BAAB & DENISON, L.L.P.

G. William Baab*
Sanford R. Denison*

L. N. D. Wells, Jr.
(1914 – 2000)

ATTORNEYS
6301 GASTON AVE, STE 550
DALLAS, TEXAS 75214

Tele: 214-637-0750 • Fax: 214-637-0730
denison@baabdenison.com

*Board Certified
Labor and Employment Law
Texas Board of Legal Specialization

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Mark R. Myers
Attorney
Allied Pilots Association
14600 Trinity Blvd., Suite 500
Fort Worth, Texas 76155-2512

Re: Duty of Fair Representation to Former Pilots Who Have Fallen off the Seniority List and Been Terminated by the Company Because of the Expiration of their Contractual Disability or Sick Leave

Dear Mark:

This letter is in response to your request for our opinion as to whether APA owes a duty of fair representation, and, if so, the nature and temporal extent of that duty, with regard to pilots who have fallen off, or will fall off, the seniority list, and who thus have or will be terminated from their AA employment, by operation of Section 11.D and Supplement F(1), §5(d).

Specifically, you have advised that APA has a group of former pilots who have fallen off the seniority list (and thus are no longer employees of AA and are no longer in the class or craft of represented employees) as a result of the operation of two sections in the CBA: First, under Section 11.D. a pilot is allowed to take a 3-year unpaid sick leave of absence (which can be extended to 5 years by mutual agreement between APA and AA) at the expiration of which leave the pilot is automatically dropped from the seniority list and terminated. Second, under Supplement F(1), §5(d), until a recent amendment which went into effect September 30, 2016, a pilot who was on long-term disability leave was also automatically dropped from the seniority list and terminated at the expiration of 5 years of disability leave. Under both provisions, the pilots are automatically dropped without the need for any formal hearing. These two CBA sections have been in the CBA for decades and have never been contested by APA.

You have further advised that Supplement F(1), §5(d) was recently amended by a LOA signed on October 19, 2016, as a result of which no additional pilots will be dropped from the seniority list under Supplement F(1), §5(d) effective September 30, 2016. Thus, a pilot on disability leave who has already hit the 5-year mark prior to September 30 will have fallen off the seniority list, but a pilot on disability leave who hit, or will hit the 5-year mark on or after September 30 will no longer be dropped from the seniority list and will retain AA employee status. Section 11.D. remains unchanged, such that a pilot who is on sick leave - as opposed to disability leave - will still be dropped from the seniority list and terminated at the expiration of the applicable 3 or 5 year period on which the pilot remained on sick leave. You have advised that in the negotiations which led to the amendment of Supplement F(1), §5(d) that the APA negotiating committee proposed that the elimination of the 5 year limitation on disability leave be applied retroactively, such that pilots who have previously been dropped from the seniority list and terminated by operation of that section would be reinstated. However, it was the Company's position that it would only agree to elimination of the 5 year limitation on disability leave for pilots who have not

reached the 5 year mark as of September 30, 2016. Similarly, APA proposed in those negotiations that the 3 year limitation (or as may be applicable the extended 5 year limitation) on sick leave in Section 11.D. also be eliminated. However, the Company would not agree to any modification of that provision, even prospectively with regard to pilots who would hit their 3 or 5 year mark on sick leave on or after September 30, 2016.

With regard to pilots who in the past have fallen off the seniority list and been terminated by AA as a result of operation of either Section 11.D or Supplement F(1), §5(d), you have advised that former pilots who subsequently regain their first class medical certificate are often reinstated to their AA employment and to their relative position on the seniority list as if they had never been dropped. This is an extra-contractual practice, which the Company reminds APA each time it occurs is on a no-cite, no-precedent and case-by-case basis. You have advised that APA has always supported pilots seeking return, but that the Company has not always agreed to bring them back. While there is no contractual basis for APA to force or grieve the Company's decision, you have advised that the APA Board has adopted resolutions which set forth APA policy with respect to former pilots who seek reinstatement by AA and restoration of their seniority. Specifically, you have advised that the APA Board has passed resolutions R3006- 61 Rev.1, adopted on November 4, 2006, and R2014-07 Rev.1 , adopted on March 2014, which set forth APA policy when a pilot who has regained his first class medical certificate, but who has already fallen off the seniority list and been terminated as a result of the operation of either of these two CBA provisions, petitions the APA for support of his request to AA for reinstatement to his or her employment and original relative AA seniority number.

Questions Presented:

With regard to pilots who have already dropped off the seniority list and been terminated as a result of the operation of Section 11.D. or Supplement F(1), §5(d), you have advised that a question has arisen as to what duty, if any, is owed to those former pilots to advocate for their return, or to advocate on their behalf with the Company on any issue.

A secondary question is whether, if no duty exists, does APA voluntarily assume a duty if it makes promises to the pilots or makes efforts on their behalf to seek their return? Do these voluntary actions expose APA to any DFR liability?

Answers:

To answer these questions one must begin by examining the case law with regard to whether a union owes a duty of fair representation to former employees who were, but are no longer members of the applicable bargaining unit, or to persons who are otherwise outside the bargaining unit. A union obviously has a duty to represent former employees who were members of the bargaining unit with respect to their rights which accrued under the contract prior to their termination, such as would be the case with an employee discharged without just cause in violation of the CBA or an employee denied post-termination some right or benefit accrued under the CBA. However, as discussed in section "I" below, the law is settled that, in general, a union only owes a duty of fair representation to those currently employed in the bargaining unit which the union is certified to represent.

This general rule, however, has two exceptions. First, as noted above, a union has a duty to represent former employees as to their previously accrued rights under the CBA. Second, as relevant here, a duty of fair representation can be imposed with regard to former employees when a union by its conduct assumes an obligation to represent those outside, or no longer employed within the bargaining unit or undertakes functions beyond its duties as the exclusive representative of the bargaining unit. This exception is discussed in section "II" below.

In short, in answer to the questions presented, it is our opinion, based on this case law and the facts presented, that as a general proposition APA has no statutory duty to represent former pilots who have been dropped off the seniority list and terminated by AA by operation of Section 11.D. or Supplement F(1), §5(d) with respect to any issue other than contract rights which accrued prior to their termination. However, having said that, APA has arguably assumed a limited duty, beyond its statutory duty as certified bargaining agent, to represent such former pilots with regard to their efforts to seek reinstatement in accordance with APA policy as set forth in the two above referenced Board resolutions and its past practice of assisting such pilots in their extra-contractual efforts to secure reinstatement by AA upon their regaining their first class medical certification.

We do not believe however, that such assumed duty would include the requirement that APA *must actually negotiate* contractual reinstatement rights for such former pilots. Moreover, even assuming APA had a duty to *seek to negotiate* contractual reinstatement rights for such former employees (as distinct from any duty that APA actually negotiate such reinstatement rights), APA has already discharged that duty by proposing in negotiations the elimination of the temporal leave limitations on sick and disability leave of Section 11.D. and Supplement F(1), §5(d), and proposing that such elimination be applied retroactively to former pilots who have already been dropped from the seniority list.

The duty of fair representation does not mandate that a union obtain an employer's agreement to that to which the employer will not agree, only that in the conduct of negotiations the union take positions which are not arbitrary, capricious or in bad faith. See *Vaca v Sipes*, 386 U. S. 171, 190 (1967); *O'Neill v. ALPA*, 939 F.2d 1199, 1203, (5th Cir. 1991); and *McCall v. Southwest Airlines Co., et. al*, 661 F.Supp.2d 647, 654 (N.D.Tex. 2009).

Therefore, while APA's efforts to support and assist such former pilots, who are no longer members the bargaining unit and for whom there is this no statutory duty to represent, to obtain reinstatement may impose an assumed duty on APA, and thus the potential for DFR liability, such duty would be limited to acting in a manner which could not be construed as arbitrary, discriminatory, or in bad faith in relation to APA's actions in "representing" a former pilot who petitions APA for support and assistance in securing reinstatement of his or her AA employment and seniority. *Id.* In other words, APA could not refuse to assist or support a former pilot in his or her reinstatement efforts based on arbitrary, discriminatory, or bad faith factors or in the course of assisting or supporting such former pilot to secure reinstatement provide such assistance or support in an arbitrary, discriminatory or bad faith manner. This limited duty of support and assistance to former pilots with their efforts to secure reinstatement with the Company would not require that APA become an advocate on behalf of these former pilots with respect to any other matters beyond those which arose or which involve rights already accrued under the CBA prior to their terminations.

I. The Duty of Fair Representation, as a General Rule, Does Not Extend to Those Who Are Not, Or Are No Longer, Members of the Bargaining Unit

As noted in our November 17, 2016 opinion memo regarding APA's duty of fair representation in the context of resolution of the issue of whether the Supp C narrowbody fence remained in effect, APA's duty of fair representation extends, as a general rule, only to those pilots who are current members of the bargaining unit. (*i.e.*, the craft or class of AA pilots on the current integrated seniority list).

In Bensel v. APA, et al., 387 F.3d 298, 312-15 (3rd Cir. 2004) the Third Circuit, citing Humphrey v. Moore, 375 U.S. 335 (1964), stated that "[a] union has the statutory duty to represent all members of the appropriate bargaining unit fairly ~~[but that]~~ ~~[t]~~he ~~scope of the duty~~ ... is commensurate with the scope of the union's statutory authority as the exclusive bargaining agent." Id. at 312. As such, the Court concluded that "[c]onversely, the union's statutory duty of fair representation does not extend to those persons who are not members of the pertinent bargaining unit." Id. On that basis, the Court went on to hold that until such time as APA was certified as the exclusive bargaining agent for the pilots of TWA-LCC it owed them no duty and that, therefore, APA's duty was "to protect the interests of American's pilots, for whom APA did have a statutory duty to fairly represent." Id. at 314. See *Barnes v. Air Line Pilots Ass'n*, 141 F. Supp. 3d 836, 844 (N.D. Ill. 2015) ("the DFR attaches only to those employees for whom the union serves as the exclusive bargaining representative.")

Accordingly, as analogous to whether APA has any duty to former APA pilots in general, with regard to retired employees, it has long been held that the duty of fair representation in contract negotiation and administration generally does not extend to retirees, who are once members of the bargaining unit prior to their retirement. The seminal case on this point is *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). In *Allied*, the Court stated that "[s]ince retirees are not members of the bargaining unit, the bargaining agent [*i.e.*, the union] is under no statutory duty to represent them in negotiations with the employer." *Id.* at 181 n. 20. Put another way: "A union's statutory duty of fair representation traditionally runs only to the members of its collective-bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for all the employees within the unit." *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364, 376 n. 22 (1984); *see also In re UAL Corp.*, 468 F.3d 456, 459 (7th Cir. 2006) ("A union's duty to bargain collectively on behalf of the members of the bargaining unit that the union represents does not extend to retired workers, because they are not members of the unit.") and *Santiago v. United Air Lines, Inc.*, 2012 WL 3583057 ~~(N.D. Ill. Aug. 17, 2012) (union had no duty~~ to represent retired flight attendant regarding United's changes to its travel policy which allegedly benefited current employees at the expense of retirees).

Similarly, as a general rule, courts have held that, as with retirees, a union has no duty of fair representation with regard to managers, supervisors, nonemployees, or others who are outside the bargaining unit. *Karo v San Diego Symphony Orchestra Assn.*, 762 F.2d 819, 821 (9th Cir., 1985) ("If a union owes no duty of fair representation to retired employees of the bargaining unit it follows that no such duty would be owed to one who never was a member of the unit. Because the union owed no duty to Karo as a nonemployee of the bargaining unit, he lacks standing to sue for breach of such a duty.") *Cooper v. General Motors Corp.*, 651 F.2d 249, 250 (5th Cir. 1981) (union owes no duty to supervisors who were formerly members of bargaining unit).

II. While it is the General Rule That a Union Owes No Duty of Fair Representation to Those Outside the Bargaining Unit, If a Union Voluntarily Undertakes the Representation of Those Outside the Bargaining Unit, the Duty of Fair Representation May Attach

However, if a union undertakes the representation of those outside the bargaining unit or takes on functions beyond its duties as the exclusive representative of the bargaining unit, along with the assumption of those functions and representation comes the obligation to carry out those functions and representation consistent with the duty of fair representation. *Barnes v. Air Line Pilots Ass'n*, 141 F. Supp. 3d 836, 844-45 (N.D. Ill. 2015); *Diaz v International Longshore and Warehouse Union Local 134*, 74 F.3d 1202, 1205 (9th. Cir, 2007).

In *Barnes* management pilots alleged that ALPA owed, and breached, a duty of fair representation to them with respect to collective bargaining negotiations with United in general and specifically on an issue of retro pay. While noting that "the DFR attaches only to those employees for whom a union serves as the exclusive bargaining representative", *Barnes*, 141 F. Supp. 3d at 844, based on record evidence that ALPA arguably led the management pilots to believe that ALPA was representing them by having negotiated specific contract provisions applicable to management pilots and by accepting dues and contract maintenance fees from the management pilots, the Court held that the issue of whether ALPA owed a duty of fair presentation to the management pilots could not be resolved on a Rule 12(c) motion to dismiss. Based on those facts the *Barnes* court concluded that "a reasonable observer could find that ALPA, through both omission and commission, conveyed to the management pilots that it was negotiating on their behalf and representing their interests in the retro pay allocation, even if it was not legally required to do so." *Id*. The *Barnes* court, as authority for its conclusion that a union, by its conduct assuming the representation of those who are not members of the bargaining unit and for whom the union had no statutory duty to represent, could nevertheless become subject to the to the DFR with respect to such assumed representation, cited the following authority:

> *Rossetto v. Pabst Brewing Co.*, 128 F.3d 538 , 540 (7th Cir. 1997) ("Although a union has no duty to represent retirees, and retirees need not submit to union representation, retirees are free to make a union their agent if they so choose. And, of course, retiree benefits are a permissive subject of bargaining—a union may bargain for retirees if the employer agrees.").
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> . . . *Rossetto*, 128 F.3d at 538 (holding that a DFR can attach to a union acting as the representative of retirees even though retired workers are not covered under the RLA); *Foust v. Int'l Bhd. of Elec. Workers*, 572 F.2d 710 , 717 (10th Cir. 1978) ("[h]aving undertaken to act affirmatively on behalf of [the plaintiff], the Union is precluded from escaping responsibility by asserting that" the plaintiff should not have "depend[ed] on" the union); *Nedd v United Mine Workers of Am.*, 556 F.2d 190 , 200 (3d Cir. 1977) ("While *Chemical Workers v. Pittsburgh Glass*[, 404 U.S. 157 , 92 S. Ct. 383 , 30 L. Ed. 2d 341 (1971),] held that future retiree benefits were not the subject of mandatory collective bargaining, it also recognized that such benefits were a permissive subject of bargaining. When the Union elects to undertake such bargaining, the union's duty of fair representation must apply. ... The Union need not have done so, and if it had not, the pensioners would have had a remedy against the employers for any delinquencies. But

> having undertaken, on behalf of the Fund, to enforce the employers' obligation to pay royalties, the Union was not then entitled to act in a manner which discriminated against the pensioners.") (citation omitted), disapproved of on other grounds, *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 113 S. Ct. 2252 , 124 L. Ed. 2d 522 (1993).

Barnes, 141 F. Supp. 3d at 844-45.

Similarly, if union takes on functions beyond its duties as exclusive representative of the bargaining unit - such as the operation of a hiring hall - the duty of fair representation can attach to the union's conduct by virtue of its assumption of that responsibility. For instance, in *Diaz*, 74 F.3d at 1205, the Ninth Circuit, noting that in the operation of a hiring hall a union "takes on additional responsibility because it wields a special power over workers livelihood", citing *Breininger v. Sheet Metal*, 493 U.S. 67, 87-88 (1989), held that "when the union operates a hiring hall, it owes a duty of fair representation to 'all applicants using the hiring hall.'" *Id.*

Sincerely,

Sanford R Denison

SRD/dd

Sanford R. Denison