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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S OBJECTIONS TO THE COURT PROPOSED INJUNCTION (Doc. # 539)**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

The Court has ordered that counsel for both parties may submit any comments or objections relating to the Court's proposed injunction language, on or before June 30, 2009. (Doc. # 539). Defendant US Airline Pilots Association (USAPA) respectfully objects to the Court's proposed injunction, which reads as follows:

> In accord with the foregoing and the entire record in this action, it is hereby ordered that Defendant USAPA and its officers, committees, representatives, and agents shall immediately, and in good faith, make all reasonable efforts to negotiate and implement a single collective bargaining agreement with US Airways that will implement the Nicolau Award seniority proposal unmodified, according to its terms. Defendant USAPA and its officers, committees, representatives, and agents shall immediately, and in good faith, make all reasonable efforts to support and defend the seniority rights provided by or arising from the Nicolau Award in negotiations with US Airways. Defendant USAPA shall not negotiate for separate collective bargaining agreements for the separate pilot groups, but shall rather negotiate for a single collective bargaining agreement that incorporates the Nicolau Award.
>
> The Court retains jurisdiction to modify or dissolve this order upon motion of any party.

USAPA objects to the proposed injunction on the following legal, evidentiary and practical grounds, and in so doing incorporates by reference its previous comment (Doc. # 504):

First, the injunction deprives the union and the company of *existing rights* under the Transition Agreement (TA) and collective bargaining agreements (CBA), which amounts to re-writing the TA, exceeds the Court's authority, and places all parties to the TA in a worse position than existed under ALPA. Under the terms of the TA, the parties now have the existing right to modify the two CBAs, the West and East, as well

as the right to mutually terminate the TA altogether. (Tr. Ex. 21, hereinafter "TA"). Nothing in the TA obligates the parties ultimately to implement a new, single CBA. Instead, the parties expressly agreed that the TA could be terminated on mutual agreement, or on stated conditions without agreement. (TA§ XII. E). The TA provides that the two CBAs, East and West, remain in force. (TA § II. A). Nothing in the TA prohibits two contracts instead of one. Moreover, ALPA certainly understood all this and even exercised the right to continue with separate contracts as can be seen by its demand for bargaining over the America West CBA. (*See* letter, March 19, 2008, Prater to Parker, authorized by McIlvenna, demanding Sec. 6 negotiations with respect to West CBA; attached hereto; Trial Ex. 1267). Yet the direct effect of the Court's proposed injunction deprives both the union and the company of existing rights by precluding modification or the possibility of two separate contracts. In this way, USAPA and both the East and West pilots it represents are prejudiced because one the principal means that ALPA was exploring to end the negotiations stalemate – the negotiation of two contracts – is being withheld from USAPA by court fiat. To this extent, the injunction exceeds the power of this Court, which does not extend to re-writing existing CBAs that are subject to the RLA (not even an Adjustment Board under the TA has this power; *See* TA § X. F).

Second, the injunction *ignores and violates the RLA* by prohibiting the union and the company from negotiating and implementing separate contracts instead of one. The TA expressly recognizes that no rights under the RLA are waived. (TA § V. G). Case

law under the RLA is clear that an employer and a union may maintain separate contracts for the same bargaining unit. *Association Of Flight Attendants v. USAir, Inc*., 24 F.3d 1432, 1437 (D.C. Cir. 1994) ("while the [NMB] has long interpreted the Act to require system-wide representation certifications, it has not similarly construed the Act to require system-wide collective bargaining agreements"); *Ass'n Of Flight Attendants v. United Airlines*, 71 F.3d 915, 919 (D.C. Cir. 1995) ("there is no barrier to an employer and union agreeing to separate contracts covering different groups of employees ... within the same Board-certified craft or class"); *Bishop v. ALPA*, 1998 U.S. Dist. LEXIS 11948, *27; 159 L.R.R.M. 2005 (N.D. Cal. 2005), *affirmed*, 2000 U.S. App. LEXIS 3270 (9th Cir. 2000) (unpublished), attached hereto as Exhibit A; and the National Mediation Board in *Grand Trunk Western Railroad Co.,* 19 N.M.B. 226, 232 n.1, 19 NMB No. 51 ("The parties are not precluded from mutually agreeing to multiple agreements covering a particular craft or class.").

Third, the proposed injunction *infringes upon the exclusive jurisdiction of the National Mediation Board* ("NMB") to oversee negotiations. The National Mediation Board is vested with broad discretion to mediate labor disputes between unions and carriers and to set ground rules for mediation. Courts have extraordinarily limited jurisdiction to review decisions of the Board, and may intervene in the activities of the Board only upon a showing of patent official bad faith. *See* 45 U.S.C. §§ 155, 160; *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-93 (1969). Given the Board's exclusive authority over the mediation of labor disputes, the

Courts' jurisdiction to review decisions of the Board is "'extraordinarily limited.'" *Local 808, Bldg. Maint., Serv. & R.R. Workers v. National Mediation Bd.*, 888 F.2d 1428, 1437 (D.C. Cir. 1989) (citation omitted). *See also, American Train Dispatchers Dep't of the Int'l Bhd. of Locomotive Eng'rs. v. Fort Smith R.R. Co.*, 121 F.3d 267, 271 (7th Cir.), *cert. denied*, 522 U.S. 1016 (1997). Congress "took such great pains" to ensure the Board's "usefulness [in] settling disputes," *Switchman's Union v. National MediationBd*., 320 U.S. 297, 303 (1943), that the courts have jurisdiction to intervene in the activities of the Board "only upon a showing of 'patent official bad faith,'" *American Train Dispatchers, 121 F.3d at 271; see also International Ass'n of Machinists & Aerospace Workers v. National Mediation Bd.,* 930 F.2d 45, 48 (D.C. Cir.), *cert. denied*, 502 U.S. 858 (1991). In fact, the effectiveness of the Act's dispute resolution mechanism depends in large part "on the assurance that neither party will be able to enlist the courts to further its own partisan ends." *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 441 (1989); *cf. Independent Fed'n of Flight Attendants v. Cooper*, 141 F.3d 900, 902-03 (8th Cir. 1998) ("the Mediation Board's power to resolve representation disputes under the RLA is exclusive" and "a district court has no power either to review Board certifications [of the bargaining representative for a carrier's employees] or to make certifications itself") (*citing Switchmen's Union v. National Mediation Bd*., 320 U.S. 297, 303 (1943)). Yet the Court's injunction fails to recognize the NMB's role, and is so vague as to effectively displace or invade its exclusive jurisdiction.

Fourth, the injunction *violates the well-settled rule announced in H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108, 90 S. Ct. 821 (1970) and its progeny, forbidding courts from dictating the terms of labor agreements. (*See*, Doc. # 451, p. 6, incorporated herein by reference). Court-set contract terms are inevitable here given that the injunction requires that USAPA "implement the Nicolau Award seniority proposal unmodified, according to its terms." (*Ramey* is distinguishable; there the side agreement – the Shuttle Transition and Integration Agreement – was already executed and the union was ordered to return a discrete, smaller list of 62 former Eastern mechanics to their Eastern seniority; here, in contrast, two entire CBAs are being negotiated and 5,000 pilots going back decades are at stake).

Fifth, the proposed injunction mandating that USAPA "make all reasonable efforts to negotiate and implement a single collective bargaining agreement with US Airways" is *not necessary*. The company has already expressly linked economic progress for the pilots to negotiation of a single CBA. (*See* Trial Ex. 5; Hemenway testimony at Tr. 883:16-17). And this Court has already recognized the same by observing that a kind of Hobson's choice confronts the pilots. (Tr. 1746:5-9, 21-25; 1747:1-4).

Sixth, the proposed injunction fails to comply with Fed. R. Civ. P. 65(d) by not stating, "specifically" and "in reasonable detail ... the act or acts restrained or required," because there is *no definition or guidance for the terms "good faith" or "reasonable efforts" or of the "Nicolau Award."*

A self-policing injunction should be the ideal, but the proposed language invites on-going judicial monitoring and intervention and promises protracted compliance litigation. The Court itself has recognized the danger of avoiding intrusive judicial management. (May 7 Tr. 1745:17-21). Plaintiffs have already demonstrated a propensity to second-guess USAPA bargaining (Tr. 5/1/09 at 886:16-889:1, 891:10-16) and will surely come under renewed demands to do so again as time passes whether or not USAPA is at fault (of course, the company may delay for its own reasons and the NMB has the power to hold out the parties indefinitely). The practical effect will be a series of threatened and actual contempt proceedings, with the collateral effect that USAPA will be pressured to ratchet down its economic demands.

Regarding the meaning of "Award" versus 'list,' the proposed language is ambiguous in the context of this case. The ALPA Merger Policy spoke in terms of the implementation of a "merged seniority *list*." (Trial Ex. 3 §§ I.1 at 8 and N.2 at 12). And there is nothing in ALPA Merger Policy that restricted ALPA from obtaining the necessary political compromise by providing for staged implementation or other conditions and restrictions. To the contrary, ALPA National interpreted ALPA Merger Policy as permitting it to "mitigate" the Nicolau List through either delayed implementation, operational fences, or other "career progression provisions." (Trial Ex. 1034 at 1; Trial Ex. 1092). As previously stated, ALPA National determined that it was consistent with ALPA Merger Policy to apply "extreme pressure" on the West MEC to consider these options as a means of advancing the imperative union objective

of negotiating better terms and conditions of employment. (Trial Ex. 1094).

Sixth, the proposed injunction fails to comply with Fed. R. Civ. P. 65(d) because there is no definition of compliance such that the parties would know that the injunction was automatically dissolved, or subject to being dissolved.

Again, this will unnecessarily involve this Court in ongoing litigation, here over how much compliance is enough to end the injunction. As proposed, the injunction now allows for a single ratification vote rejecting a CBA with the Nicolau list in it and nothing further occurring because USAPA will have complied with "mak[ing] all reasonable efforts to negotiate and implement a single collective bargaining agreement with US Airways that will implement the Nicolau Award seniority proposal unmodified, according to its terms." Yet USAPA will arguably be exposed at that very point to a claim that the extra sentence in the proposed language – i.e. "Defendant USAPA and its officers, committees, representatives, and agents shall immediately, and in good faith, make all reasonable efforts to support and defend the seniority rights provided by or arising from the Nicolau Award in negotiations with US Airways" – means that some additional duty remains.

Moreover, ALPA Merger Policy did not require ALPA to, in effect, dash its head against a brick wall in perpetuity. Rather it required only "all reasonable means." (Tr. Ex. 3 § I.I at 8). ALPA interpreted its own policy as permitting the exploration of practical alternatives that would advance the "imperative" union objective of obtaining better terms of contract. Among the "practical" alternatives that ALPA National was

exploring were "mitigation" of the Nicolau Award, an "umbrella agreement," or "multiple agreements." (Trial Ex. 1092). Any Court order that compelled USAPA to repeatedly submit a single CBA with the Nicolau list despite membership rejection would exceed the requirements of ALPA Merger Policy, subvert federal labor policy, and exceed Rule 65.

Seventh, the injunction is *overly broad*, going beyond what is a necessary remedy in this case. An order to negotiate a new single CBA is not necessary, as noted herein above, because sufficient economic incentives already exist and because USAPA has a political interest in unifying all of the rank and file. And the Court has before it other options (*See* Doc. # 504 for proposed solutions) that would constitute an effective remedy while removing the Court from ongoing intrusive involvement and at the same time capitalizing on USAPA's current bargaining position or leverage. This is both a practical and legal objection. *See Madsen v. Women's Health Center, Inc*., 512 U.S. 753, 765 (1994) (*citing Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)) ("that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs").

Eighth, the proposed injunction forbids USAPA from exercising the flexibility that even ALPA had to modify the Nicolau list. This amounts to a 'Nicolau or nothing' handcuff that the parties have previously conceded resulted in stalemate that was detrimental to both East and West pilots: no wage increases or other contractual improvements. There is no dispute about the depth of rejection among East pilots;

Plaintiffs stipulated to this and the suggestion that this will suddenly change is mere speculation in the face of hard facts. The injunction as currently drafted promises a *more enduring stalemate than that which previously existed* under ALPA Merger Policy as administered by ALPA National. This is both legally and practically objectionable. USAPA is robbed of the flexibility that ALPA had. ALPA National interpreted ALPA Merger Policy as permitting it to "mitigate" the Nicolau List through delayed implementation, operational fences, or other "career progression provisions." (Trial Ex. 1034 at 1; Trial Ex. 1092). Without that same flexibility, the pilots, the carrier, and USAPA are doomed to act out a script in which there is no ending this "toxic dispute" over seniority rights.

Respectfully Submitted,

Dated: June 30, 2009

By: ***/s/ Nicholas P. Granath, Esq.***

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- DEFENDANT USAPA'S OBJECTIONS TO THE COURT PROPOSED INJUNCTION (Doc. # 539)
- Exhibit
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

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who are admitted counsel for US Airways, Inc. in this matter.

Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On June 30, 2009, by:

/s/ Nicholas P. Granath, Esq.

Exhibit A

JAMES D. BISHOP, et al., Plaintiffs, v. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al., Defendants.

No. C-98-359 MMC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1998 U.S. Dist. LEXIS 11948; 159 L.R.R.M. 2005

August 4, 1998, Decided
August 4, 1998, Filed, Entered in Civil Docket

DISPOSITION: [*1] ALPA defendants' motion to dismiss plaintiffs' complaint, or in the alternative for summary judgment, GRANTED, and the Eagle defendants' motion to dismiss the complaint GRANTED.

COUNSEL: For JAMES BISHOP, CHESTER GAULT, RICHARD MAHON, RICHARD SPERRY, Plaintiffs: Christopher W. Katzenbach, Katzenbach & Khtikian, San Francisco, CA.

For AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, EAGLE MASTER EXECUTIVE COUNCIL, defendants: Jeffrey B. Demain, Altshuler Berzon Nussbaum Berzon & Rubin, San Francisco, CA.

For AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, EAGLE MASTER EXECUTIVE COUNCIL, defendants: Marcus Migliore, Jonathan A. Cohan, Air Line Pilots Assoc., Washington, DC.

For AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, EAGLE MASTER EXECUTIVE COUNCIL, defendants: Elizabeth Ginsburg, Air Line Pilots Association, Herndon, VA.

For AMR EAGLE INC, EXECUTIVE AIRLINES INC, FLAGSHIP AIRLINES INC, SIMMONS AIRLINES, INC., WINGS WEST AIRLINES, INC., defendants: David J. Reis, O'Melveny & Myers LLP, San Francisco, CA.

For AMR EAGLE INC, EXECUTIVE AIRLINES INC, FLAGSHIP AIRLINES INC, SIMMONS AIRLINES, INC., WINGS WEST AIRLINES, INC., defendants: Robert A. [*2] Siegel, O'Melveny & Myers, Los Angeles, CA.

JUDGES: MAXINE M. CHESNEY, United States District Judge.

OPINION BY: MAXINE M. CHESNEY

OPINION

ORDER GRANTING ALPA DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND GRANTING EAGLE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs are members of the Air Line Pilots Association ("ALPA"), a labor union representing commercial airline pilots, including those who fly for the four regional airlines operated by American Eagle, Inc. ("Eagle"), a wholly-owned subsidiary of AMR Corporation ("AMR"). Plaintiffs are dissatisfied with a collective bargaining agreement that was negotiated for Eagle pilots by ALPA. They assert that ALPA and Eagle violated the Railway Labor Act (45 U.S.C. § 151, et seq., "RLA") [1], and breached the duty of fair representation, in connection with the negotiation and ratification of the agreement. ALPA now moves to dismiss the complaint, or in the alternative, for summary judgment. Eagle has filed a separate motion to dismiss the complaint.

1 The provisions of the RLA govern labor disputes involving the airline industry. See 45 U.S.C. § 181.

[*3] The matter came on regularly for hearing on July 31, 1998, Christopher W. Katzenbach appearing for plaintiffs, and Marcus C. Migliore, Jeffrey B. Demain, and Robert A. Siegel appearing for defendants.

BACKGROUND

Except as otherwise indicated, the following facts are undisputed.

Eagle is a subsidiary of AMR Corporation ("AMR"), a corporation that also owns American Airlines ("American"). Eagle operates four regional airlines that are also AMR subsidiaries: Simmons Airlines ("Simmons"), Flagship Airlines ("Flagship"), Wings West Airlines ("Wings West"), and Executive Airlines ("Executive"). Dec. of John G. Schleder ("Schleder Dec.") at P 2. As is typical in the airline industry, AMR's mainline carrier, American, uses jet aircraft to fly the longer routes between hub airports, while the Eagle carriers employ mainly turbo propeller aircraft to fly the shorter, regional routes. Id.

Until recently, pilots at the four Eagle carriers were represented by three different unions and had four separate collective bargaining agreements. In 1995, however, the National Mediation Board ("NMB") ruled that the Eagle carriers constituted a single transportation system under the RLA, and [*4] ordered that an election be held to select a single bargaining representative for all Eagle pilots. [2] Dec. of Jerry Mugerditchian ("Mugerditchian Dec.") at P 9. ALPA won the election, which was held in late 1995, and was certified as the exclusive bargaining representative for all Eagle pilots. Id.; ALPA Exs., Ex. 3.

2 The NMB has the statutory authority to certify the authorized representatives of an air carrier's employees. See 45 U.S.C.A. § 152, Ninth.

The ALPA constitution and by-laws provide for the establishment at each airline of a master executive council ("MEC") which "function[s] as a coordinating council for the membership on that airline." ALPA Exs., Ex. 1 at 35. Under the ALPA constitution and bylaws, MECs have been delegated authority to negotiate collective bargaining agreements. Mugerditchian Dec. at P 7; ALPA Exs., Ex. 1 at 35, 83. Soon after ALPA was certified as their bargaining representative, the Eagle pilots created a unified MEC ("Eagle MEC"), which was [*5] comprised of representatives of each of the Eagle carriers. Schleder Dec. at P 7; ALPA Exs., Ex. 1 at 35.

Although ALPA was certified as exclusive bargaining representative for all Eagle pilots, the separate collective bargaining agreements for each carrier remained in effect, and the differences among these contracts created disparities among pilots with respect their terms of employment. Schleder Dec. at P 6. In April 1996, the Eagle MEC adopted a resolution calling for the negotiation of a single contract and seniority list for all Eagle pilots, and a Negotiating Committee was formed to work towards that goal. Dec. of Homer Pugh, Jr. ("Pugh Dec.") at P 6. The Eagle MEC saw a single contract as necessary to end Eagle's practice of "whipsawing" -- where pilots employed by one carrier were pitted against those employed by another -- and achieving wage, benefit and working condition parity and improvement. Pugh Dec. at P 7.

In August 1996, ALPA persuaded Eagle management to engage in negotiations for a single agreement with a single seniority list covering all Eagle pilots, even though the collective bargaining agreements covering pilots at some of the Eagle carriers were not then [*6] subject to mandatory renegotiation. Schleder Dec. at P 6; Pugh Dec. at P 10. [3] Management, however, stated that it was reserving the right to back away at any time from the concept of a single, Eagle-wide agreement. Calder Dec. at P 7. In October 1996, the Eagle MEC passed a resolution calling for membership ratification of any Eagle-wide labor contract, although such member ratification is not required by ALPA's constitution and by-laws. Pugh Dec. at P 8; ALPA Exs., Ex. 5. [4] At about the time that negotiations for a new collective bargaining agreement began, Eagle announced plans to introduce regional jet aircraft into its fleet. Regional jets are small jet aircraft that are able to cover more and longer flight segments in a given day than the turbo propeller aircraft that were then in use. at Eagle, and can provide more efficient service to smaller markets than the larger jets operated by mainline carriers. Schleder Dec. at P 4. In addition, pilots employed by regional carriers, such as those operated by Eagle, earn less than pilots employed by mainline carriers, thus making it attractive to have regional carriers fly regional jet s when possible. Id. Consequently, introduction [*7] of the regional jets caused AMR to reconsider the allocation of routes between American and Eagle. Id. at P 5.

3 The Simmons and Executive contracts were subject to renegotiation on August 31, 1996 and December 17, 1996, respectively, whereas the Flagship and Wings West contracts were not subject to renegotiation until September 1997 and December 1999, respectively. Schleder Dec. at P 6.

4 Section 2 (Ratification) of Article XVIII of ALPA's constitution and by-laws provides as follows:

> A. Any contract, letter of agreement or letter of understanding that, in the opinion of the MEC, substantially affects the pay, working conditions, retirement, or career security of member pilots will be subject to membership ratification under the following terms and conditions:

> (1) The MEC will, at its option, ballot the membership of their airline to determine if it is their desire to have membership ratification. Once membership ratification is established it will remain in effect until changes by another ballot of the membership through MEC action.
>
> (2) Unless the membership is balloted, as described in Section 2A(1) of this article, membership ratification of individual contracts and agreements will remain the option of the MEC.

ALPA Exs., Ex. 1 at 83.

[*8] In 1996, the question of whether American or Eagle pilots would fly AMR's regional jets became a major point of contention during contract negotiations between AMR and the Allied Pilots Association ("APA"), the union representing American pilots. AMR had stated its intention to purchase a number of regional jets and to have Eagle pilots fly them, and in February 1997, the APA called a strike, primarily over the regional jet issue. Schleder Dec. at P 5; Pugh Dec. at P 13.

In an attempt to resolve the strike at American, AMR and Eagle initiated negotiations with APA and ALPA regarding the regional jet issue. On March 22, 1997, the parties entered into an a Letter of Agreement which detailed the circumstances under which Eagle pilots would fly the regional jets. Id. The Letter of Agreement provided that Eagle pilots would fly regional jets having a capacity of seventy or fewer passengers. Id.; ALPA Exs., Ex. 21 at 155. The Letter of Agreement also provided that at least half of all new hire positions at American would be offered to Eagle pilots serving as regional jet captains in the order of their Eagle-wide seniority. Pugh Dec. at P 14; ALPA Exs., Ex. 21 at 157. This provision [*9] of the Letter of Agreement came to be referred to as the "Flow-Through Agreement." Pugh Dec. at P 14. It was anticipated that the Flow-Through Agreement would become part of the single, Eagle-wide collective bargaining agreement if one was reached, and that otherwise, it would become part of any separate agreement between Eagle and the pilots at any airline that received regional jets. Pugh Dec. at P 20.

Management made clear from the outset of negotiations that it was important to Eagle's business plan to have the regional jets in service by mid-1997, and that Eagle wanted to have a collective bargaining agreement in place before that time. Calder Dec. at P 6. During negotiation of the collective bargaining agreement, Eagle management informed the Eagle MEC chairman, Homer Pugh, that it intended to purchases 67 regional jets, that all of them would likely be placed in service with one carrier, and that the carrier was likely to be Simmons. Pugh Dec. at P 33. Pugh informed the other members of the Eagle MEC that in the absence of a single Eagle-wide seniority list, it was probable that only Simmons pilots would get the opportunity to fly regional jets. Id.

In June 1997, management [*10] and ALPA arrived at a tentative Eagle-wide collective bargaining agreement ("TA"). Schleder Dec. at P 19. The TA incorporated the Flow-Through Agreement and provided for the establishment of a single, Eagle-wide seniority list. Id. The TA was mailed to all Eagle pilots for their review, and a ratification vote was thereafter conducted. The ratification procedure provided that the TA would become effective if approved by a majority of pilots voting thereon. The TA was rejected by the Eagle pilots, 505 pilots voting for the TA and 642 voting against it. Schleder Dec. at P 20; ALPA Exs., Ex. 14. The ballot count indicated, however, that a majority of the pilots at Simmons and Flagship voted in favor of the TA, while pilots at Wings West and Executive voted overwhelmingly against it. Id.

After learning that the pilots had rejected the TA, Eagle's vice-president for employee relations, Mike Costello, informed ALPA's contract administrator, John Schleder, that Eagle was no longer interested in negotiating a single collective bargaining agreement, but preferred to bargain further so that the TA could be applied only to Simmons and Flagship. Schleder Dec. at P 21. Schleder was told [*11] that this was due mainly to the fact that operational deadlines for introduction of the regional jets did not allow for further protracted negotiations. Id. In addition, Costello wrote to Pugh to propose that the TA be modified to cover only Flagship and Simmons. Pugh Dec. at P 38; ALPA Exs., Ex. 15. Eagle management indicated, however, that it remained open to any creative suggestions for achieving a single, Eagle-wide agreement. Id. Pugh inquired of Eagle's president, Dan Garton, whether Eagle would consider continuing

negotiations towards a single contract if the Eagle MEC could identify a limited number of contract modifications for discussion. Pugh Dec. at P 39. Pugh also informed Garton that ALPA's constitution and bylaws provided for expedited ratification procedures. Id. Garton told Pugh that Eagle would be willing to wait a few more weeks to introduce the regional jets to give the parties additional time to negotiate an amended TA.

After rejection of the TA, the Eagle MEC met to determine how to proceed. On August 4, 1997, the Eagle MEC agreed that management should be presented with a focused list of contract enhancements relating to compensation, scheduling, [*12] and retirement benefits, with the understanding that if management approved them, the amended TA would be presented to the membership for ratification on an accelerated basis. Schleder Dec. at PP 29-30. The following day, representatives of ALPA presented Eagle management with a list of proposed contract enhancements and Costello stated that Eagle would be willing to consider them, but only on the condition that if the TA again failed to win approval on an Eagle-wide basis, ALPA would allow Eagle the option to apply the amended TA (including the provisions of the Flow-Through Agreement) to those carriers whose pilots approved the amended TA on a majority basis. Pugh Dec. at P 51.

In response, the Negotiating Committee proposed to Eagle management a revised ratification procedure, which was developed in consultation with, and under the supervision of, ALPA's Vice President - Administration/Secretary, Jerry Mugerditchian. Mugerditchian Dec. at P 32. Under the revised procedure, if a majority of the pilots on an Eagle-wide basis approved the amended TA, it would apply to all Eagle pilots. Pugh Dec. at P 51. If, however, the amended TA failed to receive overall majority support but was [*13] approved by a majority of pilots at each of three Eagle airlines, it would result in a single contract and seniority list covering all pilots at each of the three airlines. Id. Finally, if the amended TA was approved by a majority of pilots at only two Eagle airlines, it would result in a single contract and seniority list covering all pilots at those airlines if the pilots at the two airlines constituted at least 50 percent of all Eagle pilots. Id. Management approved the ratification procedure. Id. at PP 55-58.

The amended TA contained "scope" provisions that required Eagle to assign to pilots covered by that agreement all flying on Eagle aircraft. ALPA Exs., Ex. 21 at 5. One of the effects of this provision was to ensure that any regional jets acquired and put into service by Eagle would be flown by Eagle pilots. The amended TA also included contingent scope provisions that would take effect in the event that the amended TA resulted in a contract covering only two or three Eagle carriers. Schleder Dec. at P 35; ALPA Exs., Ex. 19. The contingent scope provisions guaranteed that carriers covered by the amended TA would continue to perform at least the same percentage [*14] of total Eagle flying as they did before adoption of the amended TA, and that the carriers would receive an amount of regional jet flying at least equal to the proportion of total Eagle flying then done by the carrier. Id. The Eagle MEC and the Negotiating Committee unanimously approved the amended TA (including the job security provisions) and the revised ratification procedures and agreed to present the contract to the Eagle pilots for ratification. Schleder Dec. at P 41.

The amended TA was presented to Eagle's pilots for ratification and 62% of the pilots voted to approve it, which resulted in a single collective bargaining agreement covering all Eagle pilots. Pugh Dec. at PP 62-63.

On January 30, 1998, four pilots employed by Wings West filed suit against ALPA, the Eagle MEC, Eagle, and each of the Eagle carriers. Plaintiffs' complaint contains two claims for relief: (1) breach of Section 2, Second, Third, and Fourth of the RLA; and (2) breach of the RLA-imposed duty of fair representation.

With respect to their first claim for relief, plaintiffs allege that defendants' conduct in negotiating a TA that potentially could have been applied to fewer than all Eagle pilots interfered [*15] with plaintiffs' right to bargain collectively through their chosen representatives, as guaranteed by Section 2, Third and Section 2, Fourth of the RLA (45 U.S.C. § 152, Third, Fourth). Plaintiffs also claim that defendants have refused to bargain collectively with plaintiffs' representatives in the manner designated by Eagle's pilots, in violation of Section 2, Second of the RLA (45 U.S.C. § 152, Second). Plaintiffs seek a declaratory judgment that the amended TA is invalid, as well as injunctive relief requiring defendants to negotiate for a single, Eagle-wide contract to be ratified by majority vote of all Eagle pilots as a single unit. Compl. at P 48.

With respect to the second claim for relief, plaintiffs enumerate numerous actions by defendants that they assert constituted a breach of the duty of fair representation: (1) failure to comply with ALPA's constitution and bylaws; (2) failure to follow resolutions and policies adopted by the Eagle MEC for negotiation of a single, unified collective bargaining agreement for Eagle pilots; (3) exclusion of authorized pilot representatives from bargaining session; and (4) adoption of a ratification [*16] procedure which was contrary to the ALPA constitution and bylaws, the NMB certification, and the resolutions and policies of the Eagle MEC, which discriminated against pilots who voted against the amended TA, and which favored pilots at the largest Eagle carrier. Compl. at P 52. Plaintiffs allege that Eagle joined with

ALPA and the Eagle MEC in these breaches of duty and took advantage of them to gain a financial benefit. Compl. at P 53. While plaintiffs purport to bring the complaint as a class action, no class has yet been certified.

ALPA and the Eagle MEC (collectively, "ALPA defendants") move to dismiss the complaint, or in the alternative, for summary judgment. The ALPA defendants argue that the first claim for relief under the RLA fails because plaintiffs concede that ALPA was authorized to act as the exclusive bargaining representative for Eagle's pilots. The ALPA defendants also argue that the second claim for relief for breach of the duty of fair representation fails because its actions in negotiating the amended TA and adopting the modified ratification procedures were not arbitrary, discriminatory, or in bad faith.

Eagle and its constituent carriers (collectively, the [*17] "Eagle defendants") also move to dismiss. The Eagle defendants argue that they did not violate the RLA because nothing in the RLA required them to negotiate with the pilots for a labor agreement on a system-wide basis, and because plaintiffs concede that the Eagle defendants negotiated with the pilots' duly authorized representatives. The Eagle defendants also move to dismiss plaintiffs' claims against them for breach of the duty of fair representation on the grounds that the ALPA defendants did not breach such a duty, and because the complaint fails to allege the extreme level of collusion required for an employer to be held jointly liable for a union's breach of the duty of fair representation.

DISCUSSION

A. Legal Standard

1. Motion to Dismiss Pursuant to Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a party may move to dismiss an action for failure to state a claim upon which relief may be granted. A motion to dismiss under Rule 12(b)(6) cannot be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). [*18] Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). In analyzing whether to grant a Rule 12(b)(6) motion, the court should keep in mind that dismissal is disfavored and should be granted only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. Hal Roach Studios, Inc. v. Richard Feiner And Co., Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). However, material which is properly submitted as part of the complaint may be considered. Id. In addition, documents whose contents are alleged in a complaint, and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). A matter that is properly the subject of judicial notice may be considered along with the complaint when deciding a motion to dismiss [*19] pursuant to Rule 12(b)(6). Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986) ("On a motion to dismiss . . . a court may take judicial notice of facts outside the pleadings.").

In analyzing a motion to dismiss, the Court must accept as true all material allegations in the complaint and construe them in the light most favorable to the nonmoving party. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, factual allegations can be disregarded if contradicted by the facts established by reference to documents attached as exhibits to the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Conclusory allegations, unsupported by the facts alleged, need not be accepted as true. Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992).

The Federal Rules of Civil Procedure provide that where, in considering a Rule 12(b)(6) motion, "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Fed. R. Civ. P. 12(b). Here, plaintiffs and the ALPA defendants have submitted [*20] to the Court matters outside the pleadings, thereby converting the ALPA defendants' motion into one for summary judgment.

2. Motion for Summary Judgment - Rule 56(a)

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Supreme Court's 1986 "trilogy" of Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), requires that a party seeking summary judgment show the absence of genuine issue of material fact. Once the moving party has made this showing, the nonmoving party must "designate 'specific facts showing that there is

a genuine issue for trial.'" Celotex, 477 U.S. at 324 [*21] (quoting Fed. R. Civ. P. 56(c)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations omitted). When determining whether there is a genuine issue for trial, "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita, 475 U.S. at 587 (citation omitted).

B. Analysis

1. First Claim for Relief - Section 2, Second, Third, and Fourth of the RLA

a. ALPA Defendants' Motion

In response to plaintiffs' allegation that they breached Section 2, Second, Third, and Fourth of the RLA, the ALPA defendants maintain that no cause of action lies against them under those provisions of the RLA because plaintiffs' complaint alleges that ALPA is the duly-authorized bargaining representative for all Eagle pilots, and because the sections of the RLA upon which plaintiffs [*22] rely do not regulate the relationship between unions and their members.

Section 2, Second provides that disputes between carriers and employees shall be resolved, if possible, through conferences between the parties' designated representatives. [5] Here, the complaint alleges that ALPA acted as the authorized representative for all Eagle pilots. See Compl. at P 17 ("On or about December 1, 1995, the National Mediation Board . . . designated ALPA as the exclusive representative of the airline pilots employed by American Eagle for purposes of collective bargaining . . . ."). In addition, the complaint states that, pursuant to ALPA's constitution and bylaws, ALPA conducted collective bargaining with Eagle through the Eagle MEC. Compl. at P 3.

5 Section 2, Second provides:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
>
> 45 U.S.C.A. § 152, Second (West 1986).

[*23] The Ninth Circuit has held that Section 2, Second is not implicated in the absence of a dispute between a carrier and its employees. Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1022 (Section 2, Second "govern[s] disputes between business organizations and labor unions that arise out of a collective bargaining agreement"). Plaintiffs' claims against the ALPA defendants are not disputes between a union and an employer covered by the RLA, but rather, are disputes between a union and certain of its members. Consequently, plaintiffs' claims against the ALPA defendants under Section 2, Second must be dismissed.

Section 2, Third mandates that representatives of employees and carriers shall be designated without interference, influence or coercion by either party. [6] The complaint is devoid of any allegation that the ALPA defendants interfered in any way with Eagle's choice of bargaining representatives. Accordingly, this statutory provision is facially inapplicable, and plaintiffs have failed to state a claim thereunder.

6 Section 2, Third provides:

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation of its employees as their representatives of those who or which are not employees of the carrier.
>
> 45 U.S.C.A. § 152, Third (West 1986).

[*24] Finally, Section 2, Fourth "prohibits a carrier from interfering with its employees' right to join or to refrain from joining a collective bargaining unit." [7] Herring, 894 F.2d at 1023. Again, the complaint contains nothing that would implicate this section as against the ALPA defendants. There is not, for example, any allega-

tion that the ALPA defendants attempted to prevent plaintiffs from leaving ALPA or that they otherwise prevented plaintiffs from negotiating through their chosen representatives. The ALPA defendants were, in fact, the plaintiffs' chosen representatives. See Herring, 894 F.2d at 1023 ("ALPA is the only labor organization involved in this case and neither [the carrier] nor ALPA attempted to influence the pilots to join or to leave ALPA or any other union. Therefore, [Section 2, Fourth is] inapplicable.").

7 Section 2, Fourth provides, in pertinent part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.

45 U.S.C.A. § 152, Fourth (West 1986).

[*25] Plaintiffs cite Fennessy v. Southwest Airlines, 91 F.3d 1359 (9th Cir. 1996), to support their argument that they may state a cause of action against the ALPA defendants under Section 2, Second, Third, and Fourth of the RLA. In Fennessy, the Ninth Circuit held that an employee stated a cause of action against his employer under Section 2, Fourth where the employee alleged that he was fired in retaliation for engaging in union organizing activities. Fennessy, 91 F.3d at 1364-65. Plaintiffs, however, rely on Fennessy for the proposition that because employees may state a claim against their employer under Section 2, Fourth, of the RLA, it therefore follows that they may bring a cause of action against their unions under the provisions of the RLA at issue here. Plaintiffs, however, misconstrue Fennessy. Nowhere in the decision did the court suggest that the employee could maintain a cause of action against his union.

Plaintiffs' reliance on Klemens v. Air Line Pilots Ass'n., Int'l., 736 F.2d 491 (9th Cir. 1984), is similarly unavailing. In Klemens, the Ninth Circuit held that an employee may state a [*26] cause of action against his bargaining representative where an attempt is made by that bargaining representative to impose a union shop provision that violates Section 2, Eleventh of the RLA. That issue has no bearing on whether the plaintiffs here may state a cause of action against their bargaining representative under Section 2, Second, Third, or Fourth.

For the reasons stated, plaintiffs have failed to state a cause of action against the ALPA defendants under the RLA, and the first claim for relief will therefore be dismissed as to these defendants.

b. Eagle Defendants' Motion

The gravamen of plaintiffs' RLA claim against the Eagle defendants is that the ratification procedures for and terms of the amended TA improperly coerced Eagle pilots, in violation of Section 2, Second, Third, and Fourth of the RLA, because the amended TA could have been applied to pilots at some Eagle carriers, even if it was rejected by a majority of the pilots. The Eagle defendants maintain that because the RLA does not prohibit a carrier from entering into multiple collective bargaining agreements with pilots who are represented by the same union, plaintiffs' complaint fails to state a claim [*27] under the RLA.

The Eagle defendants rely on Association of Flight Attendants v. USAir, Inc., 306 U.S. App. D.C. 324, 24 F.3d 1432 (D.C. Cir. 1994), where the Court of Appeals for the District of Columbia Circuit held that the RLA does not impose on a carrier the duty to negotiate system-wide collective bargaining agreements for employees of the same class or craft who are represented by the same bargaining representative. In that case, the court stated:

Nothing in the RLA per se requires employees of the same craft or class in a

> particular system to be subject to the same terms and conditions of employment. While the [National mediation] Board has long interpreted the Act to require system-wide representation certifications, it has not similarly construed the Act to require system-wide collective bargaining agreements. In other words, a single craft or class of employees on a particular carrier may not have more than one certified representative, but members of that class may be covered by different collective bargaining agreements.

24 F.3d at 1437-38 (internal citations and footnote omitted).

The National Mediation Board [*28] has also recognized that carriers subject to the RLA are not precluded from negotiating multiple collective bargaining agreements covering employees of the same craft or class. See Grand Trunk Western Railroad Co., 19 N.M.B. 226, 232 n.1, 19 NMB No. 51 ("The parties are

not precluded from mutually agreeing to multiple agreements covering a particular craft or class.").

Plaintiffs have offered no authority holding that a carrier must negotiate a single, system-wide agreement for all employees of the same craft or class, nor have they suggested any satisfactory reason why this Court should not adopt the USAir court's holding that while all of a carrier's employees of the same class or craft must be represented by the same union, the RLA does not require that all such employees be covered by the same collective bargaining agreement. It follows that Eagle did not violate the RLA by threatening to negotiate for separate agreements for each Eagle carrier or by negotiating for the contingent ratification procedure.

More importantly, plaintiffs fail to explain how the provisions of the RLA cited in the complaint (Section 2, Second, Third, and Fourth), bear at all on the instant dispute. [*29] The statutory provisions cited in the complaint require carriers and their employees to attempt to resolve disputes in conferences by their respective representatives, and prohibit interference by the carriers in their employees' choice of representatives.

Here, the complaint on its face indicates that the Eagle defendants complied with these provisions of the RLA. The complaint alleges that Eagle engaged in negotiations for the TA and the amended TA with ALPA, through the Eagle MEC and the Negotiating Committee. Compl. at P 21. Plaintiff's allegation that the Eagle defendants refused to bargain with the pilots "in the manner authorized and designated by the pilots," (Compl. at P 47), constitutes nothing more than an attack on the substance of a contract that was admittedly negotiated by the pilots' authorized representatives.

In their opposition, rather than explain how the Eagle defendants' conduct violated Section 2, Second, Third, or Fourth of the RLA, plaintiffs argue that the Eagle defendants violated Section 2, First of the RLA by threatening to refuse to bargain for a carrier-wide agreement, and by refusing to engage in group bargaining. Section 2, First provides:

> It [*30] shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C.A. § 152, First (West 1986). Section 2, First's mandate that the parties "exert every reasonable effort to make and maintain agreements" has been construed by the courts to prohibit a carrier from "going through the motions with a desire not to reach an agreement." Association of Flight Attendants v. Horizon Air Industries, Inc., 976 F.2d 541, 544 (9th Cir. 1992).

Plaintiffs do not cite Section 2, First as a basis of liability in their complaint, and it is well-established that a party cannot avoid dismissal of its complaint on the basis of arguments raised in a memorandum in opposition to the motion to dismiss. See, e. g., Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984) [*31] ("It is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss."). Accordingly, inasmuch as plaintiffs have not sought leave to amend their complaint to allege a violation of Section 2, First, the Court will not consider plaintiffs' argument that the Eagle defendants' actions constituted a violation of that statute.

Even if the Court were to consider plaintiffs' Section 2, First claim, such claim would nevertheless be subject to dismissal. It is plaintiffs' position that the Eagle defendants' actions in negotiating the amended TA and in demanding the amended ratification procedures constituted bad faith bargaining because they improperly coerced the pilots who were opposed to the amended TA. As discussed, the RLA does not mandate that employees of the same craft or class be covered by the same collective bargaining agreement, and it follows that the RLA does not impose on management the obligation to bargain for such an agreement. Thus, plaintiffs' assertion that they were coerced by the possibility that the amended TA would be applied to fewer than all Eagle carriers, a result permissible under the RLA, simply fails to support a claim of bad [*32] faith bargaining under Section 2, First of the RLA.

An argument similar to the one advanced by plaintiffs here was considered and rejected by the court in Rakestraw v. United Airlines, Inc., 981 F.2d 1524 (7th Cir. 1992). In Rakestraw, a group of pilots formerly employed by Ozark Airlines ("Ozark") sued Trans World Airways ("TWA") and ALPA over the terms pursuant to which seniority lists were integrated when TWA acquired Ozark, alleging violations of Section 2, Seventh of the RLA and of the duty of fair representation. Ozark's pilots had voted in favor of the integration terms, but later argued that their consent should be disregarded because it was given under duress, since TWA had transferred some of Ozark's planes to TWA and furloughed Ozark pilots. Rakestraw, 981 F.2d at 1534. The court rejected the pilots' argument:

> A voluntary choice may not be withdrawn because the choice was an effort to make the best of a bad situation. Adult pilots, of sound mind and well aware of the consequences of their acts, must expect to keep their contracts, even when they wish they could have made a better deal.

Id. As discussed, supra [*33] , the Eagle defendants were free to negotiate separate agreements with pilots at each carrier, and the fact that the ratification procedures for the amended TA allowed for the possibility that fewer than all Eagle carriers would be covered by the amended TA does not amount to improper coercion that would invalidate the consent of Eagle's pilots.

Plaintiffs also cite cases such as Retail Associates, Inc., 120 N.L.R.B. 388 (1958) and Charles D. Bonanno Linen Svc., Inc. v. N.L.R.B., 454 U.S. 404, 102 S. Ct. 720, 70 L. Ed. 2d 656 (1982) for the proposition that the Eagle defendants' threats to negotiate separate contracts with the Eagle carriers constituted improper interference with the group solidarity arrangement among the Eagle pilots. These cases, however, are distinguishable from the instant one. Retail Associates and Bonanno involved situations where employers attempted to withdraw from multi-employer/multi-union bargaining arrangements after negotiations had begun. Here, the Court does not consider a case of multi-employer or multi-union bargaining. In short, plaintiff has failed to make any showing that a claim for unfair bargaining [*34] against the Eagle defendants could be stated under Section 2, First of the RLA, even if the Court was inclined to consider such a claim.

For the reasons stated herein, plaintiffs' first claim for relief against the Eagle defendants for breach of Section 2, Second, Third, and Fourth of the RLA will be dismissed.

2. Second Claim for Relief - RLA-Imposed Duty of Fair Representation

a. ALPA Defendants' Motion

Plaintiffs' second claim for relief asserts that the ALPA defendants breached the duty of fair representation implied under the RLA by their conduct in negotiating the amended TA and approving the revised ratification procedures. "Under the Railway Labor Act, unions have a duty to represent their members fairly." Bautista v. Pan American World Airlines, Inc., 828 F.2d 546, 549 (9th Cir. 1987) (citing Steele v. Louisville & Nash. R.R., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944)). The duty of fair representation "applies to all union activity, including contract negotiation." Air Line Pilots Assoc. v. O'Neill, 499 U.S. 65, 67, 111 S. Ct. 1127, 1130, 113 L. Ed. 2d 51 (1991). "A union breaches its duty when its conduct [*35] is 'arbitrary, discriminatory, or in bad faith.'" Bautista, 828 F.2d at 549 (quoting Vaca v. Sipes, 386 U.S. 171, 190, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)).

A union's negotiation conduct will be deemed arbitrary only if such conduct "can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational . . . .'" O'Neill, 499 U.S. at 78, 111 S. Ct. at 1136. A union acts discriminatorily only when it "takes action against an employee upon considerations or classifications which are irrelevant, invidious or unfair." Breininger v. Sheet Metal Workers Int'l Assoc., 493 U.S. 67, 73-74, 110 S. Ct. 424, 429, 107 L. Ed. 2d 388 (1989) (citing Teamsters Local 553, 140 N.L.R.B. 181 185 (1962)). Moreover, to show a breach of duty on the basis of discrimination, the claimant must "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives . . . ." Amalgamated Assoc. of Street, Elec. R.R. and Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 301, 91 S. Ct. 1909, 1925, 29 L. Ed. 2d 473 (1971). [*36] In order to establish that a union has engaged in bad faith conduct, "there must be 'substantial evidence of fraud, deceitful action or dishonest conduct.'" Lockridge, 403 U.S. at 299, 91 S. Ct. at 1924; Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 (10th Cir. 1992).

In assessing claims of breach of the duty of fair representation, the Ninth Circuit has stressed the need to preserve union discretion in the negotiation process. In Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), the court stated:

> The Supreme Court has long recognized that unions must retain wide discretion to act in what they perceive to be their members' best interests. See, e.g., Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38, 73 S. Ct. 681, 685-86, 97 L. Ed. 1048 (1953). To that end, we have "stressed the importance of preserving union discretion by narrowly construing the unfair representation doctrine." Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir. 1985).

Peterson, 771 F.2d at 1253. See also, Bautista, 828 F.2d at 549 ("In the context of [*37] representing its members at the bargaining table, a union must be allowed 'a wide degree of reasonableness' because it must be able to focus on the needs of its membership as a whole without

undue fear of lawsuits from individuals disgruntled by the result of the collective process.").

In light of the narrow construction given to the unfair representation doctrine, the Ninth Circuit has recognized that challenges to a collective bargaining agreement on that basis are appropriate for summary adjudication in cases where the union has articulated a reasoned and legitimate rationale for the challenged action. Barthelemy v. Air Lines Pilots Assoc., 897 F.2d 999, 1005 (9th Cir. 1990); Bautista, 828 F.2d at 549-50.

Plaintiffs first argue that the ALPA defendants acted in bad faith and therefore violated the duty of fair representation by adopting contract ratification procedures that violated ALPA rules on the subject. It is the position of the ALPA defendants that because the Eagle MEC, pursuant to its constitution and bylaws, retained the discretion to forego member ratification of the amended TA, it could therefore alter the ratification procedure. [*38] It further argues that the ratification procedure employed fully complied with the ALPA constitution, bylaws, and other rules governing ratification votes.

It has been recognized that "courts must be careful not to undermine union self-government." Teamsters Joint Council No. 42 v. International Bhd. of Teamsters, 82 F.3d 303, 306 (9th Cir. 1996). As a corollary to this principle, it has been held that "a union's interpretation of its own rules, regulations, and constitution is entitled to a high degree of deference." United Bhd. of Carpenters and Joiners of Am., Lathers Local 42-L v. United Bhd. of Carpenters and Joiners of Am., 73 F.3d 958, 961 (9th Cir. 1996). "Absent bad faith or special circumstances, an interpretation of a union constitution by union officials . . . should not be disturbed by the court." Motion Picture & Videotape Editors Guild v. International Sound Technicians, 800 F.2d 973, 975 (9th Cir. 1986). Bad faith can only be found by the Court "on evidence that union officials acted contrary to the [union's] best interest, out of self-interest, or in an unconscionable or outrageous way." Joint Council No. 42, 82 F.3d at 306. [*39]

While acknowledging that ALPA's constitution does not require that its members ratify collective bargaining agreements, plaintiffs cite Section 90, Part 1.H. of the ALPA Administrative Manual. That section states that "except where provided otherwise by the Constitution and By-laws and applicable provisions of the Administrative Manual, a majority of valid ballots returned, with no specific minimum required, shall determine the issue." ALPA Exs., Ex. 2 at 90-5. Plaintiffs argue that the Eagle MEC was acting for the Eagle membership as a whole in negotiating the amended TA and thus, pursuant to Section 90, Part 1.H., that agreement could not be ratified other than by a majority of Eagle's pilots, voting as a whole.

The ALPA defendants, in turn, argue that, as provided by ALPA's constitution, in the absence of a member vote to require ratification, the Eagle MEC had discretion to determine if and how to conduct member ratification of the amended TA. See ALPA Const., Article XVIII, Section 2.A.(2) ("Unless the membership is balloted . . . membership ratification of individual contracts and agreements will remain at the option of the MEC."). They also cite Section 90, Part 7 of the [*40] Administrative Manual, which provides that "the Constitution and By-Laws do not require membership ratification and that the matter of membership ratification and procedures recommended in these guidelines are optional." ALPA Exs., Ex 2 at 90-20 (emphasis in original). They further point out that the revised ratification procedures were drafted under the supervision of ALPA's Vice President-Administration/Secretary, the ALPA official with the responsibility to provide advice and counsel to MECs in connection with development of ratification procedures. See ALPA Administration Manual, Part 7 at 90-21 ("It is . . . strongly recommended that a MEC wishing to exercise its right to deviate from the guidelines seek the advice and counsel of the Vice President-Administration/Secretary prior to implementing procedures different from those recommended below.") (emphasis in original).

The ALPA defendants' interpretation of the relevant provisions of ALPA's governing documents is not unreasonable, and is therefore entitled to deference. See Joint Council No. 42, 82 F.3d at 306. Moreover, plaintiffs have offered no evidence that the ALPA defendants acted in bad faith [*41] in construing the relevant portions of the relevant union rules or in adopting the ratification procedures employed.

To the contrary, the record reflects that the amended ratification procedures were adopted in response to management's position that it would only continue to bargain for a single Eagle-wide agreement if management was allowed the option to apply any agreement reached on a less than Eagle-wide basis if the agreement was again rejected by a majority of Eagle pilots. Pugh Dec. at P 51. Management had already reserved the right to abandon the concept of a single Eagle-wide agreement. Calder Dec. at P 7.

The record demonstrates that the ratification procedures were in accord with ALPA's rules, adopted in a reasonable manner, and for the legitimate purpose of persuading management to continue to negotiate for a single, Eagle-wide agreement. In short, the ALPA defendants did not violate the duty of fair representation by

developing implementing the amended ratification procedures.

Plaintiffs' other contention is that the ALPA defendants violated the duty of fair representation by structuring the amended TA in such a manner that it would discriminate against pilots not covered [*42] by the agreement, by eliminating their rights under the Flow-Through Agreement and structuring the amended TA so that only pilots covered by that agreement would benefit from job security provisions.

As to their first point, plaintiffs' argument fails because the Flow-Through Agreement, standing alone, created no flow-through rights for Eagle pilots. Under that agreement, the flow-through opportunities were provisional, and would only be made available to Eagle pilots who became regional jet captains. Calder Dec. at P 5; ALPA Exs., Ex. 21 at Letter 3-3. Absent an agreement to the contrary, Eagle management retained complete discretion as to whether and where to deploy the regional jets, and, thus, to control the pilots' access to flow-through opportunities. Calder Supp. Dec. at PP 5-6. In fact, it is the "scope" provision of the amended TA that guarantees Eagle pilots access to the benefits of the Flow-Through Agreement.

Plaintiffs make the related argument that the amended TA, if applied to fewer than all Eagle carriers, would have discriminated by extinguishing flow-through rights of pilots at carriers not covered by the agreement by excluding them from the combined Eagle-wide [*43] seniority list referred to in the Flow-Through Agreement. Plaintiffs cite the provision of the amended TA which states that in the event that the amended TA was ratified by pilots of only two or three of the Eagle carriers, "the Pilots' System Seniority List . . . [would] include only the pilots of the three or two AMR Eagle carriers covered by the [amended TA]." ALPA Exs., Ex 19.

Contrary to plaintiffs assertion, however, this provision did not exclude pilots from carriers not covered by the amended TA from the benefits of the Flow-Through Agreement. The amended TA provided that "as to pilots on the Pilots' System Seniority List . . . that Seniority List fulfills the provisions of [the Flow-Through Agreement] for purposes of implementing said [Agreement] for pilots of the three or two carriers covered by the Agreement." ALPA Exs., Ex. 19. The amended TA did not, however, provide that only pilots on the Pilots' System Seniority List would have flow-through rights based on their overall Eagle seniority. Thus, even if the amended TA had been applied to pilots at only two or three Eagle carriers, pilots at the other carriers would nevertheless have retained flow-through rights [*44] based on their overall Eagle seniority if regional jets were placed in service at those carriers. It follows that the ALPA defendants did not extinguish flow-through rights of pilots not covered by the amended TA, and therefore did not breach the duty of fair representation in this manner. Further, plaintiffs have failed to adduce any evidence to indicate that the ALPA defendants' conduct with respect to the Eagle-wide seniority list was based on "considerations . . . which are irrelevant, invidious or unfair." Breininger, 493 U.S. at 73-74, 110 S. Ct. at 429. See also Caudle v. Pan American World Airways, 676 F. Supp. 314, 318 (D.D.C. 1987) (fact that union's action affects employees differently does not establish discrimination, and "so long as the bargaining agent does not act on the basis of arbitrary factors . . . such as race, personal animosity or shear numbers of employees in a given group, it will not breach the duty of fair representation").

Plaintiffs' final contention is that the contingent scope provisions discriminated against pilots who were not covered by the amended TA by guaranteeing a minimum amount of flying to carriers whose [*45] pilots were covered by that agreement. It is plaintiffs' position that the granting of a guaranteed amount of flying to the carriers covered by the amended TA would necessarily deprive pilots at carriers not covered by that agreement of a degree of job security. As discussed, these contingent scope provisions stated that if the amended TA covered only two or three Eagle carriers, the pilots at these carriers would continue to perform at least the same percentage of total Eagle flying as they did at the time of ratification of the amended TA. ALPA Exs., Ex. 19. The contingent provisions also stated that pilots at carriers covered by the amended TA would perform an amount of regional jet flying at least equal to the carrier's share of total Eagle flying.

Nothing in the contingent scope provisions, however, required Eagle to increase the amount of flying done by carriers whose pilots had ratified the amended TA at the expense of carriers whose pilots had not. Moreover, as explained by the ALPA defendants, the contingent scope provisions constituted a means by which it could be ensured that some, rather than none, of the Eagle pilots would have access to opportunities to fly regional [*46] jets, along with corresponding flow-through rights. Under the circumstances, it simply cannot be said that the ALPA defendants' decisions with respect to the contingent scope provisions were based "upon considerations or classifications which are irrelevant, invidious or unfair." Breininger, 493 U.S. at 73-74, 110 S. Ct. at 429. Further, plaintiffs have failed to offer any evidence that the ALPA defendants' actions were "unrelated to legitimate union objectives." Lockridge, 403 U.S. at 301, 91 S. Ct. at 1924. Accordingly, plaintiffs' claim that the ALPA defendants acted discriminatorily

and breached the duty of fair representation by adopting the contingent scope provisions fails. [8]

> 8 To the extent that plaintiffs' duty of fair representation claim is based on the exclusion of Walter Villafane from negotiation sessions, plaintiffs' claim fails. The evidence shows that Villafane was excluded only from the Negotiating Committee meetings relating to the Flow-Through Agreement. Pugh Dec. at PP 19-20. Plaintiffs have not raised any objection to that agreement. Moreover, the evidence indicates that Villafane was temporarily excluded from negotiations because he had admitted to breaching the confidentiality agreement that each member of the Negotiation Committee was required to abide by. Pugh Dec. at PP 15-19; Calder Dec. at PP 11-13. Villafane, however, participated in all negotiations relating to the TA, the amended TA, and the contingent ratification procedures. Finally, Villafane, together with all other members of the Negotiating Committee and the Eagle MEC, approved the terms of the amended TA and the contingent ratification procedures. Pugh Dec. at P 58; Calder Dec. at P 17; Schleder Dec. at P 41. In short, plaintiffs have failed to show that Villafane's temporary exclusion from the Negotiating Committee was improper, nor have they shown any connection between the exclusion of Villafane from negotiating sessions and the harm about which they complain.

[*47] Even assuming that plaintiffs had established that the ALPA defendants breached their duty of fair representation, plaintiffs would still need to show a causal connection between the breach and the alleged harm. In Acri v. International Assoc. of Machinists & Aerospace Workers, 781 F.2d 1393 (9th Cir. 1986), the Ninth Circuit held that plaintiffs claiming a breach of the duty of fair representation in connection with the ratification of a collective bargaining agreement must establish a causal relationship between the breach and the injury. Acri, 781 F.2d at 1397.

In Acri, employees sued their union, asserting that the union breached its duty of fair representation by communicating to union members, prior to a ratification vote on a new collective bargaining agreement, that their employer had agreed to remove from the agreement a contested provision limiting severance pay, whereas the employer did not, in fact, agree to removal of that provision. Id. at 1395. The district court, finding that the plaintiffs did not make an adequate showing that the union's conduct caused the plaintiffs' damages, granted the union's motion [*48] for summary judgment. The court of appeals affirmed, stating:

> Although the duty of fair representation extends to misrepresentations during ratification, plaintiffs must establish a causal relationship between the alleged misrepresentations and their injury. In this context causation would be established by proof that (1) the vote to ratify would have been different had the misrepresentation not been made; and (2) that the company would have acceded to union demands had the vote been different.
>
> At the hearing on the Union's motion for summary judgment in the district court, plaintiffs' counsel conceded that plaintiffs could not establish that [the employer] would have given in to their demands to remove the severance pay limit even if the strike had continued. Given this concession, we agree with the district court's grant of summary judgment against plaintiffs' duty of fair representation claim.

Id. at 1397 (internal citations omitted).

Similarly, in Ackley v. Western Conference of Teamsters, 958 F.2d 1463 (9th Cir. 1992), a case wherein the plaintiffs alleged that their union breached the duty of fair representation by [*49] failing to disclose material information regarding a tentative collective bargaining agreement before the agreement was presented to the union's membership for ratification, the court held that the plaintiffs failed to state a claim against the union because they did not demonstrate a causal relationship between the alleged nondisclosure and the plaintiffs' harm. The court stated:

> To prevail in a misrepresentation case -- and thus in a nondisclosure case -- plaintiffs must demonstrate a causal relationship between the alleged misrepresentations and their injury. They must show that (1) absent the misrepresentations, the outcome of the ratification vote would have been different; and that (2) had it been different, the company would have acceded to the union's demands.

Ackley, 958 F.2d at 1472.

Relying on Acri and Ackley, the ALPA defendants argue that in order for plaintiffs to prevail, they must establish that absent the alleged breach of the duty of fair

representation, (1) the Eagle pilots would have voted to reject the amended TA, and (2) if the amended TA had been rejected, Eagle would have acceded to the pilots' bargaining demands.

[*50] Plaintiffs first argue that the Acri/Ackley causation test is not relevant outside the context of cases where a union is accused of misrepresentations made in connection with membership ratification of a collective bargaining agreement. While Acri and Ackley involved an alleged misrepresentation and an alleged nondisclosure, respectively, nothing in those decisions suggests that the causation requirement stated therein was limited to misrepresentation cases. On the contrary, the Acri court cited and relied on cases that did not involve misrepresentations. See, e. g., Brown v. International Union, United Auto, Aerospace and Agric. Implem. Workers of Am., 689 F.2d 69, 71 (6th Cir. 1982) (union members' claim for breach of duty of fair representation based on union's failure to monitor employer's contributions to employee pension plan properly dismissed where causation could not be shown because employer, due to its financial condition, would not have been able to make the required contribution, even if demanded by union); Barrett v. Thorofare Markets, Inc., 452 F. Supp. 880, 883-84 (W.D. Pa. 1978).

Further, other courts have applied [*51] the causation analysis used by the Acri and Ackley courts to bar claims in the context of alleged union misconduct other than misrepresentations. See Wood v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local 406, 807 F.2d 493, 502-503 (6th Cir. 1986) (claim for breach of the duty of fair representation based on allegations that union did not make reasonable efforts to force employer to honor a collective bargaining agreement failed because plaintiffs did not "demonstrate that [the employer] would have adopted the contract and that they would not have been injured had the union not breached its duty"). Accordingly, plaintiff here must demonstrate causation pursuant to the standard established in Acri and Ackley.

Plaintiffs cannot meet either prong of the Acri/Ackley test. Plaintiffs have not offered sufficient evidence that had the allegedly coercive provisions of the ratification procedure and the amended TA not been included, the ratification vote would have resulted in a rejection of the amended TA. The plaintiffs acknowledge, and the evidence shows, that the ratification vote for the amended TA resulted in [*52] 773 votes in favor of ratification and 473 opposed. ALPA Exs., Ex. 20. Thus, in order to prevail on the first prong of the test discussed above, plaintiffs must demonstrate that at least 150 pilots would have voted differently if the amended TA and ratification procedures had not contained the allegedly coercive features.

While not conceding that the Acri/Ackley test applies in this case, plaintiffs attempt to meet the burden imposed thereunder by arguing that because the TA was rejected by a majority of pilots, and because the amended TA contained only minor modifications, the pilots would likely have rejected the amended TA in the absence of coercion. Plaintiffs' position is undermined by the evidence. The ALPA defendants communicated to the pilots that the amended TA contained a number of enhancements over the original TA, including provisions relating to guaranteed minimum raises for pilots during the life of the amended TA, more favorable scheduling and assignment procedures, and increased employer contributions to pilots' 401(k) retirement plans. Schleder Dec. at P 30; ALPA Exs., Ex. 18.

Plaintiffs also offer the declaration of James D. Bishop, one of the litigants in this [*53] case, wherein he states that "the distinctions between the two agreements are not substantial in terms of the benefits provided by the contracts," and that "based on [his] discussion with pilots, the minor benefit improvements in [the amended TA] over the TA would not have resulted in a favorable all-Eagle ratification vote on the [amended TA]." Bishop Dec. at P 15. Plaintiffs, however, concede that the amended TA contained improvements over the original TA, and Bishop's conclusory assertion that, in the absence of coercion, these improvements were insufficient to cause pilots to change their ratification votes, does not give rise to a genuine issue of fact. [9]

> 9 Plaintiffs have included the declarations of approximately 107 Eagle pilots who state that they "felt coerced by the ratification process used for the [amended TA]." Katzenbach Dec. at P 1. Of these declarants, only forty-one state that they voted for ratification of the amended TA and that they would have voted against it if the challenged ratification procedures had not been employed. Given the vote of 773 to 473, these declarations do not constitute sufficient evidence that in the absence of the ratification procedures complained of, the amended TA would not have been ratified.

[*54] Further, even if plaintiffs could satisfy the first prong of the Acri/Ackley test, they would still need to show that had the outcome of ratification vote been different, Eagle would have acceded to the pilots' demands. The ALPA defendants argue that plaintiffs cannot show that had the amended TA been rejected, management would have acceded to the pilots' demand that it continue to bargain for a single agreement covering all Eagle pilots, presumably on terms perceived by plaintiffs as better than those already agreed to by management.

Plaintiffs concede that Eagle did not have the obligation to agree to a single contract, since USAir, 24 F.3d at

1437-39, supra, held that it is not repugnant to the RLA for employees of the same craft or class of a carrier to be covered by different employment agreements. In addition, management had stated that it was willing to negotiate for separate agreements covering each Eagle carrier if a single, Eagle-wide agreement could not be reached. [10]

10 Plaintiffs point to a statement allegedly made by Pugh at a meeting of the Eagle MEC after rejection of the original TA, wherein he communicated to MEC members that Eagle's president, Dan Garton, desired a single contract and a single seniority list because Eagle had developed plans to reorganize the four Eagle carriers into one airline. Kehm Dec. at P 6. This evidence, without more, is insufficient to raise a genuine issue of fact with respect to whether Eagle management would have acceded to the union's demand to continue bargaining for a single agreement if the amended TA had been rejected.

[*55] Accordingly, even if plaintiffs had submitted sufficient evidence of wrongdoing, which they have not, the ALPA defendants would be entitled to summary judgment with respect to plaintiffs' second claim for relief.

b. Eagle Defendants' Motion to Dismiss Duty of Fair Representation Claims

Plaintiffs argue that the Eagle defendants are liable for breach of the duty of fair representation because they joined with the ALPA defendants in their breaches of duty and took advantage of such breaches in order to gain financial benefits, such as savings on wages. Compl. at P 53. It has been recognized that an employer may be held jointly liable with a union for breach of the duty of fair representation "if it acts in collusion with the union." United Indep. Flight Officers v. United Air Lines, Inc., 756 F.2d 1274, 1283 (7th Cir. 1985). In order for an employer to be found liable, however, it is essential that the union be found to have violated its duty. Id. ("If the RLA-based [duty of fair representation] claim against the union is dismissed, the claim against the employer must also be dismissed."); Caudle, 676 F. Supp. at 323.

As discussed, [*56] the ALPA defendants did not violate their duty of fair representation. It follows that plaintiffs cannot state a claim against the Eagle defendants for such a breach.

CONCLUSION

For the reasons stated herein, the ALPA defendants' motion to dismiss plaintiffs' complaint, or in the alternative for summary judgment, is GRANTED, and the Eagle defendants' motion to dismiss the complaint is GRANTED.

The Clerk is directed to close this file.

IT IS SO ORDERED.

Dated: AUG X4 1998

MAXINE M. CHESNEY

United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the ALPA defendants' motion to dismiss plaintiffs' complaint, or in the alternative for summary judgment, is GRANTED, and the Eagle defendants' motion to dismiss the complaint is GRANTED.

AUG X4 1998

Date

LEXSEE

JAMES D. BISHOP, CHESTER L. GAULT, RICHARD T. MAHON, and RICHARD S. SPERRY, Plaintiffs-Appellants, v. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, EAGLE MASTER EXECUTIVE COUNCIL, and AMR EAGLE, INC., EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC., SIMMONS AIRLINES, INC., and WINGS WEST AIRLINES, INC., all d/b/a AMERICAN EAGLE, INC., Defendants-Appellees.

No. 98-16652

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2000 U.S. App. LEXIS 3270

January 12, 2000, Argued and Submitted, San Francisco, California
March 1, 2000, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 2000 U.S. App. LEXIS 14900.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-98-0359 MMC. Maxine M. Chesney, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For JAMES BISHOP, CHESTER GAULT, RICHARD MAHON, RICHARD SPERRY, Plaintiffs - Appellants: Christopher W. Katzenbach, Esq., KATZENBACH & KHTIKIAN, San Francisco, CA.

For AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, EAGLE MASTER EXECUTIVE COUNCIL, Defendants - Appellees: Jeffrey B. Demain, Esq., ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN, San Francisco, CA.

For AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, EAGLE MASTER EXECUTIVE COUNCIL, Defendants - Appellees: Jonathan A. Cohan, Esq., Marcus C. Migliore, Esq., AIR LINE PILOTS ASSOCIATION INTERNATIONAL, Elizabeth Ginsburg, Esq., Air Line Pilots Association, Washington, D.C.

For AIR EAGLE INC., EXECUTIVE AIRLINES INC., FLAGSHIP AIRLINES INC., SIMMONS AIRLINES, INC., WINGS WEST AIRLINES, INC., Defendants - Appellees: David J. Reis, Esq., O'MELVENY AND MYERS LLP, San [*2] Francisco, CA.

For EXECUTIVE AIRLINES INC., FLAGSHIP AIRLINES INC., SIMMONS AIRLINES, INC., WINGS WEST AIRLINES INC., Defendants - Appellees: Robert A. Siegel, Esq., O'MELVENY & MYERS, Los Angeles, CA.

JUDGES: Before: VAN GRAAFEILAND, Senior Circuit Judge, [2] and ALARCON and SILVERMAN, Circuit Judges.

2 The Honorable Ellsworth A. Van Graafeiland, Senior United States Circuit Judge for the Second Circuit Court of Appeals, sitting by designation.

OPINION

MEMORANDUM [1]

1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appellants, individual airline pilots, appeal from a summary judgment of the United States District Court for the Northern District of California (Chesney, J.) in favor of appellee, Air Line Pilots Association, International ("ALPA"), and also from an order granting

ALPA's motion to dismiss or, in the alternative, for summary judgment and granting AMR Eagle, Inc.'s motion to [*3] dismiss.

Appellants are members of ALPA which is a union representing commercial airline pilots. ALPA is the collective bargaining representative for the pilots of four regional airlines, Simmons Airlines, Inc., Flagship Airlines, Inc., Executive Airlines, Inc. and Wing West Airlines, Inc. These airlines operate under the name "American Eagle" or just "Eagle." Each of them is a wholly-owned subsidiary of AMR Corporation ("AMR"), which also owns American Airlines. AMR uses the regional carriers to reach smaller cities.

Until 1995, three different unions represented the pilots of the four regional airlines under four separate Collective Bargaining Agreements ("CBAs"). The National Mediation Board determined in 1995 that the regional carriers made up a single transportation system under the Railway Labor Act ("RLA") and should be represented by one union. ALPA won the election in late 1995 to be the sole representative of the pilots at the four regional airlines. Pursuant to ALPA's constitution, the Eagle pilots created a unified master executive council ("MEC") which negotiates CBAs. The MEC consisted of representatives of each of the Eagle airlines.

In 1996, the MEC adopted a resolution [*4] calling for a single contract and a unified seniority list. ALPA began negotiations with Eagle for a single contract even though some of the individual regional contracts were not yet subject to renegotiation. In October of 1996, the MEC passed a resolution calling for membership ratification of any Eagle-wide CBA, although membership ratification is not a requirement of ALPA's constitution and by-laws.

Negotiations on the CBA coincided with Eagle's announcement that it was planning to introduce jets into its fleet of aircraft. This prompted AMR to consider shifting routes from American to Eagle where the pilots were paid less. As a result, a conflict arose between AMR and the Allied Pilots Association ("APA"), the pilots' union for American. This led to a strike at American in February 1997. AMR, American and Eagle negotiated with the APA and ALPA in an effort to end the strike. The outcome was a Letter of Agreement that limited the size of jets to be used by Eagle, and guaranteed that half of the new pilot positions at American would be offered to Eagle jet pilots on the basis of an Eagle-wide seniority system. This arrangement of offering positions to Eagle pilots was known as [*5] the "Flow-Through Agreement." The agreement was ratified by the MEC on March 31, 1997 and was to become part of a single, Eagle-wide CBA, if ratified by the membership.

In June 1997, Eagle and ALPA arrived at a tentative agreement ("TA") which included the Flow-Through Agreement and a unified seniority system. The TA was rejected by Eagle's pilots. The vote totals indicated, however, that a majority of the pilots at Simmons and Flagship voted in favor of the TA. Upon rejection by the pilots, Eagle notified ALPA that it wanted to negotiate individual CBAs with the airlines. Eagle was under time constraints due to operational deadlines arising from the entry of new jets into service. Negotiations continued.

The MEC and Eagle modified some terms of the TA and developed a recast ratification process. Under this process, if the modified TA ("MTA") did not pass, but achieved a majority at each of three airlines, those three airlines would have the contract and a unified three-airline seniority list. If it achieved a majority at only two airlines, and if the total of pilots at those two airlines constituted at least 50 percent of all Eagle pilots, then those two airlines would have the [*6] contract and a unified two-airline seniority list. The purpose of these provisions was to insure that the ratifying carriers would maintain the same percentage of total Eagle flights as they had before the MTA was adopted. This did not mean, however, that the pilots on the non-ratifying carriers would be deprived of their overall seniority rights. If regional jest were assigned to the non-ratifying carriers, their pilots' flow-through rights would be determined on the basis of their overall Eagle seniority. In addition, non-ratifying carriers would not be precluded from negotiating for potentially better terms. The MTA was ratified by 62% of Eagle's pilots resulting in a single CBA and seniority list for all four of the airlines.

On January 30, 1998, appellants, four pilots at Wings West, instituted the instant action alleging violations of the RLA and the Act's imposed duty of fair representation. They sought a declaratory judgment that the MTA was invalid and injunctive relief requiring appellees to negotiate and present to the membership a single, Eagle-wide CBA procedure for ratification by a simple majority. ALPA and MEC moved to dismiss or, in the alternative, for summary judgment. [*7] Eagle and its airlines filed a motion to dismiss. In a well-reasoned decision, the district court granted ALPA's and MEC's motion for summary judgment and Eagle's motion to dismiss. We turn first to the grant of summary judgment.

A bargaining representative is responsible to, and owes complete loyalty to, the interests of all whom it represents. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 97 L. Ed. 1048, 73 S. Ct. 681 (1953). Appellants contend that ALPA acted arbitrarily and in bad faith when it devised a scheme for ratification of the MTA that favored its desire for an Eagle-wide CBA. They say that, in doing so, ALPA favored the pilots at Simmons and Flagship and pressured the other pilots to vote to

ratify, even though pilots supporting the agreement were in a minority as demonstrated by the vote on the TA.

A court's review of a union's representation of its members is highly deferential. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78, 113 L. Ed. 2d 51, 111 S. Ct. 1127 (1991). Deferential review applies to all union activity with respect to contract representation. *Id.* at 67, 76-79. A union violates its duty to its [*8] members when its actions are "arbitrary, discriminatory, or in bad faith." *Id.* at 67 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967)). "The final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" 499 U.S. at 78 (quoting *Ford Motor Co.*, 345 U.S. at 338). "A union's conduct during bargaining need only fall within '[a] wide range of reasonableness' to survive judicial review." *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992) (quoting *O'Neill*, 499 U.S. at 67) (internal quotation omitted).

Appellants claim that the Flow-Through arrangement was initially a separate, stand-alone agreement covering all the airlines. They say that, after the TA failed, ALPA and Eagle modified the Agreement so that it would apply only to the regional airlines that ratified the MTA, thus eliminating the rights of pilots in airlines that did not ratify the MTA. Prior to the vote, ALPA notified the [*9] pilots in writing of this change and the fact that only pilots in the ratifying airlines would be part of the unified seniority list. Also, they notified the pilots that certain job security guarantees and access to jet aircraft were contingent upon ratification of the MTA. Those airlines that ratified would be guaranteed no reduction in flights. Thus, appellants contend, ALPA was concerned only with the needs of the pilots at Simmons and Flagship, the pilots in favor of the MTA, and breached its duties to the pilots of Wings West and Executive.

In a well-reasoned opinion, the district court held that "the Flow-Through Agreement, standing alone, created no flow-through rights for the Eagle pilots," and that it was only through the MTA that the Flow-Through Agreement's provisions became guarantees to Eagle pilots. The court held, however, that the traditional seniority rights of pilots on non-ratifying airlines would not be extinguished for purposes of the Flow-Through Agreement. According to the court, the seniority of all Eagle pilots is considered for opportunities under the Flow-Through Agreement. We agree.

Moreover, ALPA contends that even if it agreed to omit non-ratifying airline [*10] pilots' seniority rights under the Flow-Through Agreement from the MTA, it was lawful for it to do so. ALPA claims that it was seeking the legitimate goal of a comprehensive Eagle-wide agreement that would end the existing practice of pitting one airline's pilots against another in collective bargaining. By hinging the benefits of the Flow-Through Agreement on ratification, it was inducing its members to vote for the single CBA. ALPA contends that this provides the reasoned basis upon which it suggested the establishment of separate rights in the event an Eagle-wide CBA was not agreed upon. *See Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990) (individual union members cannot sue union over integration of seniority lists where union acted on a reasoned basis).

"The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.*, 345 U.S. at 338. A union "must be able to focus on the needs [*11] of its whole membership without undue fear of law suits from individual members." *Herring*, 894 F.2d at 1023 (citing *Bautista v. Pan Am. World Airways*, 828 F.2d 546, 549 (9th Cir. 1987)). To be sure, if, as appellants allege, Eagle intended to assign jets primarily to Simmons the MTA and Flow-Through Agreement would primarily benefit Simmons' pilots. However, appellants demonstrate no detriment to themselves. Because Eagle always was free to assign the jets as it chose, the proposed limitation would ensure that these four existing airlines would be the ones to receive the aircraft rather than a fifth airline for jet service then under consideration by Eagle. In addition, the benefit to all Eagle pilots, appellants included, that ALPA sought to achieve was a single CBA that would prevent the "whipsawing" by Eagle between the airlines to force concessions on the pilots. These goals and the means utilized to achieve them fell within the wide range of reasonableness accorded unions in negotiating contracts.

Appellants also contend that ALPA violated its duty of fair representation when it set up a ratification system that permitted parts of Eagle to accept [*12] the MTA, even if a majority of the pilots as a whole rejected it. They say that, in so doing, ALPA violated the MEC single-contract resolution, the TA voting procedures and ALPA's voting rules. This, appellants contend, is evidence of bad faith or arbitrariness and a violation ALPA's duty of fair representation. The MEC passed a resolution calling for a single CBA which the membership was to ratify by majority vote of the Eagle airline pilots as a whole. The vote for the TA was undertaken using this procedure. Appellants contend that a reasonable trier of fact could find that ALPA redesigned the

ratification process for the MTA in violation of the resolution and its own constitution and by-laws in order to coerce a vote in favor of an agreement the majority of pilots did not support. Appellants concede that ALPA was under no obligation even to hold a ratification vote and the MEC could have ratified the MTA on its own and without a membership vote. They contend, however, that once the MEC decided to have a ratification vote, it was obligated to conduct it fairly without use of coercion to force the will of a minority onto that of the majority.

"There is a well-established federal [*13] policy of avoiding unnecessary interference in the internal affairs of unions." *Teamsters Joint Council No. 42 v. International Bhd. of Teamsters*, 82 F.3d 303, 306 (9th Cir. 1996). "[A] union's interpretation of its own rules, regulations, and constitution is entitled to a high degree of deference." *United Bhd. of Carpenters and Joiners of Am., Lathers Local 42-L v. United Bhd. of Carpenters and Joiners of Am.*, 73 F.3d 958, 961 (9th Cir. 1996). "Courts must be careful not to undermine union self-government. 'Absent bad faith or special circumstances, an interpretation of a union constitution by union officials . . . should not be disturbed by the court.'" *Council No. 42, supra*, at 306 (quoting *Motion Picture & Videotape Editors Guild v. International Sound Technicians*, 800 F.2d 973, 975 (9th Cir. 1986)).

ALPA's ratification procedures for the MTA provided for a single Eagle CBA. In addition, the procedures called for partial ratification among a subset of the airlines if certain conditions were met. In light of prior case law, the union had the clear authority to make these modifications. The question for this Court [*14] is whether the union engaged in bad faith in formulating and implementing these procedures or whether other special circumstances were present?

Bad faith exists where union officials act contrary to the union's best interest, "out of self-interest, or in an unconscionable or outrageous way." *Id.* Accepting the facts as appellants present them, there is nothing in the record to support a finding of bad faith on the part of ALPA officials. Appellants are unable to demonstrate any way in which ALPA officials acted contrary to the union's best interest, out of self-interest, or in a way that was unconscionable or outrageous. ALPA presents the reasonable justification of attempting to get a single Eagle-wide CBA as the primary motivation for adjusting the procedures and, failing that, to get some contracts in place to put new jets into Eagle service and prevent Eagle from establishing a fifth airline to handle them. ALPA was not obligated to ensure that all of its members at Eagle were happy with the MTA; appellants must provide the Court with some basis for finding bad faith. They have failed to do so here.

Viewing the situation as a whole, the district court made short shrift of [*15] appellants' claim against the Eagle defendants. Citing *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985), as pertinent authority, the court held that, if the claim of unfair representation against the union is dismissed, the claim against the employer also must be dismissed. However, the district court did not rest its holding solely on this terse statement. The district court cited *Association of Flight Attendants v. USAir, Inc.*, 306 U.S. App. D.C. 324, 24 F.3d 1432 (D.C. Cir. 1994), for the proposition that "the [National Mediation Board] does not impose on a carrier the duty to negotiate system-wide collective bargaining agreements for employees of the same class or craft who are represented by the same bargaining representative." In *USAir, Inc.*, the District of Columbia Circuit Court of Appeals held that "while the [NMB] has long interpreted the Act to require system-wide representation certifications, it has not similarly construed the Act to require system-wide collective bargaining agreements." 24 F.3d at 1437 (citation and footnote omitted). The district court also cited [*16] a NMB case for the proposition that "the parties are not precluded from mutually agreeing to multiple agreements covering a particular craft or class." *Grand Trunk Western R.R. Co.*, 19 NMB 226, 232 n.1 (1992). The district court concluded that there was no legal basis for requiring Eagle to negotiate a single CBA with ALPA for its regional carriers and, therefore, Eagle was within it rights in notifying ALPA that it would seek individual CBAs if necessary.

It is plaintiffs' position that the Eagle defendants' actions in negotiating the MTA and in demanding the amended ratification procedures constituted bad faith bargaining because they improperly coerced the pilots who were opposed to the MTA. However, the RLA does not mandate that employees of the same craft or class be covered by the same collective bargaining agreement, and it follows that the RLA does not impose on management the obligation to bargain for such an agreement. Thus, plaintiffs' assertion that they were coerced by the possibility that the MTA would be applied to fewer than all Eagle carriers, a result permissible under the RLA, simply fails to support a claim of bad faith bargaining under the Act.

Moreover, [*17] like the district court, we are not persuaded that Eagle's actions in negotiating the MTA and demanding the amended ratification procedures created bad faith by improperly coercing the pilots who were opposed to the MTA. Eagle was free to negotiate separate agreements with the pilots of each employer and the fact that the ratification procedures under the MTA allowed for the possibility that not all the Eagle carriers would be covered by the MTA does not amount to im-

proper coercion that would invalidate the consent of Eagle's pilots *See Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1534-35 (7th Cir. 1992).

In sum, we find no reversible error in the judgments and orders appealed from and they are AFFIRMED.