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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSN., *et al.*, Defendants.	CASE NO. 2:08-CV-1633-PHX-NVW (Consolidated) **PLAINTIFFS' RESPONSE TO: DEFENDANT USAPA'S COMBINED MOTIONS IN LIMINE WITH POINTS AND AUTHORITIES**
Don ADDINGTON, *et al.*, Plaintiffs, vs. Steven H. BRADFORD, *et al.*, Defendants.	Case No. 2:08-CV-1728-PHX-NVW

Plaintiffs, on behalf of the West Pilot Class, Respond to *Defendant USAPA's Combined Motions in Limine with Points & Authorities* (doc. 316).

1) <u>Motion To Exclude Evidence Offered To Show Any Challenge To The Election Of USAPA, Or Its Certification By The NMB.</u>

Defendant's Proposed Order:

"Evidence of any kind challenging the legitimacy or lawfulness of the US Airways pilots' election of USAPA, or the legitimacy or lawfulness of USAPA's certification by the National Mediation Board, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #1*.

USAPA is liable for unfair representation if it promised that it would disregard the Nicolau Award if elected the bargaining representative. If USAPA made such a promise, it "renounced any good faith effort to reconcile the interests of both pilot groups." *Addington v. US Airline Pilots Assoc.*, 588 F.Supp.2d 1051, 1060 (D. Ariz. 2008); *see also Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 145 (D.C. Cir. 1967) (finding this "would . . . constitute a default by [the union] in its obligation to represent fairly all the employees in the unit for which it becomes the exclusive bargaining representative."). Evidence of such promises, therefore, is highly relevant to Plaintiffs' case. Evidence of such promises supports relief other than decertification. Indeed, unfair representation was not remedied with decertification in *Truck Drivers*. That such evidence would logically support a decertification claim is no reason to exclude such evidence —particularly because Plaintiffs do not make a decertification claim (for which this Court has no jurisdiction).

Defendant's *Motion in Limine #1*, therefore, should be denied.

2) Motion To Exclude Evidence Offered to Show Implementation of the Nicolau List Was Possible Prior to Negotiation of a Single CBA.

Defendant's Proposed Order:

"Evidence offered to prove that implementation of the Nicolau List was possible prior to negotiation of a single collective bargaining agreement shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #2* in part.

Defendant proposes an Order that would exclude evidence from both the jury trial and the bench trial. Plaintiff objects to this proposed Order to the extent that it limits the scope of what would otherwise be appropriate cross examination and because there is little reason to exclude such evidence from the remedy phase bench trial. *See Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004) ("The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial.")

Although Plaintiffs will not try to prove liability by arguing that it was possible to implementation the Nicolau List prior to negotiation of a single CBA, such evidence could demonstrate the feasibility and fairness of certain remedies. Plaintiffs, therefore, oppose Defendant's motion to the extent that it would limit otherwise appropriate cross-examination and would limit relevant evidence in the remedy phase bench trial.

Plaintiffs, therefore, will stipulate to a more limited Order, as follows: "Evidence offered to prove that implementation of the Nicolau List was possible prior to negotiation of a single collective bargaining agreement shall be excluded for the liability trial only, without advance notice to the Court and counsel."

3) Motion To Exclude Evidence Offered to Prove Count I.

Defendant's Proposed Order:

"Evidence offered to prove Count I, including breach of those West CBA terms found in the Transition Agreement requiring furlough of all pilots on the New Hire Seniority list, *i.e.* furlough out of order, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #3* in part.

Defendant proposes an Order that would exclude evidence from both the jury trial and the bench trial. Plaintiff objects to this proposed Order to

the extent that it limits the scope of what would otherwise be appropriate cross examination and because there is little reason to exclude such evidence from the remedy phase bench trial. *See Deal*, 392 F.3d at 852.

Although Plaintiffs will not try to prove liability by arguing that the Transition Agreement required furloughing all pilots on the New Hire Seniority list first, evidence of how the Company furloughed pilots will be relevant to balancing hardships during the remedy phase. The fact that such evidence might also prove breach of the CBA is no reason to exclude it for this purpose, particularly because it would be heard only by the Court. Plaintiffs, therefore, oppose Defendant's motion to the extent that it would limit otherwise appropriate cross-examination would limit relevant evidence in the remedy phase bench trial.

Plaintiffs, therefore, will stipulate to a more limited Order, as follows: "The Parties shall not argue in the liability phase of the trial whether the Airline furloughed pilots out of an order otherwise required by the CBA or Transition Agreement, without advance notice to the Court and counsel."

4) Motion To Exclude Evidence Offered to Prove Count II.

Defendant's Proposed Order:

"Evidence offered to prove Count II, including that the Company breached the West CBA terms found in the Transition Agreement by not negotiating with USAPA in good faith to adopt a single CBA implementing the Nicolau List, *i.e.*, failure to negotiate in good faith, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #4* in part.

Defendant proposes an Order that would exclude evidence from both the jury trial and the bench trial. Plaintiff objects to this proposed Order to the extent that it limits the scope of what would otherwise be appropriate

cross examination and because there is little reason to exclude such evidence from the remedy phase bench trial. *See Deal*, 392 F.3d at 852.

Although Plaintiffs will not try to prove liability by arguing that the Company breached a contract duty to negotiate with USAPA in good faith, evidence of the lack of diligence on the part of either the Company or USAPA will be relevant to balancing hardships during the remedy phase. The fact that such evidence might also prove breach of the CBA is no reason to exclude it for this purpose, particularly because it would be heard only by the Court. Plaintiffs, therefore, oppose Defendant's motion to the extent that it would limit otherwise appropriate cross-examination would limit relevant evidence in the remedy phase bench trial.

Plaintiffs, therefore, will stipulate to a more limited Order, as follows: "The Parties shall not argue in the liability phase of the trial whether the Airline breached any duty to negotiate in good faith as required by the CBA or Transition Agreement, without advance notice to the Court and counsel."

5) Motion To Exclude Evidence Offered to Prove Plaintiffs' May 2009 Arbitration Claims.

Defendant's Proposed Order:

"Evidence offered to prove claims that Plaintiffs have been ordered to pursue and are now pursuing, before the System Board of Adjustment in the scheduled May 2009 arbitration hearing, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #5* because it is duplicative of *Motions in Limine #2, #3* & *#4*, which address the claims in Counts I and II, claims that the Court ordered to System Board arbitration. Because Defendant's *Motion in Limine #5* does not add anything to the three preceding motions, the Court should deny it without prejudice to those motions.

6) Motion To Exclude Exhibit Nos. 32, 172, 173, 174, 175, 215, 218, 320 Regarding Any Evidence Offered to Show Six East Pilots Serving in the West Were Displaced Back to the East.

Defendant's Proposed Order:

"Evidence relating to the six East pilots flying within West operations who were allowed to displace back to East operations after being furloughed from West operations, including Plaintiffs' Trial Exhibit Nos. 32, 172, 173, 174, 175, 215, 218, and 320 shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #6* in part.

Defendant proposes an Order that would exclude evidence from both the jury trial and the bench trial. Plaintiff objects to this proposed Order to the extent that it limits the scope of what would otherwise be appropriate cross examination and because there is little reason to exclude such evidence from the remedy phase bench trial. *See Deal*, 392 F.3d at 852.

Although Plaintiffs will not use evidence that six East Pilots were allowed to displace back to East operations after being furloughed from West to prove liability, they might use such evidence in the remedy phase to balance hardships and/or demonstrate the feasibility of remedy.

Plaintiffs, therefore, will stipulate to a more limited Order, as follows: "Evidence relating to the six East Pilots flying within West Operations who were allowed to displace back to East Operations, including trial exhibit Nos. 32, 172, 173, 174, 175, 215, 218 and 320, shall be excluded from the liability trial, without advance notice to the Court and counsel."

7) Motion To Exclude Exhibit Nos. 84, 86, 106, 141, 148, 266, 267, 268, 270, 271, 274, 275, 276, 277, 280 and 282 Regarding Enforcement of Section 29 of CBA.

Defendant's Proposed Order:

"Plaintiffs' trial exhibit Nos. 84, 86, 106, 141, 148, 266, 267, 268, 270, 272, 274, 275, 276, 277, 280, and 282 regarding enforcement of Section 29 of the CBA shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #7* in part.

Defendant proposes an Order that would exclude only Plaintiffs' use of evidence on this subject matter, not Defendant's. It logically follows, if evidence of allegedly improper enforcement of the obligation to pay membership dues and agency fees is excluded as irrelevant and/or potentially prejudicial, then evidence of allegedly improper refusal to pay such dues and fees must be excluded for the same reasons. Both kinds of evidence are equally likely to confuse or mislead the jury.

Plaintiffs, therefore, will stipulate to a broader Order, as follows: "Evidence relating to the payment of membership dues and agency fees, or the failure to pay membership dues and agency fees shall be excluded from the liability trial, without advance notice to the Court and counsel."

8) Motion To Exclude Exhibit Nos. 92, 440, and 466, *ie.* Transcript of Road Shows or Other.

Defendant's Proposed Order:

"Plaintiffs' trial exhibit Nos. 92, 440, and 466 shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #8* in part.

Defendant proposes an Order that would exclude only Plaintiffs' use of video transcripts. It logically follows, if Plaintiffs' use of video transcripts would be prejudicial, then Defendant's use of the same kind of evidence

would be equally prejudicial. In both instances, the videos themselves are better evidence.

Plaintiffs, therefore, will stipulate to a broader Order, as follows: "Transcripts of all videos, whether offered by Plaintiffs or Defendant shall be excluded from the liability trial, without advance notice to the Court and counsel."

9) Motion To Exclude Exhibit Nos. 209, 210, 223, 240, 242, 304, 305, 306, 307, 309, and 311, Regarding Unrelated, Various Individual Grievances.

Defendant's Proposed Order:

"Plaintiffs' trial exhibit Nos. 209, 210, 223, 240, 242, 304, 305, 306, 307, 309, and 311 shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #9* in part.

Defendant proposes an Order that would exclude only Plaintiffs' use of evidence of System Board grievances. It logically follows, if Plaintiffs' use of such evidence would be prejudicial or confuse the jury, then Defendant's use of the same kind of evidence would be equally prejudicial and confusing.

Plaintiffs, therefore, will stipulate to a broader Order, as follows: "Evidence, testimony or argument about any grievances pending, heard, decided, or scheduled to be heard before the System Board of Adjustment, whether offered by Plaintiffs or Defendant, shall be excluded from the liability trial, without advance notice to the Court and counsel."

10) Defendant's Motion To Exclude Exhibit Nos. 227, 235, 237 Regarding Letters of Agreement.

Defendant's Proposed Order:

"Plaintiffs' trial exhibit Nos. 227, 235, 237 shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #10* in part.

The exhibits addressed by this motion show modification of the terms of the East CBA. Defendant proposes an Order that would exclude only Plaintiffs' use of such evidence. It logically follows, if Plaintiffs' use of such evidence would be prejudicial and confusing to the jury, then Defendant's use of the same kind of evidence would be equally prejudicial and confusing.

Plaintiffs, therefore, will stipulate to a broader Order, as follows: "Evidence, testimony or argument about the terms of the East CBA, including but not limited to trial exhibit Nos. 227, 235, and 237, whether offered by Plaintiffs or Defendant, shall be excluded from the liability trial, without advance notice to the Court and counsel."

11) Motion To Exclude Exhibit Nos. 246, 247, 248, 249, 250, Transcripts of Court Hearings.

Defendant's Proposed Order:

"Plaintiffs' trial exhibit Nos. 246, 247, 248, 249, and 250 shall be excluded."

Plaintiffs' Response:

Plaintiffs do not oppose Defendant's *Motion in Limine #11.*

12) Motion To Exclude Exhibit No. 312 Regarding the Empire Shuttle Issue.

Defendant's Proposed Order:

"Plaintiffs' trial exhibit No. 312 shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #12* in part.

The exhibit addressed by this motion is an East Pilot's letter alleging unfair representation by Defendant. Defendant proposes an Order that would exclude only Plaintiffs' use of such evidence. It logically follows, if Plaintiffs' use of such evidence would be prejudicial and confusing to the

jury, then Defendant's use of the same kind of evidence would be equally prejudicial and confusing.

Plaintiffs, therefore, will stipulate to a broader Order, as follows: "Evidence, testimony or argument about whether East Pilots are satisfied or dissatisfied with their representation by Defendant, including but not limited to trial exhibit No. 312, whether offered by Plaintiffs or Defendant, shall be excluded from the liability trial, without advance notice to the Court and counsel."

13) Motion To Exclude Evidence Offered To Prove Pre-Certification DFR Liability By USAPA.

Defendant's Proposed Order:

"Evidence offered to prove that Defendant is liable for failure to fairly represent Plaintiffs, or the class, at any time prior to certification by the National Mediation Board on April 18, 2008, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #13*.

Defendant, in effect, seeks summary judgment on a point of law under the guise of a motion *in limine*. Under the circumstances of this case, Defendant is not entitled to such an Order. Indeed, this Court found that a union ***can*** be liable for unfair representation based on a continuing course of conduct that began prior to becoming the certified bargaining agent. *See Addington*, 588 F. Supp. 2d at 1062. This is so because, where a "union reconstitutes itself in a discriminatory fashion, the duty of fair representation might be breached 'by the union that the majority used as a tool.'" *Id.*; *see also Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990) (same).

Under this doctrine, USAPA would be liable for unfair representation if the East Pilots "formed a union whose constituted purpose was to impose a

date-of-hire scheme on the minority membership in disregard of an arbitrated compromise both sides agreed to and deemed fair in advance." *Addington*, 588 F. Supp. 2d at 1061; *see also Air Wisconsin*, 909 F.2d at 217 ("[A]n attempt by a majority of the employees in a collective bargaining unit ['to oust the union' for such purposes] … could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool.")

To the extent that this Order would limit evidence, it would exclude evidence as to the motivation for and the events of Defendant's formation, all of which occurred before USAPA was certified as the bargaining agent. If so, the Order would exclude the same kind of evidence that was material to the *Air Wisconsin* analysis cited above.

Defendant's *Motion in Limine #13*, therefore, should be denied.

14) Motion To Instruct Jury On Limitation On Evidence Of Pre-Certification Conduct By USAPA Not Offered To Show Pre-Certification Liability.

Defendant's Proposed Order:

"Evidence of USAPA's pre-certification conduct that is offered for any purpose (other than to show pre-certification liability) shall be limited by curative instruction to the jury, *i.e.* that it cannot consider such evidence to find USAPA liable for any conduct occurring prior to April 18, 2008."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #14*.

Defendant seeks a jury instruction, not an Order limiting evidence. The Court should deny its motion on that basis alone. The Court should deny it as well because it is based on a flawed premise. Regardless that an unfair representation claim against a union might not ripen until the union

becomes the bargaining agent, there is no reason that precertification conduct could not be considered in an analysis of the union's liability.

USAPA's argument fails to properly account for inchoate or preparatory conduct. Liability attaches for preparatory conduct once the course of conduct results in injury. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 453 (7th Cir. 1982) (Posner, CJ) ("Tort law, unlike criminal law, does not punish 'inchoate' which is to say purely preparatory, conduct; for wrongdoing to be actionable as a tort there must be an injury…."). Injury arises from loss of fair representation (as alleged here) the moment that the duty attaches. *See Bertulli v. Independent Assn. of Continental Pilots*, 242 F.3d 290, 295 (5th Cir. 2001) (A claim for "loss of 'fair representation' under the RLA" asserts " 'procedural rights' protected by statute, the loss of which is itself an injury without any requirement of a showing of further injury."). Hence, liability attaches here to precertification conduct that was preparing to deny Plaintiffs' fair representation.

Defendant's argument that preparatory conduct is irrelevant falls as flat as a bank robber's argument that his preparations to rob the bank are irrelevant to his criminal liability. Once the bank is robbed, the entire course of the bank robber's conduct is relevant to liability.

In a related context, an RLA union could be liable for an entire course of conduct even though, by itself, the earlier conduct might not be actionable. Under continuing violation doctrine, liability will attach to "earlier related acts" if those acts are part of "a continuing practice" and the last act "falls within the applicable limitation period." *Dunn v. Air Line Pilots Assn.*, 836 F. Supp. 1574, 1583 (S.D. Fla. 1993). "Under this theory, the plaintiff may recover for all violations where the violations outside the limitation period are so closely related to those inside the period that they constitute one continuing infraction." *Id.*

USAPA, therefore, can be liable for pre-certification conduct if that conduct was preparatory to its post-certification unfair representation or was so closely related to its post-certification conduct that together it constitutes a continuing infraction.

USAPA's reliance on *McNamara-Blad v. Assn. of Prof. Flight Attendants*, 275 F.3d 1165, 1169070 (9th Cir. 2002), is misplaced. That court addressed whether a union was liable for conduct that began and ended before the plaintiff workers actually merged into a single workforce with the group favored by and represented by the union. *Id.*; *see also Bernard v. Air Line Pilots Assn.*, 873 F.2d 213, 218 (9th Cir. 1989) (holding that duty of fair representation attaches at the moment the workforces merge). In contrast, the Plaintiffs here merged into a singe workforce with the group favored by the union before any misconduct occurred and the issue here is whether Defendant is liable for conduct that began after that merger and continued after it became the certified representative.

According to *Truck Drivers*, 379 F.2d at 144, a union seeking to represent a merged workforce cannot make promises to favor one group so much over another as to constitute a "pledge[ ] … to violate its fair representation duty in the future. *Id.* Such conduct is actionable even if the union has no continuing misconduct after the election because it interferes with the election. Making a promise such as this "restrains the employees of the bargaining unit in the exercise of their … right to freedom of choice in the selection or rejection of a bargaining representative." *Id.* Plaintiffs make the same kind of claim that was made in *Truck Drivers*. Defendant seeks an Order to exclude the same kind of evidence that was highly relevant and material in the *Truck Drivers* case.

The Court, therefore, should deny Defendant's *Motion in Limine #14*.

15) Motion To Limit Evidence Of Post-Certification Conduct By USAPA.

Defendant's Proposed Order:

"Evidence of conduct by USAPA occurring after its certification by the NMB on April 18, 2008, shall be limited to evidence of, or concerning, USAPA's constitutional seniority policy or consideration of USAPA's current seniority integration bargaining proposal where such evidence is offered to illustrate USAPA's constitutional objective concerning seniority."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #15.*

Defendant argues that it is entitled to violate its duty of fair representation because: (1) its founders intended to violate the duty; (2) it promised to violate the duty if certified; and (3) its Constitution requires it to violate the duty. The first two points have no logical connection to a defense. The third point, while logical, is wrong because a union's Constitution cannot relieve it of its duty to fairly represent all members of the bargaining unit.

A duty created by Congress can be changed only by Congress, not by a private agreement. A contract, even where envisioned the federal law creating the duty, cannot modify that duty. *See Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1481 (9th Cir. 1991) (ERISA plan cannot relieve ERISA fiduciary of statutory duty). A union constitution is nothing more than a contract, a private agreement. *Korzen v. Loc. Union 705, Intl. Bhd. of Teamsters*, 75 F.3d 285, 288 (7th Cir. 1996). A union constitution, therefore, cannot change the duty of fair representation created by the RLA.

Plaintiffs have not conceded that nothing matters once Defendant is in violation of its duty of fair representation. While nothing can eliminate the

"stain" of unfair representation once it has occurred, that does not mean that nothing can make the "stain" worse. Defendant argues, if unfair representation has caused a stain, they should be free to repeat and extend the stain over and over again. Not so. Defendant's continuing denial of fair representation makes Plaintiffs' situation worse each day. Plaintiffs must be allowed to introduce evidence to prove that point.

The Court should, therefore, deny Defendant's *Motion in Limine #15*.

16) Motion To Exclude Evidence of Drafts of USAPA's Seniority Integration Proposal.

Defendant's Proposed Order:

"Evidence of drafts, or any non-final iterations of USAPA's seniority proposal to the Company, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #16.*

In the event that Defendant is allowed to argue that it fairly represented Plaintiffs when drafting its seniority proposal, Plaintiffs would use drafts of Defendant's seniority proposal to refute that argument.

Defendant disclosed and now wants to exclude printed copies of drafts of its seniority proposal. These copies were made from electronic files that could track changes and show comments. The copies disclosed show that comments were made but do not show comment text. Comment text presumably explains the rationale for the changes.

The rationale for the changes is highly relevant because it is direct evidence of Defendant's motives. Motive is a material issue in a bad faith claim. Rather than complain that drafts are marginally relevant, Defendant ought to produce (as Plaintiffs have demanded) comment text, which is highly relevant. To date, it has not.

The only valid reason for not producing comment text is that Defendant erased the electronic files. If it did, the Court should instruct the jury that it may draw an adverse inference from the fact that comments are not in evidence. *See Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y.2003) ("[T]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation …."); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (A district court "has the broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior."). The exhibits at issue, therefore, are highly relevant evidence of Defendant's motive.

The Court, therefore, should deny Defendant's *Motion in Limine #16*.

17) Motion To Exclude Evidence that USAPA Allegedly Deliberately Delayed Negotiations of a Single CBA.

Defendant's Proposed Order:

"Evidence that USAPA deliberately delayed negotiations of a single CBA, for any purpose, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #17*.

Defendant must either admit that it "deliberately delayed negotiations of a single CBA," or admit that it is wasting the Court's time with a motion to exclude evidence that does not exist. Regardless, the fact that Plaintiffs have not ***yet*** contended that USAPA deliberately delayed negotiations of a single CBA is no basis to exclude such evidence if it is in the trial exhibits or can be obtained in trial testimony.

In the context of liability, the relevant issue is whether Defendant disregarded the Nicolau Award. Whether Defendant "regarded" something else is of no import. Such evidence can only mislead the jury and, on that

basis, should be excluded from the liability trial. Defendant's motion is deficient because it would exclude only Plaintiffs' use of such evidence. In contrast, Plaintiffs' *Motion in Limine #9* (doc. 319) would exclude all such evidence, whether introduced by Plaintiffs or Defendant. The Court should grant that motion and deny Defendant's *Motion in Limine #17*.

18) Motion To Exclude Evidence Offered to Prove Disgorgement of Dues or Fees

Defendant's Proposed Order:

"Evidence offered to prove any claim, or remedy, that seeks refund of union membership dues or agency fees, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #18* in part.

Plaintiffs argued in prior filings that they were entitled to disgorgement of membership dues and agency fees ***because*** Defendant was in breach of its duty of fair representation. The Court found that breach of the duty does not support such remedy. In effect, the Court held as a matter of law that no evidence could support such remedy. If no evidence could support the remedy, what evidence would be excluded by the Order proposed by Defendant?

Perhaps Defendant seeks to exclude evidence that Plaintiffs paid agency fees and membership dues. If such evidence would be prejudicial or misleading, then evidence that Plaintiffs did not pay fees and dues would also be prejudicial or misleading. If evidence of payment of agency fees and membership dues is excluded, then evidence of refusal to pay such dues and fees must be excluded for the same reasons. Both kinds of evidence are equally likely to confuse or mislead the jury.

Plaintiffs, therefore, will stipulate to the same Order that they request in their response to Defendant's *Motion in Limine #8*: "Evidence relating to

the payment of membership dues and agency fees, or the failure to pay membership dues and agency fees shall be excluded from the liability trial, without advance notice to the Court and counsel."

19) Motion To Exclude Evidence Offered To Show That West Pilots Were Denied Opportunity To Present Their Interests For Consideration By USAPA.

Defendant's Proposed Order:

"Evidence offered to show that West Pilots were denied an opportunity to present their interests for consideration by USAPA, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #19.*

Plaintiffs oppose Defendant's motion which is, rather than a discrete evidentiary motion, yet another motion for reconsideration of this Court's denial of Defendant's efforts to discover irrelevant information about certain West Pilots. This Court has already noted that Defendant has a duty to fairly represent all pilots, regardless how the pilots feel about it. The Court stated that if Plaintiffs "want to argue even inferentially that the absence of West Pilots from...relevant committees is indicative of an animus and in some way contributes to their case, [Defendant] can present the efforts you made to get West Pilots." (RT 7: 5-9 (Mar. 31, 2009).)

Defendant identifies no specific evidence it seeks to exclude. Presumably, it seeks to exclude evidence from ***its own witnesses*** that it did not have any West Pilots on the relevant committees when it contrived its pre-determined date-of-hire seniority proposal, that it did not include any West Pilot input when creating its illusory Conditions and Restrictions, and that ***its own governance documents*** prevented West Pilots from becoming members the union for a significant period of time due to the requirement that a non-existent domicile representative approve all applications.

To exclude such evidence would prejudice Plaintiffs, whose claims focus on the facts that Defendant's intent was to disregard the Nicolau Award, that it campaigned on a promise to disregard the Nicolau Award, and that it has delivered on that campaign promise by utilizing a pre-determined seniority scheme that disregards the Nicolau Award.

Moreover, as this Court has already ruled that Defendant is free to introduce evidence of the efforts it made to include West Pilots, to the extent such evidence exists, it should not be prejudiced at all if the Court denies this motion.

The Court, therefore, should deny Defendant's *Motion in Limine #19*.

20) Motion To Exclude Evidence Or Argument That The Fact That The USAPA Negotiating Committee Was Composed Entirely Of East Pilots Is Probative Of Liability.

Defendant's Proposed Order:

"Evidence offered to show, reference to, or argument that, the fact that (at one time) USAPA's negotiating committee was composed entirely of East pilots is probative in any way of the alleged breach of duty of fair representation, shall be prohibited."

Plaintiffs' Response:

Plaintiffs do not oppose Defendant's *Motion in Limine #20*, adding the proviso "without advance notice to the Court and counsel."

Defendant's *Motion in Limine* #20 is a minor subset of its *Motion in Limine #19*. Plaintiffs do not oppose this specific motion because the jury will understand why Defendant's negotiating committee was, at one time, composed entirely of East Pilots.

21) Motion To Exclude Exhibit No. 14, Bradford Letter Wrongfully Posted On Web Board.

Defendant's Proposed Order:

"Plaintiffs' Trial Exhibit No. 14 shall be excluded from trial, and no reference of, or argument from, shall be made."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #21*.

Defendant intentionally disclosed trial exhibits Nos. 314 and 315 and does not claim they are privileged or confidential. These exhibits, however, report the exact ***same*** communication between Mr. Bradford and Mr. Katzenbach that is the only subject matter in trial exhibit No. 14, the exhibit that Defendant claims is protected by attorney-client privilege.

Trial exhibit No. 314 is an open letter, dated January 31, 2008. It states, in relevant part, as follows:

> In our quest for legal help in this matter we interviewed four law firms. The first was Katzenbach and Khitkan of San Francisco. We interviewed Mr. Katzenbach on **June 1, 2007.** This firm was recommended to us because they **represent the American Eagle pilots in their fight to remove ALPA on that property.** Mr. Katzenbach said that if we could replace ALPA as the bargaining agent we could prevail in a [sic] achieving a Date of Hire seniority integration. The qualifications were that the contract must remain open. **He was provided with both final briefs from AWA and US Airways. He mentioned that the AWA brief was particularly effective.** Their location was not conducive to a good lawyer client relationship.

(USAPA 2349) (emphasis added). Trial exhibit No. 315, a later version dated February 10, 2008, uses this same language. (USAPA 2359.)

Trial exhibit No. 14 is also an open letter. Although undated, it reports a conversation that occurred in early June 2007 between Mr. Bradford and Chris Katzenbach of Katzenbach and Khitikan, a law firm. This exhibit states the following facts, all of which are stated in trial exhibit Nos. 314 and 315: (1) that Katzenbach represents a group of American Eagle pilots,

helping them to set up an independent union to oust ALPA from that airline; (2) that Mr. Katzenbach was impressed with the America West Pilot final brief submitted in the Nicolau Arbitration; and (3) that Mr. Katzenbach advised that, by forming a new bargaining agent, the East Pilots could get around the Nicolau Award. The only point made in trial exhibit No. 14 that is not disclosed in exhibit Nos. 314 and 315 is that Mr. Katzenbach cautioned Mr. Bradford that when communicating the reasons for forming USAPA and when selling USAPA to the East Pilots he must not reveal that the reason for creating USAPA was to "abrogate" the Nicolau Arbitration.

Although Mr. Bradford left out the advice to avoid creating evidence of the true reason for formation of USAPA—abrogation of the Nicolau Award—he followed it when revising trial exhibit No. 314 to No. 315. Trial exhibit No. 314, the earlier version, states:

> **If any one of them** [the attorneys consulted] **has said this is not possible or very dangerous and likely to fail then USAPA would not exist.**

(USAPA2354) (emphasis added). Trial exhibit 315, the later version, shows editing of this language:

> ~~If any one of them has said this is not possible or very dangerous and likely to fail then USAPA would not exist~~ [this statement infers that Nicolau is the only reason for USAPA's existence]

(USAPA2360) (font as in original).

If the communication between Mr. Bradford and Mr. Katzenbach was privileged the subsequent communication of that communication to others is not necessarily so. Defendant has asserted that it is without adequate explanation. Defendant does not identify who Mr. Bradford intended to receive trial exhibit No. 14, what their relationship was to him, or why such communication did not waive the privilege for the underlying

communication with Mr. Katzenbach. Regardless, Defendant voluntarily disclosed the underlying communication with Mr. Katzenbach when it disclosed trial exhibit Nos. 314 and 315.

"[V]oluntary disclosure of the content of a privileged attorney communication [such as this] constitutes waiver of the privilege as to all other such communications on the same subject." *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 23 -24 (9th Cir. 1981) (emphasis added). "In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered." *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992).

> When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts "reasonably designed" to protect and preserve the privilege. Conversely, we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter.

Id.

If Defendant intentionally disclosed Mr. Bradford's communication with Mr. Katzenbach, it does not matter whether its disclosure of trial Exhibit No. 14 was involuntary — the privilege was already waived as to the underlying communication.

All that aside, Defendant has not adequately established involuntary disclosure of trial exhibit No. 14. In such matters, the party asserting privilege bears the burden to show that there was no waiver. Defendant fails to meet that burden. It does not explain how trial exhibit No. 14 came to be posted on an unidentified web board and does not claim to have taken any action to get it removed from the web board. Defendant, therefore, fails to disprove waiver. Any privilege as to the ***subject matter*** of the

communication between Mr. Bradford and Mr. Katzenbach, therefore, is now waived.

Subject matter waiver applies to all evidence of the communication between Mr. Bradford and Mr. Katzenbach.

> The disclosure of … advice and reliance on that advice waived the attorney-client privilege with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice.

In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370, 1374-75 (Fed. Cir. 2001). In this instance, subject matter waiver applies to every document reporting what was communicated between Mr. Bradford and Mr. Katzenbach in June 2007.

Mr. Bradford and other USAPA officers have been advised by their counsel to refuse to answer any questions about trial exhibit No. 14, claiming that it is subject to attorney-client privilege. Prior to discovery of trial exhibits Nos. 14, 314 and 315, Plaintiffs only suspected that Defendant was advised to hide that it was created to abrogate the Nicolau Award. If Plaintiffs had these exhibits when they filed *Plaintiffs' Motion to Compel USAPA to Produce* (Dec. 12, 2008) (doc. 106), the Court might have reached a different decision on that motion.

The communication with Mr. Katzenbach is no longer confidential. On that basis and for the other reasons set out above, it is not privileged.

The Court, therefore, should deny Defendant's *Motion in Limine # 21*.

22) Motion To Exclude Testimony or Declaration by Kevin Horner

Defendant's Proposed Order:

"Evidence in the form of testimony or written Declaration by Kevin Horner shall be excluded."

Plaintiffs' Response :

Plaintiffs do not oppose Defendant's *Motion in Limine* #22.

23) Motion To Exclude Evidence of 36,000 E-mails

Defendant's Proposed Order:

"Evidence in the form of any of the '36,000 emails', shall be excluded"

Plaintiffs' Response:

Plaintiffs do not oppose Defendant's *Motion in Limine* #23.

24) Motion To Exclude Evidence Obtained by Subpoena for Production of Documents Or Things on Non-Paries Not First Served on Defendant

Defendant's Proposed Order:

"Evidence of documents or things (e.g. videos) obtained by Plaintiffs by subpoena for production of documents or things that was directed to non-parties, shall be excluded where the subpoena was not first served on Defendant as required by Rule 45."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine* #24.

The "aim" of the notice provision of Rule 45(b)(1) "is to assure that the other parties' opportunity to review the subpoenaed materials be concurrent with and just as extensive as that of the party issuing the subpoena." Fed. R. Civ. P. comment C-45-22. There is no such concern where, as here, the "other party" always had possession and control of the evidence at issue.

Defendant does not explain the whole story. Although Defendant, through its lawyer Stanley Silverstone, promised to produce unedited copies of Defendant's "Road Show" videotapes, they have not done so. The fact is, Plaintiffs relied on Mr. Silverstone's assurances and did not serve a subpoena on Defendant's video company.

The Court, therefore, should deny Defendant's *Motion in Limine* #24.

25) Motion To Exclude Testimony Of, Or References To, Lee Seham.

Defendant's Proposed Order:

"Testimony of, or reference to, the absence of testimony by Defendant's attorney Lee Seham, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #25* in part.

USAPA wants it both ways. It wants to use Mr. Seham's legal advice as a sword and as a shield. If the court excludes any reference to Mr. Seham's advice by Plaintiffs it must also exclude any advice of counsel defense by Defendant. Plaintiffs, therefore, will stipulate to the following Order:

"Reference to, or introduction of, evidence of legal opinions received by USAPA from Mr. Seham or any other attorney, whether made by Plaintiffs or Defendant, is excluded from the liability trial, without advance notice to the Court and counsel."

26) Motion To Exclude Witnesses To Be Called From The Courtroom Prior To Their Testifying.

Defendant's Proposed Order:

"Witnesses to be called shall be excluded from the Courtroom prior to their testifying; sequestration shall not apply, however, to: 1) the named plaintiffs; 2) designated officers or employees of USAPA (Steve Bradford, Mike Cleary, Robert Davison, Paul Diorio, Mark King, Doug Mowery, Randy Mowrey, Tracy Parrella, David Ciabattoni or Rob Streble); 3) any testifying or non-testifying expert."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #26*.

Defendant misquotes Fed. R. Evid. 615(2). Rule 615(2) makes an exception for an officer or employee "designated as," not "designated by," a

party which is not a natural person. The exception is limited to **one** designee, not to **any** officer and employee a non-natural person wants to designate. As one court explained:

> Relying on the mandatory language of Rule 615 and the singular phrasing of the exception embodied in 615(2), we hold that the district court erred in refusing to sequester Agent Martin, if not during the entire trial, at least during the testimony of his colleague. As the Advisory Committee noted, the sequestration of witnesses effectively discourages and exposes fabrication, inaccuracy, and collusion. Notes of Advisory Committee on Proposed Rules. Scrupulous adherence to this rule is particularly necessary in those cases in which the outcome depends on the relative credibility of the parties' witnesses.

United States v. Farnham, 791 F.2d 331, 335 (4th Cir. 1986); *see also United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991) (agreeing with *Farnham* based, in part, on the singular language used in the advisory note); *Oliver B. Cannon & Son, Inc. v. Fidelity & Cas. Co. of New York*, 519 F.Supp. 668, 679 (D.C.Del. 1981) (applying singular exception rule in civil context, noting that "the exception is clearly framed in the singular and … conclud[ing] … that it does not permit counsel to designate more than one person to be present as a corporation's representative").

To date, Defendant has not followed the spirit of the one-designee rule at depositions. Rather, several of its officers and committee members have been attending the depositions, presumably as party representatives. Plaintiffs have not objected in that context but do object multiple representatives at trial.

Defendant's motion is also flawed because it presumes that a witness will testify only once. In general, a Rule 615 sequestration order applies for the duration of the trial. Because a witness might be recalled for rebuttal purposes, the sequestration order here should apply for the entire duration of the trial, including the remedy phase that will begin during jury

deliberations. *See Geders v. United States*, 425 U.S. 80, 87 (1976) (holding that the district court has "broad power to sequester witnesses before, during, and after their testimony"). Indeed, the Ninth Circuit has found error where a potential rebuttal witness was not sequestered for the duration of the trial:

> The time for sequestration] continues for each witness after he has left the stand, because it is frequently necessary to recall a witness in consequence of a later witness' testimony. Thus, we hold that it was error for the district court to refuse to exclude the government witnesses from the courtroom upon Ell's request.

United States v. Ell, 718 F.2d 291, 293 (9th Cir. 1983) (citations and alteration and quotation marks omitted).

Oliver B. Cannon, *Ell* and the other cases cited hold that Rule 615(2) makes an exception for only ***one*** natural person to represent a non-natural person party and hold that a sequestration order should extend for the full length of the trial. The Court, therefore, should deny Defendant's *Motion in Limine #26* and, in its place, order that Defendant can designate only one natural person as its designated exception to the sequestration order and that witnesses are to be sequestered for the entire length of the trial, including the remedy phase. Plaintiffs consequently propose the following language for the Court's Order:

"All witnesses listed by either party shall be excluded from the Courtroom and precluded from discussing the testimony of any other witness with anyone, including counsel for the parties, for the entire duration of the trial; such sequestration shall not apply, however, to the named plaintiffs and one specifically designated officer or employee of USAPA who can represent Defendant for the entire trial."

27) Motion To Exclude All Evidence Of Damages In Bifurcated Liability Trial.

Defendant's Proposed Order:

"Any and all evidence, references to evidence, testimony, or argument relating to the named Plaintiffs' damages or class damages during the liability phase of this bifurcated trial shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #27*.

Defendant's language is far too broad. Arguably, much of the evidence and argument that relates to liability also relates to damages. It would be entirely unfair to ask the jury to rule on liability without giving them some information on the consequences of that liability—why it matters. The jury need not hear evidence as to the dollar value of any consequences of the liability. Plaintiffs, therefore, do not oppose an Order that would exclude evidence and reference to damages—a claim for money as compensation for an injury. *See* BLACK'S LAW DICTIONARY 393 (7th ed. 1999) (defining "damages" as: "Money claimed by, or ordered to be paid to, a person as compensation for loss or injury…").

Plaintiffs will stipulate, therefore, to a more specific Order, as follows:

"Any and all evidence, references to evidence, testimony, or argument relating to the named Plaintiffs' claims or class claims for money as compensation for loss or injury shall be excluded from the liability phase of the trial."

28) Motion To Exclude Reference To Witnesses Not Called.

Defendant's Proposed Order:

"Evidence of, reference to, or testimony or argument, relating to any decision not to call any witnesses to testify at trial shall be prohibited."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #28.*

Plaintiffs are uncertain what Defendant is requesting, especially because they do not and cannot know what witnesses Defendant will call to testify. Some witnesses, if not called by Defendant may refuse to appear. In all fairness, if Plaintiffs properly subpoena a witness and that witness fails to appear, Plaintiffs should be allowed to note the absence of that witness.

The Court, therefore, should deny Defendant's *Motion in Limine #28*.

29) Motion To Exclude Any Exhibit That Was Not Exchanged With Defendant By April 1.

Defendant's Proposed Order:

"Any trial exhibit for which a copy was not exchanged in paper form with Defendant by April 1, in accordance with this Court's Order Setting Final Pretrial Conference (Doc. #251), that was then in possession of Plaintiffs, shall be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #29.*

Defendant misleads the Court. On March 31, 2009, via email, and again at the beginning of the meeting on April 1, Plaintiffs gave Defendant's attorneys an exhibit list which included the Plaintiffs Trial Exhibit number, the bates range that corresponded with Plaintiffs' previous productions, the date of the document (if it had one listed) and the description of the document. Almost all of Plaintiffs' exhibits had already been produced to Defendants as separate PDF files using a filename describing the document and indicating the Bates number range of the document, with every page individually Bates numbered. The approximately 225 pages of documents that had not yet been disclosed by Plaintiffs were provided to Defendants in paper and electronic form, included identifying Bates ranges and were given

to USAPA counsel at the beginning of the meeting on April 1, 2009. Plaintiffs also attempted to simplify the document review by identifying approximately 100 of these 471 documents that they were more likely to use in their case-in-chief.

In contrast, Defendant had made all of their document production in an exceeding burdensome format. They had produced thousands of pages of multiple documents together in huge PDF files. These files were so large that Plaintiffs had to pay an outside consultant several thousands of dollars to separate and rename individual documents into individual PDF files. Then on April 1, 2009, to fulfill its obligation to identify trial exhibits, Defendant gave Plaintiffs ***twenty-one*** (21) three-inch binders of documents. Most of these documents had not been previously produced. None of the approximately 8,000 pages of these documents were Bates stamped. There was no ready way for counsel to ascertain if Defendant had previously produced the non-Bates stamped documents.

Furthermore, on March 31, Plaintiffs counsel Don Stevens suggested in an email to gave Defendant counsel Nick Granath that they view documents of interest with a video projector, rather than as paper copies. Mr. Stevens' email stated, in relevant part, as follows:

> Just a heads up that the universe of our potential trial exhibits is about 500, mostly USAPA documents. I am guessing that the final trial exhibits we "will" use will be in the range of 100 or less. We will not have paper copies for everyone, but we will have all of the documents on the list I gave you available for display on a screen so we can look at them together. My plan was to first review the likely trial exhibits for each side, then decide what to do with the rest of the documents to allow each side the flexibility to use something else if there is a development at trial.

(Email March 31, 2009.) The full attached email is attached hereto as Exhibit A. Defendant's counsel never expressed dissatisfaction with Mr. Stevens' proposal.

Defendant's counsel arrived on April 1, 2009, with one paper copy of their exhibits for Plaintiffs, filling the 21 binders described above. They did not have any exhibits to view by video projector. Defendant's counsel immediately complained that he wanted paper copies of each of Plaintiffs' trial exhibits. Plaintiffs' counsel Katie Brown offered to print paper copies if needed. As a more economical and practical alternative, Ms. Brown also suggested, in place of paper copies, that she could provide each of Defendant's counsel with a DVD identifying each exhibit by exhibit number and Bates range for each one of Plaintiffs' exhibits. Defendant's counsel elected to take this electronic production and ***nothing*** more was said that day about paper copies.

Counsel met and conferred all day, paying most of their attention to the stipulated facts in each party's draft Joint Pretrial Order. In the course of this meeting, Plaintiffs projected the documents they referred to in the Joint Pretrial Order using the video projector. Defendant's counsel never referred to any of their trial exhibits or to anything in the twenty-one binders they brought to the meeting.

Defendant's motion to exclude the documents not exchanged in paper format on April 1 is frivolous and mean spirited. The Court's order did not specify a paper exchange. There would be no rationale for doing so. In 2009, the era of the electronic courtroom, in a case where all production of documents has been produced electronically as PDF files by both parties, there was no reason to require or expect a paper exhibit exchange.

Plaintiffs went to a substantial effort to make a useful exhibit exchange. In contrast, Defendant made as great an effort to make an inconvenient exhibit exchange.

The Court, therefore, should summarily deny Defendant's *Motion in Limine #28*.

30) Motion To Exclude Improper Argument In Opening Statement Regarding Nicolau Award.

Defendant's Proposed Order:

"Counsel shall be prohibited from stating in Opening Statement that this Court has ruled that the Nicolau Award is *contractually* enforceable on USAPA."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #30*.

Defendant seeks an ambiguous order that would serve no useful purpose. It should go without saying that neither party would state in Opening Statement any of the Court's rulings, other than as expressly permitted by the Court. Plaintiffs see no reason to set this out in a formal order.

31) Motion To Exclude Regarding Length of Contract Negotiations

Defendant's Proposed Order:

"Lay witness testimony as to how long it should take to negotiate a collective bargaining agreement should be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #31* in part.

Plaintiffs anticipate that there will be disputes over what constitutes "lay witness testimony." The committee notes to the 2000 amendment to Fed. R. Evid. 701 explains that "[t]he amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony." Testimony requiring no specialized knowledge is "lay testimony." A witness might give lay testimony and expert testimony, depending on the topic. *Id.* ("Certainly it is possible for the same witness to provide both lay and expert testimony in a single case."); *see*, *e.g.*, *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997).

Plaintiffs do not assert that there is a standard of care for how long it should take to complete CBA negotiations. Plaintiffs, therefore, will not try to prove unfair representation liability by showing that Defendant failed to complete negotiations within a requisite period of time. Testimony as to how long it should take to negotiate a CBA, therefore, is not relevant to prove liability in this case.

That said, Plaintiffs do assert that Defendant's unfair representation has delayed integrated operations. Evidence of the expected length of time to complete negotiations and start integrated operations, therefore, is relevant to determine the extent to which unfair representation has caused such delay. This determination is material to fashioning a remedy, not to determining liability.

No witness, lay or expert, therefore, should testify as to such matters in the liability trial. Such evidence, however, might be relevant to balancing hardships or deciding the feasibility of a remedy.

Plaintiffs, therefore, will stipulate to an Order as follows:

"Evidence or argument as to the expected or usual length of time needed to complete pilot single CBA negotiations after an airline merger, whether introduced by Plaintiffs or Defendant, shall be excluded from the liability trial, without advance notice to the Court and counsel."

32) Motion to Exclude Testimony Regarding Parties to Nicolau Arbitration

Defendant's Proposed Order:

"Lay or expert witness testimony that is offered to argue that the parties to the Nicolau arbitration were the East pilots and the West pilots should be excluded."

Plaintiffs' Response:

Plaintiffs oppose Defendant's *Motion in Limine #32*.

The validity of the proposed Order hinges on the definition of "party." If "party" means expressly identified as a participant in the arbitration, it includes only the entities stated in the arbitration agreement—a document that speaks for itself. If it means contractually obligated to abide by the arbitration award, it includes the entire group of pilots, East and West.

Even where persons are not expressly stated to be parties to an arbitration, they can be bound by the arbitration as if the were parties. For example, "[a] claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act." *Ficek v. Southern Pac. Co.*, 338 F.2d 655, 656 (9th Cir. 1964); *see also Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983) (same).

What matters is if there person voluntarily submitted the claim to arbitration. That agreement "may be implied from the conduct of the parties." *Ficek*, 338 F.2d at 656. *Cf. Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1279 (9th Cir. 2006) (individual not bound to the outcome of an arbitration where he "forcefully objected to arbitrability at the outset of the dispute, never withdrew that objection, and did not proceed to arbitration on the merits"); *accord Olsen v. U.S. ex rel. U.S. Dept. of Agriculture*, 546 F.Supp. 2d 1122, 1129 (E.D.Wash. 2008).

The synthesis of these principals is that persons not expressly stated to be parties to an arbitration are bound by the result of the arbitration as if they were a party under ordinary estoppel and agency doctrine. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006). Under the doctrine of collateral estoppel:

> [T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be strangers to the cause. One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the

> prosecution or defense of an action in aid of some interest of his own is as much bound as he would be if he had been a party ….

Montana v. United States, 440 U.S. 147, 154 (1979) (alteration and quotation marks omitted). "Substantial participation or control … weighs heavily in favor of a finding of virtual representation." *Irwin v. Mascott*, 370 F.3d 924, 930 (9th Cir. 2004). Consequently, workers who "voluntarily and actively" participated through representatives in a merger related seniority arbitration were "bound by its outcome." *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1103 (2d Cir. 1991).

Defendant, in effect, asks the Court to exclude evidence and argument that would readily show that all pilots, East and West, were represented parties in the Nicolau Arbitration. It is shear sophistry for Defendant to argue otherwise. Defendant does so, in hope that it can mislead the jury into seeing the East Pilots as not bound in any way by the Nicolau Arbitration. This is contrary to *Gvozdenovic* and the other authorities cited above. There is no reason the Court should make an order such as this, based on erroneous law and having potential to mislead the jury.

The Court should, therefore, deny Defendant's *Motion in Limine #32*.

33) Motion To Exclude Improper Reference in Opening Statement to Evidence Ordered Excluded.

Defendant's Proposed Order:

"Counsel shall be prohibited from referencing or mentioning in Opening Statement any evidence that the Court has ordered excluded from trial on motion *in limine*."

Plaintiffs' Response:

The Court said that a lot of motions *in limine* do not need to be filed. Defendant's final motion proves the point. A motion *in limine* to obtain an Order directing counsel to not violate orders arising from other motions *in*

limine is as unnecessary as a motion can be. The Court, therefore, should summarily deny Defendant's *Motion in Limine #33*.

Dated this _13th day of April, 2009

POLSINELLI SHUGHART PC

By: */s/*
Andrew S. Jacob
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2009, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

I further certify that on April __, 2009, I caused a paper courtesy copy of the foregoing document and the Notice of Electronic Filing to be delivered to the assigned Judge:

s/
Andrew S. Jacob