed to this. And the other thing is we have provided -- well, I think it's right that -- it's -- it's not clear what sort of evidence they might already have in their possession that they could use to prove causation. But one thing they certainly could have done is filed a Rule 56(e) motion and said we'd like to depose the company before the summary judgment motion is heard. And they haven't done that.

And we do have some evidence -- even though we don't think it's our burden, we do have some evidence in our briefs that we think makes pretty clear the company would not have agreed to this, which is the fact that the company did not agree to extend this benefit to the Mid-Atlantic pilots who actually were furloughed, unlike the plaintiffs.

THE COURT: Okay. I'll give you one more chance on this issue, Mr. Katzenbach, but then I do want to move to the second claim. Time is flowing. Go ahead.

MR. KATZENBACH: Quickly, just to sort of -- you know, quick -- on the -- the new evidence that they produced in the reply, which I believe is their Exhibit 53, I believe, I would just simply note that that's a statement by the company a year after the document is negotiated saying that you don't fall under the terms of the document.

That really doesn't have very much to do with the idea of what should have happened in negotiations before that document was negotiated.

The more striking thing about this is that APA has decided to represent the interests of the MBA pilots in trying to get this benefit where they have simply not responded to our many requests.

In terms of causation, broadly, I think some evidence standard is met here. In fact, their position is that sort of makeup benefits are given all the time. It's commonly done. It's been done here at least two times prior to any conceivable events and then several times afterwards.

That their distinction between why you should get makeup benefits for times you were furloughed from US Air when you had no claim to benefits from American at all and yet those benefits -- American should give them and we don't have to ask

for benefits for Flow-Thru Pilots for times they couldn't get to American, I think that's the most arbitrary distinction that I could conceive of. It has nothing to do -- there is no standard here of all the factors they rely on. They're not saying you have to have had some loss.

The fact of the matter is that TWA Staplees never flew for American. US Air pilots never flew for American until recently, yet they're getting all these years.

THE COURT: But as counsel points out, there is, certainly in your Complaint, some indication that you contend the airline was not very favorably disposed towards your clients, so it's not as if they're -- with respect to the other groups you mention, they didn't presumably have any particular predisposition.

MR. KATZENBACH: But my position on this one is pretty simple. If ALPA had said give it to these 400 guys, you have a pilot shortage, you need pilots, keep these guys happy, American would have said at least they're -- you know, we love them at least as much as the US Air pilots we don't know at all. I think that it's -- some evidence standard we meet and it's up to a jury --

THE COURT: You agree it's your burden to present some evidence that there would be causation, injury would be caused?

MR. KATZENBACH: Yeah, but I don't think it's an unusual burden in that sense.

THE COURT: I'm not suggesting it is.

MR. KATZENBACH: I think in *Ackley*, those kind of cases, there just really wasn't any evidence so the Court could say there is no evidence here. I don't think -- there the -- the fact that no one can cite you a case that discusses this much beyond that suggests to me that we met whatever sort of standard there could be, and this doesn't seem to me a difficult standard.

Now, the -- I did have a remark about forced out of their job. I would point out the Flow-Thru Pilots were, in many ways, forced out of jobs, too, because of the flow-downs.

THE COURT: The flow-downs?

MR. KATZENBACH: When the TWA Staplees flowed down.

THE COURT: I see.

MR. KATZENBACH: And it talks about no contemporaneous -- these are all contingent expectations. I think these were hardly contingent. These were parts of contracts that were there, and when you look at -- in terms of their sort of saying what -- we had a duty to TWA, the answer to that question, I think, is really simple.

You know, even if you accept that they had no -- that they had a duty to TWA pilots to honor -- to represent their interests to some level, arbitration decisions become parts of contracts when they're rendered. It's common law and that's *Addington*.

The moment LaRocco in 2007 said no, you can't -- you have to give these jobs to the -- to the Flow-Thru Pilots, that became part of the Flow-Thru Agreement. And where does it say anywhere that that -- when one of the parties to the Flow-Thru Agreement decides that they're going to ignore that decision or two parties, right, that that isn't evidence of something? It isn't evidence of bad faith? That is way beyond representation issues and way beyond the sort of appropriate sort of arbitration. It's like saying a duty for representation means not just fair advocacy; it rather means deception and deceit in favor of one group or another.

So while we don't agree to all -- their argument about the bargaining unit, we think that independently of that, a jury could easily find that.

I sort of rushed through that and I apologize.

THE COURT: Well, I rushed you.

What I would like to do now is go on to the second claim for relief. And that gives us the mootness and rightness issues and perhaps others that I didn't highlight.

Go ahead, Mr. Katzenbach.

MR. KATZENBACH: Well, look, it's hard to say that there isn't a ripeness issue here and I don't want to argue that, but it does seem to me the Court is in a sort of practical pickle, created in part by the parties to this case or at least the defendants, but, you know, we'll say parties.

And that is at some point in the relatively near future, we're going to get a decision. Any action on that -- on ripeness grounds would have to allow us to come back. So unless this case is tossed out entirely -- and it's our expectation it will not -- it just does not make sense to me to toss the second cause of action at this stage.

THE COURT: What is the timing on all?

MR. KATZENBACH: I think the evidence they have is the record is closed. I believe they have 60 days to issue an opinion on this, but I am not positive. You know, that would be, I think, the time frame that I would expect it, but, you know, saying somebody issued in 60 days is like, you know --

MR. ROSENTHAL: I can speak to that.

THE COURT: And I'll ask you to in a moment.

But just before I forget, the difficulty with what you've said -- and I don't disagree with you or I'll accept your representation that let's use some common sense here and from a practical standpoint, if a claim is just going to be revived, why do anything to kill it off while it's there.

But ripeness is a real thing, and, you know, I don't have the luxury sometimes of -- what brings to mind is sometimes jurisdictional issues where you say oh, come on, why can't I just decide this, but if I don't have jurisdiction, I don't have jurisdiction.

Similarly if a case is not ripe, it's not ripe. I'm not

sure, even if my practical sense was boy, it doesn't make a lot -- it doesn't make a lot of sense to get rid of something, I'm not sure I have that luxury.

But in any event, go ahead and clear up for us the timing and then we'll go back to the --

MR. ROSENTHAL: Sure.

The timing is that -- so what I'm going to say now is not on the record, so take it for what it's worth based on that, but I can tell you that we think that the earliest there could be a decision is June or July and then there will be some period after that where there may be some sort of issues that then have to take place before it gets implemented, but that's the timing.

THE COURT: If I understand you correctly, if the result is, as the defendants are advocating, you're maybe content with that.

MR. KATZENBACH: My expectation is -- but with the knowledge, you know, that people can, you know, build this, you know, entity in a number of different ways -- but, yeah, if it was just a category and class type of merger, that would satisfy my clients. I mean, in other words, that would be a situation where longevity was not a factor.

It is hard for me to see how longevity -- candidly, I don't -- longevity has virtually been a factor. It seems to me hard not to think it will be, but I can see many reasons why it

shouldn't be.

I agree that there are issues here that are ripe. I'm saying as a practical matter I don't want to have to amend to bring it back, is what I really -- or perhaps file supplemental Complaint, is what it would actually be at this point.

THE COURT: So from the defendants' perspective, go ahead.

MR. ROSENTHAL: Well, I guess to start out with, you know, they -- we made an argument about the merits of Count 2 that they haven't responded to at all. To be frank, if you found --

THE COURT: Remind me what your merits argument --

MR. ROSENTHAL: Sure. The argument was so as you -- you've accurately described the basic framework here, which is that everyone here is on the same page, that the arbitrator should not consider longevity. The question is should we have presented this backup argument.

Our merits argument said that the committee's decision not to pursue that fallback was a reasonable and nondiscriminatory one because -- for a variety of reasons, including that in all of the prior airline mergers that we know of and that have been cited by the parties here, pilots have never gotten credit for longevity from regional affiliates when they then came up to a mainline carrier.

And beyond that, that unions have to -- that this

committee had to make calculations about its credibility with the arbitrators, how it was going to use its time and resources in presenting its arguments, and that it made a rational decision in doing so.

THE COURT: You're saying, if you will, the fallback argument in the event that longevity is being deemed to be a factor, you couldn't make or you conclude you don't have a basis to make the argument for the Flow-Thru Pilots on the longevity issue?

MR. ROSENTHAL: Well, yeah. To be perfectly precise, we're saying that the committee, even if APA was responsible for their actions, did not violate the duty of fair representation because they didn't really have a basis to make this argument.

So plaintiffs haven't said anything about that in their opposition. So if you were to find it ripe, we would ask you to resolve it on those grounds. But I think you're right, that ripeness is a constitutional jurisdictional requirement and that I'm not sure you can bypass it to get to the merits.

And I think that in terms of the practicalities of it, the plaintiffs are going to have to file an Amended Complaint. In theory, even if you were to allow this, what we see is an unripe claim to continue.

THE COURT: You agree if ripeness is the basis on which the case -- in this instance, the motion would be

granted, it has to be without prejudice because it's not a merits --

MR. ROSENTHAL: Yes. We understand that.

THE COURT: -- determination.

MR. ROSENTHAL: We're just saying that there is going to have to be an Amended Complaint in any event, so I'm not sure it's really, even practically, that much easier to keep the case alive and then wait to file an Amended Complaint instead of a new Complaint.

THE COURT: Well, the case is -- what Mr. Katzenbach was saying -- and it depends on what I'm going to decide on these other claims, is the case will potentially, if I go his way, will remain alive, so I guess he's sort of saying well, just -- while that's alive, let's see how things go and then we'll go about our business.

It's a different proposition if the entire case is going away. Then I think you're in a different posture, but okay.

Any further comments on the ripeness issue? And then I want to go to a class cert discussion.

MR. KATZENBACH: I don't think I have any. I think, as you say, the case is alive until there's a judgment.

THE COURT: Okay. On class cert --

MR. ROSENTHAL: Sorry. Mr. Demain is going to handle the class cert issue for APA.

THE COURT: Thank you.

So, Mr. Demain, my first question is to you. I didn't see a particular -- I know your basic argument is that these claims should not survive, but if the claims do survive, I didn't really see an argument that class certification is an appropriate mechanism to go forward. Am I reading that correctly?

MR. DEMAIN: You are, Your Honor. We agree that class certification, if the claims are going to survive, would be appropriate for liability purposes. It's damages purposes that we take an issue with.

THE COURT: Well, yes, and, you know, there's -- that issue now is such a hot issue, if you will, in class cert law, is whether or not damages -- you know, differences or questions with respect to damages is enough to thwart certification, and I will tell you, quite frankly, that generally -- I'm not saying always -- I don't think the fact that you may have some individualized damage issues floating out there is enough to preclude certification.

MR. DEMAIN: I agree with that, Your Honor, but I don't think even the new Supreme Court case, which I will confess to having read several times while scratching my head -- nothing in that case undoes the Ninth Circuit -- the existing Ninth Circuit law that goes beyond what you just said and says that even if individualized damages issues don't themselves preclude a (b)(3) certification, the plaintiffs have

a duty, when they're seeking class certification, to present a damages model that does three things.

It, first of all, has to be tied to their theory of the case, the theory of liability, number one. Number two, it has to present a way to calculate damages that excludes other causes of financial loss. And then the third thing that it has to do is that it has to -- the damages computation methodology has to be such that once liability is determined, the damages, even if individualized, can be calculated feasibly and efficiently.

And they haven't done any of that here. They haven't presented any kind of damages model. In fact, on that third point --

THE COURT: So that's really not an individualized problem. That's an overarching *there is no damage theory* problem.

MR. DEMAIN: Yes. That there is no damage theory.

And, in fact, in the -- in the -- this court had a case called *Lilly vs. Jamba Juice*. I think it was Judge Tigar in 2014.

What he said is that where the plaintiffs can establish at the certification stage -- I'm sorry. That they must establish this feasibility of calculation. And I'm quoting from the decision. "Where defendants can make at least a prima facie showing that damage calculations are likely to be more

complex, expert reports or at least some evidentiary foundation may have to be laid to establish the feasibility and fairness of damage assessments."

The plaintiffs haven't done that at all. What they have said is it can be calculated by a formula, but they haven't introduced any evidence, whether expert evidence or nonexpert evidence, that it can be, and if you look at our papers in opposition to class cert, we presented a declaration showing how complicated the -- and how mediated the relationship is between position on a seniority list and economic damages.

There are many, many personal, complex decisions that go into getting from your position on a seniority list to your relative pay and benefits. Pilots may make decisions. In fact, we illustrated this by showing four people who are consecutive on the seniority list currently and have wildly fluctuating pay -- I mean, fluctuating from each other, because they make certain decisions because they'd rather take -- you know, have more time at home on the weekends with their family. They would rather have a less lengthy commute to the domicile or home base where they are flying out of. I won't go over it all because it's laid out in the declaration and the brief.

My point is the plaintiffs have not presented any evidence to satisfy these burdens, so we believe that damages -- excuse me -- that class certification should be restricted to the liability issues and not to the damages issues.

THE COURT: Let me, before I go back to Mr. Katzenbach, on the issue of sort of the steps in this process -- and I alluded to that at the beginning, that if I'm reading your papers correctly, you're saying well, what you should do is you should certify the class, I guess for liability purposes under what you've just gone over again, and then you should dismiss it, you should grant our summary judgment motion.

Isn't that the wrong order? I mean, you know, if I am inclined to grant your motion for summary judgment, is there really an argument that I should certify it and then grant the motion?

MR. DEMAIN: Well, I think it depends, Your Honor. The question that you raised, which is a very interesting question and I have to confess offhand I don't know the answer to, is whether there is a problem with dismissing it on a class-wide basis without giving the plaintiffs -- without giving absent class members an opportunity to opt out.

But that is only a problem, Your Honor, that's restricted to a (b)(3) class. The plaintiffs have sought class certification under (b)(2) and (b)(3). And a (b)(2) class certification, there is no opportunity for absent class members to opt out so I think it would be absolutely appropriate for you to certify the liability classes under (b)(2), especially because it's really only the damage issues that throw a class

action like this into a (b)(3). So you could certify under (b)(2) both of the claims and then dismiss them pursuant to the summary judgment --

THE COURT: The question then becomes okay, why should I do that?

MR. DEMAIN: Well, I think --

THE COURT: Why is there -- what is the policy or other reason that would favor doing that?

MR. DEMAIN: Well, also I can't -- I can't cite you a case on this just off the top of my head, but I believe there is a due process right for a defendant, when faced with a summary judgment -- excuse me -- faced with a class certification motion to have that motion decided before summary judgment is granted so that it can get the benefit of a class certification, the bar to liability, but it wins summary judgment --

THE COURT: That's the question, are they entitled to that benefit?

MR. DEMAIN: Yes. There is a class action issue that I'm desperately searching my memory for. It's -- there's a cute name for it, kind of like *rays of hope*, something like that. Reverse --

MR. HOLLINGER: One-way intervention.

MR. DEMAIN: One-way intervention. Thank you, counsel.

That's a situation where it says it's not fair to allow someone to sit on the sidelines and wait to see what happens on the merits and then later be able to bring their own case.

THE COURT: Of course, though, you know the reason that I -- that fairness issue -- and I'm just now thinking it through. I hadn't thought of this before.

But you're the master of the timing of your motion, depending upon the Court's requirements in terms of it's calendar. So you bring your summary judgment motion when you elect to do so. And it wasn't -- I don't think you had a deadline that it had to be brought before the class certification motion. In fact, I know I don't have that rule.

So it's of your own making in the sense that you make the motion. So you could obviate exactly that problem by simply not bringing your summary judgment motion until after we go through the class certification motion.

So from the perspective of fairness issues to the defense, I'm not sure I'm particularly swayed by that because I think you could control for that if you felt so inclined because you brought the motion.

MR. DEMAIN: Well, that's true. You know, I thought it would be good to wrap this up in one neat bundle if we could.

THE COURT: I'm not suggesting that I -- I'm not -- don't take that to be I think you didn't do it in the right

order or what have you. I'm just trying to think through these issues of putative class members and their rights and the defendants' rights as well, and I'm just thinking that through, and of course this should not -- so that Mr. Katzenbach doesn't get too riled, it -- I'm not meaning to suggest by this I've decided the question that the case is not going to live on. I'm just trying to work through the different scenarios in my mind and then I'll go back and figure out what I'm going to do.

MR. KATZENBACH: I understand that, Your Honor.

THE COURT: All right.

So now I'll turn to you on the class issues. In particular, what I would ask you to comment on is this causation -- damages causation question, which -- because otherwise, it looks like there isn't any dispute that should the case move on, it can move on on a class basis, at least for purposes of a liability determination.

So go ahead.

MR. KATZENBACH: Let me see if I can try to express it. I believe the class can be certified under (b)(2) or (b)(3). I mean, trying to look at this -- trying to look at it from your perspective.

It seems obvious to me that if there is a damage component, that you probably, given that the class is not humungous, that you probably want to certify it under (b)(3) and require some form of notice, an opt-out notice. That it

makes little sense to think that the Court would really ultimately do it that way, even if you could, you know.

That being the case, I don't see a reason why the Court would want to proceed under Mr. Demain's suggestion of wiping everyone out through a (b)(2) liability finding and denying them under (b)(3). It seems to me for a lot of reasons, which you have indicated and others, that you could think of as well, that just seems to me to be an anathema to the idea of opt in/opt out and (b)(3), and unless this Court is going to say that (b)(3) is not a possibility, then I just don't see that it's an appropriate exercise of discretion to do what Mr. Demain suggests.

THE COURT: How about the damages issue in the class context?

MR. KATZENBACH: My feeling is that APA has simply confused two forms -- simply merges two forms of seniority: occupational seniority and classification seniority. Now, the loss of service credit is classification seniority, and that is only applicable for pay purposes.

So that when we say you -- you should have had been -- you should have been at Step 10, not Step 3, all that does is say -- is you go to the chart and you look at what the Step 10 pay would have been. And you can go right back to the future and you can look at the jobs the guy had, the choices that he made, every one of those the guy or gal, I guess -- every one

of those things, right, and you get the past, and bingo, it gives you a number. It's just a straight formula.

You're not saying that -- sure pilots made, like every other person -- may make all sorts of compromises, but looking back, all you do is look at the compromises they made and say what would the money have been if you had been at Step 10, not Step 3. I don't think there's a problem there. That's exactly a formula.

THE COURT: That to me goes to the question of whether or not the fact that you've got individual differences is going to defeat the -- individual differences with respect to damage is going to defeat -- should defeat class purposes, and you're suggesting listen, there are ways to -- claims process or what have you, you can deal with that.

I hear you on that point, but I also heard Mr. Demain to make the other argument that it's not so much can you get class-wide answers to the -- can you -- you can liquidate the damage question. He is saying that there hasn't been a showing of the class as a whole has been damaged.

MR. KATZENBACH: Well, we know, for example, under Letter G, just to pick an example, we didn't get two years of credit. So that instead of being -- if we had been at Step 5 and we got those two years of credit, that would have moved us up. Right? So we didn't get that, so it's back to the same calculation. You just say what would you have gotten if you

had two more years, and it's just -- and it's as simple as -- I don't mean --

THE COURT: If you move up -- if, as you say, you would be in a better posture, does that translate into you can show that you would have gotten the position that would --

MR. KATZENBACH: No. You just take it to the position they had. For example, if you're flying a 757 or you're first officer on a 757 and you're at Step 3 and you get two years of credit and that pushes you up a step, you go back and see when you got that and that would have increased your salary.

It's a little like, you know -- it's just like the same calculation you would do, for example, for someone who was denied equal pay, you know, if you had that rigid a system and this is a fairly rigid system.

As to going forward, of course, the -- it becomes a question of, you know -- going-forward damages are slightly more difficult, and I'll concede on that because you would have to -- because going-forward damages means projection into the future, what people would do, even if they had the two extra years of pay and what jobs would they have had. But my feeling is that that ultimately -- that ultimately is not an issue -- not going to be an issue for class certification. I think that ultimately is just going to be an issue that would have to be resolved later on, but it doesn't change the basic point for class certification.

The damages here are going to be computed by formula one way or another. If American Airlines is not here and we can't force them to agree to something and we can only tag APA for damages, my fervent hope is that that will induce negotiations, but that's our feeling on this and that's about it.

MR. DEMAIN: Your Honor, if I could respond briefly?

THE COURT: Yes.

MR. DEMAIN: Two things I would like to say.

First of all, Mr. Katzenbach said if there is a damage component, it should be under (b)(3) with an opt-out notice so why proceed under (b)(2). The answer is because he hasn't met his burden on class certification for damages so it can't be under (b)(3). It can only be under (b)(2).

THE COURT: He hasn't met his burden because?

MR. DEMAIN: He hasn't shown a damages methodology that is tied to his theory of liability that excludes other causes for economic loss such as I'd rather be home with my family on weekends.

And third -- I'm sorry -- the third -- just the third one is that it has to efficiently and easily compute damages.

THE COURT: Well, how about on -- let's use his example, Letter G claims. Why can't that work?

MR. DEMAIN: That was the second argument, the second thing I wanted to say.

Mr. Katzenbach is performing -- and I'm not saying this is

intentional, but he is performing a bit of slight of hand here because his damages claim on his -- on Claim 2 has nothing to do with Letter G. It has nothing to do with length of service credit. It has to do with your position on a seniority list, and that's what I'm saying does not at all run by formula to calculating losses. That's where pilots -- where they are in the seniority list depends how they bid, and how they bid determines where they fly. It's a very complex calculation.

So by him saying well, this case is just about Letter G, that's only one small part of it. The much bigger claim actually, to tell you the truth, is the -- even though it takes up less pleading space -- is the second claim for relief which is all about where these people are going to end up on the seniority list.

Now, for the reasons we said, that claim is not ripe, and for the reasons that we said in our brief, even if it were ripe, it would be meritless because the union's decision not to present this fallback argument is exactly the type of discretionary decision that unions are allowed to make and that doesn't breach the DFR, as long as they present a rational basis for it, which they have, that it would undermine our main position.

But all that being said, Mr. Katzenbach is ignoring that the far greater damages and the real big prize in this case is on the second claim and that he's presented absolutely no

damages methodology for.

THE COURT: One more --

MR. KATZENBACH: Your Honor, it seems to me that the main issue -- I think, the main relief sought on the second claim would enjoin use of the list, which would eliminate the need for damages. So if there is -- if the list is noted as improperly and breach of duty, we've asked for declaration of injunctive relief.

So if the Court grants an injunction against the use of the list, damage issues disappears. The Court grants the injunction largely for the reasons Mr. Demain says, that the damages are difficult to calculate and so therefore injunctive relief is more appropriate.

If it turns out that the Court says on the other hand, I won't -- I won't do that and now it's ripe enough so that we can figure damages, I understand Mr. Demain's point. We might have to come up with some better calculation for damages, but it's hard to do that right now for the ripeness issues we've previously discussed, which I don't like to acknowledge, but still are there.

THE COURT: The disconnect is that you're talking about how to calculate and he's talking about, if I'm hearing him correctly, what's your damages theory. And there seems to be a disconnect between the two of you when you're talking about this, or maybe I'm missing some.

MR. KATZENBACH: I have gone over the first claim, the Letter G. I think those are very straightforward.

On the second claim, if there were to be a damage remedy for loss of position, I think that it would require much more analysis and methodology that would try to figure out where people were. And I can understand that a damage calculation under that might be difficult. It wouldn't be impossible, but probably couldn't be presented to the Court until we know the exact parameters of what the new list looks like because candidly there are big differences. For example, there is over a thousand positions, differences depending on which list you use. If you use the APA or APSIC's list, my clients tend to be a thousand plus spaces up. If you use the east or the west list, they drop over a thousand points down, thousand spots down, which is a big jump, big drop, which is why we think that the damages are alleged there because I think we, as a practical matter, have to. When it comes down to relief, if it's not injunctive relief, it's going to be a difficult damage case. Not that damages don't exist, but there may be problems calculating it.

MR. DEMAIN: If I could just briefly respond to that point, Your Honor.

First of all, when Mr. Katzenbach says really what we want is an injunction, not damages, that confirms my argument that you shouldn't certify the class for damages. But that being

said -- and he said but there may be damages if you don't grant a remedy, and we will figure it out at that time. It will all be clear. We will figure it out then.

All of the cases that we've cited in the briefs from *Lilly vs. Jamba Juice*, *Saavedra vs. Eli Lilly*, *In re NJOY*, etc., these are all either Ninth Circuit or Northern District cases. I think we cited some other Ninth Circuit cases. They all stand for the proposition that the plaintiff doesn't get to say *we'll figure it out later*. The time for doing this is at the class certification stage, and if the plaintiff doesn't meet their burden, they don't get a damages class certified. That's exactly what that quote from Judge Tigar in *Lilly vs. Jamba Juice* was all about. So it's not like they get to put it off. They filed their motion for class certification. It was their burden. They don't get a do-over later.

MR. KATZENBACH: I think -- once again, I don't think he can pick a term *flow-down* from the second cause of action to the first cause of action. They are different situations. And so his concerns about the second cause of action don't really address the issues in the first cause.

THE COURT: Okay. Thank you. Very good and interesting argument. Well presented. And I appreciate it.

Of course it will come as no surprise, I always ask, particularly in this case, is there anything the Court can do to facilitate some -- while I'm considering the decision and

these meaty motions here some settlement discussion? Is there any ongoing discussion or is it just a nonstarter? I know there are many levels of complication, and I know we have other groups that -- whose ox potentially will get gored if one side benefits vis-a-vis the other, and that's what this whole case sort of talks about, but any notion that there would be any value in some discussions, or you just need my orders?

MR. KATZENBACH: I don't know. We haven't had any real discussions. I don't sense that -- whether they will or won't. I guess my answer is I'm always interested.

I will just simply say that the last appeal I handled dealt with the fact that settlement discussions ended up in a settlement which was then enforced differently than its terms and I had to go to the Seventh Circuit to get it reversed so that has a --

THE COURT: You have a bad taste in your mouth --

MR. KATZENBACH: I have a bad tease in my mouth for that.

THE COURT: That's a whole different proposition. I'm not hearing a lot of encouragement so I'll leave you alone.

MR. DEMAIN: I assume you will issue a written ruling at some point, Your Honor.

THE COURT: I hope so.

MR. DEMAIN: Thank you.

MR. KATZENBACH: Thank you, Your Honor.

(Proceedings adjourned at 3:06 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, May 6, 2016

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter