No. 11-11098

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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GAVIN MACKENZIE and MARK BURNETT,

Plaintiffs - Appellants,

vs.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, ALLIED PILOTS ASSOCIATION, AMERICAN AIRLINES, INC. and AMERICAN EAGLE AIRLINES, INC.,

Defendants - Appellees.

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On Appeal From A Final Judgment Of The District Court For The Northern District Of Texas
Case No. 3:10-CV-020343

APPELLANTS' BRIEF

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STATEMENT OF INTERESTED PERSONS

Case No. 11-11098

GAVIN MACKENZIE and MARK BURNETT,

Plaintiffs - Appellants,

vs.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, ALLIED PILOTS ASSOCIATION, AMERICAN AIRLINES, INC. and AMERICAN EAGLE AIRLINES, INC.,

Defendants – Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

PARTIES AND OTHER INTERESTED PERSONS:

Gavin Mackenzie
Mark Burnett

Captains and First Officers employed or formerly employed by American Eagle Airlines, AMR Eagle, Inc., Executive Airlines, Inc., Flagship Airlines, Inc., Simmons Airlines, Inc., and Wings West Airlines, Inc.

Captains and First Officers employed by American Airlines, Inc.

Arbitrator George Nicolau

American Airlines, Inc.
American Eagle Airlines, Inc.
AMR Eagle, Inc.
Related former airline companies:
Executive Airlines, Inc.
Flagship Airlines, Inc.
Simmons Airlines, Inc.
Wings West Airlines, Inc.

Air Line Pilots Association International ("ALPA")
Allied Pilots Association ("APA").

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Dated: April 25, 2014.

KATZENBACH LAW OFFICES

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Christopher W. Katzenbach
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STATEMENT REGARDING ORAL ARGUMENT

Appellants submit that oral argument is appropriate in this case. The issues presented involve the rights of hundreds of pilots whose contractual rights are subject to mandatory arbitration. This case concerns the extent to which a court must defer to an Arbitrator's decision that adds new requirements and adopts new procedures that conflict with the provisions of the contract to which the award relates. While Courts apply highly-deferential standards to review of Arbitrator decisions, the application of those standards to a particular case is less certain. Cases do not draw clear lines for when an Arbitrator is permissibly interpreting or drawing the essence of the decision from the contract compared to when an Arbitrator has strayed so far away from the contract and its terms that the Arbitrator is instead imposing the Arbitrator's own brand of equity or industrial justice.

This case also presents due process issues arising from off-the-record proceedings occurring during the arbitration in which evidence and other matters were conveyed to the arbitrator. While this Court recognizes that a lack of due process invalidates an Arbitration decision, the point at which due process has been denied is less certain.

Oral argument will assist the Court is addressing these issues and how the law should apply to the specific circumstances in this case.

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STATEMENT OF JURISDICTION

This case arises under the Railway Labor Act ("RLA") (45 U.S.C. § 151 et seq.) to set aside an arbitration decision issued April 9, 2010, by Arbitrator George Nicolau. Appellants, GAVIN MACKENZIE and MARK BURNETT, acting *pro se*, brought his action on behalf of themselves and class of pilots affected by the arbitration decision. Appellees, AIR LINE PILOTS ASSOCIATION INTERNATIONAL ("ALPA"), ALLIED PILOTS ASSOCIATION ("APA"), AMERICAN AIRLINES, INC. ("AA" or "American") and AMERICAN EAGLE AIRLINES, INC. ("AEA" or "Eagle"), are parties to the arbitration decision at issue and parties to the underlying agreement that was the subject of the arbitration. ALPA and APA are labor unions representing airline pilots and Eagle and American are airline companies employing the pilots represented by ALPA and APA.

The arbitration arose under a four-party agreement known as the Flow-Through Agreement (alternatively, Letter 3 or Supplement W). Under the Flow-Through Agreement, pilots employed by Eagle (represented by ALPA) were entitled to move to pilot positions at American when positions were available ("flow-up"). Pilots employed at American (represented by APA) were entitled to move to Eagle if laid-off from American ("flow-down").

The District Court had jurisdiction under 45 U.S.C. §153, First subsec. (q) and 45 U.S.C. § 184, to review a decision by an arbitrator under the Railway Labor Act, and under 28 U.S.C. §§ 1331 and 1337, as this action arises under federal

laws regulating commerce. This court has jurisdiction over this appeal under 28 U.S.C. § 1291 as this is an appeal from a final judgment disposing of all claims. The Judgment in this case was entered on November 1, 2011 (USCA5 809)[1] following the grant of Appellees' motion to dismiss (USCA5 800). On November 16, 2011, Appellants filed a timely notice of appeal under Rule 4(a)(1) of the Federal Rules of Appellate Procedure. USCA5 810.

QUESTIONS PRESENTED FOR REVIEW

1. In adopting a remedy for American Airlines' hiring discrimination against 244 American Eagle pilots who were denied positions at American in favor of former TWA pilots, did Arbitrator Nicolau exceed the scope of his authority to interpret and apply the contract when:

- He imposed a new requirement that Eagle pilots, in the group denied the transfer to American, make an "irrevocable election" by May 24, 2010 whether or not they would transfer to American if a position became available at any time in the future, where the contract did not require a pilot to decide whether to transfer until American announced hiring for a new hire class of pilots and a position in that class was offered to the Eagle pilot for the pilot to accept or decline;

[1] The judgment was signed October 31, 2011 and entered November 1, 2011. USCA5 809.

- He imposed the requirement for the advance "irrevocable election" on only a part of the American Eagle pilots who had the ongoing right to transfer to American;
- He gave re-hiring priority under the American/APA contract to former TWA pilots who had been the beneficiaries of American's violation of the contract over the Eagle pilots who had lost the job opportunities the TWA pilots took, where the contract providing for the rights of the Eagle pilots to transfer to American expressly provided that it would control;
- He changed the transfer procedure in the contract that gave Eagle pilots one of every two new hire positions at American, or priority to new positions if they had been delayed in transferring for operational reasons, to a seniority based process that favored the former TWA pilots; and
- He directed the parties to enter into a new contract to give transfer rights to Eagle pilots who had no transfer rights under the contract involved in this case.

2. Did Arbitrator Nicolau violate due process when he received off-the-record evidence, including evidence of the parties' settlement positions, and relied on this undisclosed evidence in reaching his decision?

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS.[2]

This case arises from a four-party agreement between Appellees, AIR LINE PILOTS ASSOCIATION INTERNATIONAL ("ALPA"), ALLIED PILOTS ASSOCIATION ("APA"), AMERICAN AIRLINES, INC. ("AA" or "American") and AMERICAN EAGLE AIRLINES, INC. ("AEA" or "Eagle"), known as the "Flow-Through Agreement," "Letter 3" or "Supplement W." USCA5 720-729. ALPA and APA are labor unions representing airline pilots. Eagle and American are airline companies employing the pilots represented by ALPA and APA. ALPA represents the pilots at Eagle and APA represents the pilots at American. USCA5 618.

1. The Provisions of the Flow-Through Agreement.

The Flow-Through Agreement provides for Commuter Jet ("CJ") Captains employed by Eagle to move to positions at American when American conducted new hire training classes for new positions ("flow-up") and for pilots employed at American to move to Eagle if laid-off from American ("flow-down"). The Flow-Through Agreement is a four-party agreement. It supersedes any conflicting provisions in the various collective bargaining agreements between the employers

[2] The facts are taken from the allegations in the Complaint, supplemented by the documents referenced in the Complaint (including the arbitration decisions cited), facts admitted by Appellees' in their motion papers, Appellant's statements in their opposition filed in the District Court and in other papers filed in the District Court, including in response to the District Court's request for status reports, while the motion to dismiss was pending.

and the unions for the separate pilot groups the unions represent. Paragraph I.C of the Flow-Through Agreement provides (USCA5 721):

> This Supplemental Agreement supplements and makes certain exceptions to the Basic Agreements between the parties. The provisions of the Basic Agreements will continue to apply, except as modified herein and, in the event of a conflict, the provisions herein shall apply.

The basic right to flow-up to American is stated in Paragraph III.A (USCA5 722):

> At least one (1) out of every two (2) new hire positions per new hire class at AA will be offered to CJ Captains who are line pilots and who have completed their IOE at AMR Eagle, Inc. Such positions will be offered to the CJ Captains who are line pilots in order of their AMR Eagle, Inc. seniority.

The Flow-Through Agreement also recognizes that qualified Eagle Captains might not be allowed to move to American immediately because of Eagle's operational needs. In particular, Paragraph III.E provides that there would be training freezes of 18 months or two years after Eagle pilots completed their IOE at Eagle to qualify for an Eagle CJ Captain position.[3] Accordingly, Paragraphs B and D provide that Eagle Captains withheld from transferring to American because of a training freeze or other operational constraint at Eagle would nevertheless get an

[3] Paragraph III.E provides: "Each of the first 125 AMR Eagle, Inc. pilots who successfully complete transition training as a CJ Captain must fulfill a training freeze for a period of eighteen (18) months from the date said pilot completes IOE. All other pilots who successfully complete transition training as CJ Captains must fulfill a training freeze for a period of two (2) years from the date each pilot completes IOE, unless released from such training freeze by AMR Eagle, Inc."

American seniority number. These Captains would thereafter receive priority in new hire classes at American once they were released from the training freeze or operational constraint that had prevented their initial transfer to American (USCA5 722):

> B. If a CJ Captain is unable to fill a new hire position at AA in accordance with Paragraph III.A. above, due to a training freeze or other operational constraint, (see Paragraph III.J. below), such CJ Captain will be placed on the AA Pilots Seniority List and will count toward the number of new hire positions. * * *
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> D. If a CJ Captain is placed on the AA Pilots Seniority List per III.B. above, such CJ Captain will receive priority based on his AA seniority in filling a new hire position in the next new hire class, following release from a training freeze or other AMR Eagle, Inc. imposed operational constraint. Such CJ Captains will not count toward the number of new hire positions offered to CJ Captains at AMR Eagle, Inc., under Paragraph III.A. above.

Paragraph IV of the Flow-Through Agreement provides for flow-down rights for American pilots. These provisions allow a furloughed American pilot to replace an Eagle Captain, other than an "Eagle Rights" Captain. USCA5 724-726. An Eagle Rights Captain is a CJ Captain who, at or before the time the Eagle pilot completes IOE for a CJ Captain position, elected to forfeit the opportunity to transfer to American under the Flow-Through Agreement. Paragraph III.F; USCA 5 722.[4]

[4] Paragraph III.F provides: "An AMR Eagle, Inc. pilot may, not later than the completion of IOE for a CJ Captain position or at such time as the pilot is able to demonstrate hardship, elect to forfeit the opportunity to secure a position on the AA Pilots Seniority List as provided by this Supplemental Agreement. Such pilot

Disputes over the Flow-Through Agreement are subject to arbitration. Paragraph VI; USCA5, 726-727. The Flow-Through Agreement provides that arbitration would be "on an expedited basis direct before a single neutral arbitrator jointly selected by the parties." It further provides: "The jurisdiction of the neutral shall be limited to disputes involving the interpretation or application of this Supplemental Agreement." Paragraph VI.B; USCA5 727.

The Flow-Through Agreement establishes an expedited time-frame for filing grievances and completing arbitration, but also provides that the parties could, by mutual agreement, extend the various time limits that were stated in the agreement. Paragraph VI.C; USCA5 727.[5] The agreement provides: "The neutral's decision on any matter within his jurisdiction may be enforced in federal court against any and all parties pursuant to the Railway Labor Act, as amended." Paragraph VI.D;

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will hereinafter be referred to as an "Eagle Rights CJ Captain," and will not be eligible for a future new hire position at AA which may otherwise become available under Paragraph III of this Supplemental Agreement. The existence of a hardship for this purpose shall be approved by the ALPA AMR Eagle MEC Chairman and the appropriate management official(s)."

[5] Paragraph VI.C provides: "Any grievance concerning the interpretation or application of this Supplemental Agreement shall be stated in writing and set forth a full and complete statement of the facts, and it shall be served upon all of the other parties. During the course of the next fourteen (14) days after receipt of service by all parties, the parties shall meet and confer for the purpose of seeking to resolve the dispute. If all of the parties are unable to resolve the dispute to all parties' satisfaction, any party may submit the dispute, in writing, to the neutral by service of such submission upon the other parties within thirty (30) days thereafter. All of the parties shall convene for a hearing on the first hearing dates offered by the neutral selected by the parties. The hearing shall be completed within sixty (60) days, and the briefs, if any, shall be submitted to the neutral within seven (7) days of the close of the record and receipt of the transcript. The neutral shall render a written opinion and award no later than thirty (30) days after the conclusion of the hearing. The time limits may be extended by mutual agreement of the parties."

USCA5 727. The Flow-Through Agreement expired after the later of the amendable date of the next Basic Agreement between APA and American or 10 years from when the Flow-Through Agreement was signed, unless renewed by mutual agreement. Paragraph VII; USCA5 727-728. Under these provisions, the Flow-Through Agreement expired May 1, 2008. USCA5 20 (¶ 16), 714, 734.

2. The Events In 2001 Following the Execution Of the Flow-Through Agreement.

At the time the parties entered into the Flow-Through Agreement in May 1997, they anticipated that the pilots on the Eagle seniority list would all flow-up to American within the following five (5) years. USCA5 18 (¶ 10). Subsequent events in 2001 impacting air travel undermined this expectation. As a result, only 124 Eagle pilots flowed-up to American. USCA5 624,709. Instead, during the 2001 through 2007 time period, more than 350 pilots flowed-down from American to Eagle and displaced Eagle Captains. USCA5 709.

a. The acquisition of TWA and integration of its pilots onto the American seniority list.

In April 2001, American acquired the assets of the bankrupt Trans World Airlines ("TWA"). USCA5 18, 599, 708. TWA Airlines, LLC ("TWA-LLC") was established to operate TWA' s airline routes after this acquisition. USCA5 18, 599, 675, 708. In November 2001, American and APA agreed to integrate the American and TWA pilot seniority list. One group of TWA pilots (approximately 1000 pilots) were merged into the American seniority list by seniority using a 1:8 ratio. The remaining TWA pilots (approximately 1225 pilots) were added to the

bottom of the American seniority list. This latter group became known as "Staplees." USCA5 624, 639.

The Staplees (as well as some other former TWA pilots) never performed active service for American, but were placed on furlough status immediately from their positions at TWA-LLC. USCA5 624.

b. Furloughs after September 11, 2001, delay new pilot hiring until June 2007.

The events of September 11, 2001, and the consequent economic collapse, resulted in massive layoffs in the airline industry. USCA5 708. In October 2001, American began implementing furloughs of pilots that did not stop until March 2005. USCA5 624. After September 11, 2001, the first "new-hire" class at American occurred on June 6, 2007. USCA5 19 (¶ 13), 625, 710.

3. The LaRocco (FLO-0903) and Bloch (FLO-0107) Arbitrations Under The Flow-Through Agreement.

In FLO-0903, Arbitrator John B. LaRocco concluded that those TWA pilots who had never entered active service with American and who had been directly furloughed from TWA-LLC were the equivalent of new hire pilots for purposes of the Flow-Through Agreement. USCA5 18 (¶ 12), 625, 709-710. As a consequence, Arbitrator LaRocco determined that the Flow-Through Agreement would apply to any recall involving these TWA pilots. USCA5 18, 625-626, 639, 641, 710. Arbitrator LaRocco issued his decision on the merits in FLO-0903 on

May 11, 2007[6] and returned the issue of remedy to the parties for initial consideration and agreement if possible. USCA5 625-626, 710.

In FLO-0107, Arbitrator Richard I. Bloch was asked to determine the effect of the expiration of the Flow-Through Agreement in May 2008 on Eagle pilot's employment opportunities at American. USCA5 20 (¶ 16), 713-714. On June 30, 2008, Arbitrator Bloch issued an award that concluded that the expiration of the Flow-Through Agreement did not adversely affect the flow-up rights of Eagle Captains who had obtained American seniority numbers before the agreement expired. USCA5 20 (¶ 16), 713-714, 734. Arbitrator Bloch's award stated (USCA5 734):

> The effect of the expiration of Supp. W in May 2008 on Eagle pilots' employment opportunities is as follows: The right to flow-up is to be retained by Eagle CJ Captains who, prior to May 1, 2008, completed IOE and received AA seniority number.

4. The Arbitration Decisions By Arbitrator Nicolau Arising From American's Hiring Of New Pilots Starting In June 2007 Without Honoring The Flow-Up Rights Of Eagle Pilots.

a. ALPA files a grievance when American hires TWA "new hire" pilots starting June 2007, a month after LaRocco's award that hiring TWA pilots would trigger the flow-up rights of Eagle Captains.

In June 2007—about a month after Arbitrator LaRocco's decision that the TWA-LLC Staplees were the equivalent of new hires for purposes of the Flow-

[6] LaRocco's award issued a month before American began hiring the furloughed Staplees in June 2007 that lead to the arbitration before Arbitrator Nicolau that is the subject of this case.

Through Agreement—American began hiring pilots for new hire training classes. Between June 6, 2007 and March 19, 2009, there were 20 training classes. No Eagle pilots with American seniority numbers were called for these classes. At the same time, 244 of the former TWA "new hire" pilots[7] were called for these classes. USCA5 19 (¶ 14), 601, 620, 712, 713.

On March 29, 2008, ALPA filed a grievance alleging that the hiring of the TWA "new hire" pilots rather than Eagle pilots violated the Flow-Through Agreement. The case was assigned to Arbitrator George Nicolau (FL0-0108). USCA5 18-19, 601, 619. However, ALPA stated that this grievance would move forward only if Arbitrator LaRocca did not address this issue in his remedy decision in FLO-0903. USCA5 619, 711.

b. Nicolau concludes that American violated the Flow-Through Agreement by hiring pilots starting in June 2007 without hiring Eagle pilots who were entitled to flow-up.

ALPA attempted to raise the issue of the hiring of former TWA pilots in the remedy phase of the proceedings before Arbitrator LaRocco (FLO-0903). USCA5 620-621, 711. Arbitrator LaRocco concluded that he lacked jurisdiction to consider a remedy for American's hiring of former TWA pilots starting in June 2007 because the parties had stipulated that the remedy issue before Arbitrator LaRocco was only the "appropriate seniority number" for the Eagle Captains who

[7] That is, TWA pilots who had never flown for American and fell under Arbitrator LaRocco's decision that they were "new hires" for purposes of the Flow-Through Agreement.

had been adversely affected by the violation of the Flow-Through Agreement that LaRocco had found. The grievance in FLO-0108 then proceeded before Arbitrator Nicolau. USCA5 19 (¶ 13), 619-620, 711.

Arbitrator Nicolau addressed the contract violation issue in his decision on the merits. USCA5 618. He concluded that the Eagle pilots had been denied their right to flow-up to American when American began hiring pilots for new pilot training classes in June 2007. USCA5 643. His Award provided: "American Eagle pilots who hold American Airline seniority numbers were entitled to attend AA training classes beginning in June 2007". USCA5 643. Arbitrator Nicolau remanded the case to the parties to formulate a remedy and reserved jurisdiction if they could not do so. USCA5 643.

c. The case returns to Nicolau to provide a remedy for the 244 Eagle pilots American denied the right to flow-up.

There were 244 American Eagle pilots who were entitled to attend the American training classes beginning in June 2007. USCA5 645, 802.

The matter returned to Arbitrator Nicolau for a remedy determination when the parties could not agree on a remedy. USCA5 19 (¶ 14), 647. Arbitrator Nicolau held hearings on February 25 and 26 and March 30, 2010. USCA5 647. Arbitrator Nicolau took testimony and evidence at the February 25 and 26 hearings. USCA5 647-649.

(i) Nicolau is given off-the-record evidence at the March 30 hearing.

Arbitrator Nicolau's decision on remedy in FLO-0108 states that he elected "to announce certain aspects of my decision to the Parties on the record and then to ask the Parties to discuss with me, collectively, the remedy issues that would remain open in light of my preliminary rulings." USCA5 653.

At the March 30 hearing, Arbitrator Nicolau was given information as to the furlough of 102 pilots, 83 of whom were former TWA-LCC "new hire" pilots who were hired in 2007-2009 hiring classes. USCA5 654. It also included American's statement that it anticipated no further training classes in 2010. USCA5 654.

The specifics of this information were provided off the record.[8] At the March 30 hearing, Arbitrator Nicolau acknowledged that there had been an exchange of unidentified emails and documents after the February 26 hearing. These were not shown as introduced into the hearing record or made a part of the transcript. March 30 Transcript ("TR") p. 347:6-16. Arbitrator Nicolau was then informed that there had been a furlough of 80 pilots effective March 1, 2010. TR p. 348:8-11.[9]

Arbitrator Nicolau was told there had been a dinner meeting of the parties prior to the hearing and that the parties proposed to discuss the "ideas [that] came

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[8] Appellants request the court take judicial notice of a copy of the March 30, 2010, transcript. Appellants are submitting a separate motion for judicial notice attaching a copy of the transcript.

[9] The actual numbers were apparently provided in an off the record communication, as Arbitrator Nicolau finds that there were 102 pilots furloughed, 83 of which were former TWA-LLC pilots. USCA5 654.

out of that dinner" with the Arbitrator. TR p. 363. Arbitrator Nicolau proposed, and the parties agreed, that such a discussion should be "taken down confidentially, I mean not be part of the public record." TR p. 363:19-21. Arbitrator Nicolau and parties agreed to close the public record and proceed in a confidential manner, but with stenograph notes kept for the Arbitrator's use. TR pp. 364-365. Arbitrator Nicolau stated that "the record is closed on this matter and from now on the stenographer will take some notes for my benefit." TR p. 365:19-21. He also noted that "There may be times I will ask her not to do that at all, but we will proceed in that fashion." TR p. 365:21 – p. 366:1.

The parties then went off the record. TR p. 366. When the record resumed, Arbitrator Nicolau stated "I am now fully familiar with every one of the issues" and "as a result, I do not think that additional briefs are necessary, particularly since it is in the interest of everyone that my award be issued sooner rather than later." TR p. 366:7-12.

The hearing closed at approximately10:42 am, 32 minutes after it had started. TR p. 366:17.

(ii) Nicolau's decision on remedy creates new disadvantages for the Eagle pilots that were entitled to flow-up, creates new benefits for the former TWA pilots to allow them to be hired ahead of the Eagle pilots when new hire positions open up and directs the parties to enter into new preferential hiring arrangement for the Eagle pilots who did not have flow-up rights.

On April 9, 2010, Nicolau issued a decision on the remedy. USCA5 644. At the time of this decision, there were 1351 Captains at Eagle, 527 of whom had American seniority numbers and 824 of whom did not have American seniority

numbers. USCA5 660. The 824 Eagle group included Eagle Rights captains. USCA5 663 (last paragraph). In addition, there were 102 American pilots furloughed on February 28, 2010, 83 of whom were TWA-LLC pilots. USCA5 654, 659.

Initially, in explaining his remedy, Nicolau stated that he would not require any Eagle pilot to transfer to American if they did not want to do so. USCA5 654-655. Nicolas stated two reasons for that determination.

First, "the now expired Supp W/Letter 3 did not require it." Nicolas noted that the Flow-Through Agreement did not require a pilot to accept a flow-up position at American when offered but instead the agreement referred to pilots "who 'accepts a new hire position.'" USCA 5 654. "If a pilot were required to move to that new hire position when actually available, that is, if such movement were obligatory, the word 'accept,' which clearly entails a choice, would not have been used." USCA5 654-655.

The second reason for not requiring pilots to transfer was that circumstances had changed since 1997 when the Flow-Through Agreement was crafted, including the delay in movement to American. USCA5 655. Nicolau explained (USCA5 655): "That unanticipated upward delay, encompassing ten years for some, strongly supports the judgment that reading Supp W/Letter 3 as containing an irrevocable obligation is inappropriate and inconsistent with equity." USCA5 655. At the same time, Nicolau stated that it was also his conclusion "that a choice should be made." USCA5 655.

After this initial conclusion, Nicolau divided the pilots into separate groups and provided different terms for each of the groups involved.

First. The first group Nicolau addressed was the 244 Eagle pilots who should have been hired by American but were not. To this group, Nicolau added an additional 42 pilots, so that the total in this group became 286 pilots. The 286 included all the Eagle CJ Captains with greater American seniority than the least senior currently active TWA-LLC pilot. USCA5 655.

For this first group of 286, Nicolau directed that, after being informed of the remedial components of his remedy and the timetable in his decision, each of the pilots in this group would be required to make an irrevocable choice whether or not to flow-up to American. USCA5 655-656, 661. He stated that that election had to be made by May 24, 2010. USCA5 661. The opportunity to flow-up would be extended only to those of these 286 pilots making the election to flow-up. USCA5 656. Nicolas stated that, although "the opportunity to flow-up to American may not occur for some time, dependent as it is on the health of the airline and the compelling equities in this case, I have decided to make the choice irrevocable rather than allowing an affected pilot to choose one option and later choose another. Supp W/Letter 3 has expired and finality, in my judgment, is to the interest of all." USCA5 656. The most senior 244 pilots in this group would also get retroactive compensation and benefits. USCA5 656-658.

Out of the group of 286, only the most senior 35 Eagle pilots would go to American immediately, beginning in June 2010. Nicolau did not explain the source of this number. USCA5 658-659. He provided that there should be "no

furloughs as a direct result of these transfers." However, if "a furlough is deemed necessary during the remainder of 2010, 35 pilots furloughed shall receive two months additional furlough pay in the amount set forth in the AA/APA Agreement, as specified in the Award." USCA5 659, 663.

Second. The second group was the American pilots, including the TWA pilots, furloughed on February 28. After the transfer of the 35 pilots from the group of 286, Nicolau's awarded required rehiring of the 102 pilots furloughed on February 28, 2010 before any Eagle Captains would be offered positions. Nicolau stated: "Following the aforesaid transfer, before any additional CJ Captains are transferred, recalls to AA shall be administered in accordance with the AA/APA Agreement based on the AA seniority list as of the date of this Award until the most junior pilot furloughed on February 28, 2010 has been offered recall." USCA5 659.

Third. The third group was Eagle pilots with AA seniority numbers and all other pilots on furlough from American. This group included the remaining members of the first group of 286 who had made irrevocable elections to transfer to American[10] and the additional 241 pilots with American seniority numbers who did not have to make that irrevocable election.[11] Nicolau stated, that after all the February 28 furloughed pilots were recalled, "the remaining Eagle CJ Captains

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[10] Pilots in the group of 286 who elected not to transfer or who declined to make this election at all lost their American seniority number. USCA5 735.

[11] That is, the total 527 Eagle pilots with American seniority numbers less the 286 pilots in the first group.

with AA numbers who elect to transfer when and as future positions become available and those AA pilots presently on furlough shall be entitled to enter and re-enter active service at American in AA seniority order." USCA5 659.

Fourth. The fourth group consisted of the 824 Eagle CJ Captains—including Eagle Rights pilots—without American seniority numbers. USCA5 660.[12] The remedial provisions for this group were intended to address the downstream damages caused by loss of job opportunities for pilots who could not move up at Eagle because Eagle CJ Captains were not transferred to American to open up job opportunities. USCA5 652, 659-660.[13] Nicolau provided: "When job opportunities become available as a result of future hiring at AA, said Captains are to be offered one of every two new hire positions in a new hire class in Eagle seniority order" subject to the limitation that no more than 20 pilots per month were required to be released by Eagle if it felt that releasing more would create severe operational difficulties. USCA5 660. Eagle pilots becoming CJ Captains in the future would share in this opportunity until 824 pilot positions were filled. USCA5 660. Nicolau provided that "This system of preferential hiring should be a matter of agreement between the directly affected Parties." USCA5 660. The Award provides: "The affected Parties are directed to enter into a preferential hiring agreement pursuant to which American, at the time hiring resumes, will

[12] The specific terms of the Award state that this group includes the Eagle Rights pilots. USCA5 663.

[13] Nicolau's award is limited to the existing CJ Captains, except that a pilot who becomes a CJ Captain can take one of the 824 slots until those are exhausted. USCA5 660, 664.

offer to 824 Eagle Captains, including Eagle Rights Captains, one of every two new hire positions in a new hire class in order of Eagle seniority" unless releasing more than 20 pilots would cause Eagle severe operational difficulties. USCA5 663-664.

5. After Nicolau's Decision, Eagle Pilots Refusing To Make An Immediate Irrevocable Election Before Any Job At American Is Available For Them Lose Their American Seniority Numbers.

After Nicolau's decision, the 286 Eagle pilots in the first group were required to make the irrevocable election Nicolau required. USCA5 735. The additional 241 pilots who also had American seniority numbers were not required to make this election. USCA5 784.

In connection with that election, pilots were given an information packet ("The Packet") and required to sign a "hold harmless" agreement that, *inter alia*, promised that they would "not sue or otherwise bring any claim whatsoever . . . arising out of any information provided to me in the Packet or any statements made to me about that information. . .." USCA5 717, 736. The information given these pilots in the Packet included information as to the anticipated timetable referenced in Nicolau's decision. American informed the pilots: "Flow of 244 Eagle pilots to AA is as follows: 35 in 2010, an estimate of 100 in 2012, and an estimate of 109 in 2013." USCA5 749, 758.[14] Based on this information and concerned about the

[14] The pages of the information given the Eagle pilots was before the Court in connection with Appellants' motion to extend time to file a motion for class certification (DKT # 64 USCA5 745) that was filed on January 21, 2011 while the motion to dismiss was pending. Appellants also provided this information in their Status Report (USCA5 786-787) submitted in response to the District Court's

uncertainty of eventual transfer sometime years away, many pilots refused to sign this election by June 1, 2010 (see USCA5 735) and lost their American seniority. USCA5 749, 787. In fact, American began hiring flow-through pilots in January 2011; the initial group (excluding those who did not sign the irrevocable election) was all transferred to American by May 2011. USCA5 749, 787.

B. THE PROCEEDINGS IN THE DISTRICT COURT.

1. The Complaint.

Appellants brought this action *pro se* to set aside Arbitrator Nicolau's remedy decision in FLO-0108. The Complaint alleged that Arbitrator Nicolau had exceeded his authority to fashion a remedy for the failure-to-hire violation he had found occurred.

The Complaint alleged that Nicolau had re-written the Flow-Through Agreement (USCA5 19 (¶ 14) by requiring an "irrevocable election" to flow-through to American that was "not contemplated by the confines of Letter 3" (USCA5 20 (¶ 15)) and resulted in loss of the pilots' opportunity to flow-up to American and the American seniority numbers that they had obtained in accordance with the Flow-Through Agreement. USCA5 20 (¶ 15). The Complaint alleged that the decision took away the seniority rights established in the prior arbitration award by Arbitrator Bloch in FLO-0107 and that the requirement of an "irrevocable" election was contrary to Nicolau's interpretation of the agreement that it did not contain any requirement of an irrevocable

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request for supplement reports addressing the impact of the Court's ruling in the related *Stewart* case (USCA5 769).

obligation to transfer to American. USCA5 20 (¶ 16). The Complaint alleged that Nicolas "ignored the provisions of Letter 3. . . and dispensed his own form of justice by attempting to create a new agreement, all the while ignoring the provisions and restrictions of Letter 3." USCA5 21 (¶ 17).

2. The Motion To Dismiss.

American, Eagle and ALPA filed a motion to dismiss under Rule 12(b)(6) asserting that Nicolau's award was within the scope of his authority under the Railway Labor Act (RLA). USCA5 589. APA took no position on the motion. USCA5 774.

Appellants opposed the motion. USCA5 704. Appellants argued that, while the Flow-Through Agreement provided for expedited arbitration (USCA5 706), the parties had delayed resolution of the arbitrations, including bifurcating the remedy process for remedy negotiations after liability was found. Appellants argued that the Flow-Through Agreement did not provide for bifurcation in this manner. USCA5 706, 715.

Appellants argued that Arbitrator Nicolau exceeded his jurisdiction over disputes of the interpretation and application of the Flow-Through Agreement by dividing the 520 pilots with American seniority number into two groups, and then requiring only 286 of them to make an irrevocable choice whether to flow-up to American, even though the Arbitrator had construed the agreement not requiring pilots to make an irrevocable obligation to flow-up. The remaining pilots with American seniority numbers did not have to make this choice. USCA5 714-715. Appellants argued that requiring an irrevocable election was contrary to the

provisions of the Flow-Through Agreement and Arbitrator Bloch's previous interpretation of it. USCA5 716-717.

Appellants also argued that Nicolau's award of downstream damages for Eagle pilots without American seniority numbers was unjustified as the Flow-Through Agreement did not provide for a remedy for downstream damages. USCA5 715.

Appellants also questioned the procedure Arbitrator Nicolau had used. Appellants argued that the hearing conducted on March 30, 2010, did not consist of testimony, only involved the arbitrator and attorneys and "was conducted sub rosa in Washington D.C." USCA5 713. Appellants noted that Arbitrator Nicolau's remedy contained terms that had previously been proposed in a settlement of a related arbitration (the LaRocca liability decision in FLO-0903), including the requirement of an "irrevocable choice" to flow-up. USCA5 711, 716.

3. The Additional Information Provided To The District Court While The Motion To Dismiss Was Pending.

While the motion to dismiss was pending, the parties provided the Court additional information bearing on the issues before the Court on the motion to dismiss.

On January 21, 2011,[15] Appellants moved to extend the time for filing a motion for class certification. USCA5 745. In connection with that motion,

[15] This was 11 days after Appellants' Opposition to the motion to dismiss and nine months prior to the Court's October 31, 2011 decision on the motion (USCA5 800).

Appellants argued that Nicolau's decision had divided the single group of flow-through pilots with American seniority numbers into two groups (286 pilots and the remaining 235 pilots[16]), but required only the pilots in the first group (the 286 pilots) to make the irrevocable election. USCA5 747. Appellants argued that nothing in the Flow-Through Agreement required an irrevocable election by these pilots. USCA5 747.

Appellants also advised the Court of the information given the group of 286 Eagle pilots in May 2010 at the time they were compelled to make the irrevocable election whether to flow-up. In particular, Appellants advised the Court that the information American gave in May 2010 asserted that the flow-up (other than for the first 35 pilots) would not start until 2012. USCA5 749-750, 758. Based on that information, Appellants stated: "This accumulated five year delay[17] factored into the decision of some of the pilots, required to make the irrevocable decision, to either not make the irrevocable election, or to elect to forfeit their previously awarded AA seniority number and their opportunity to transfer (flow-through) to American Airlines. [¶] Pilots were not comfortable making an immediate irrevocable election, which would obligate them indefinitely, for an unknown and unclear future which could change significantly. Pilots were well aware of the

[16] This number was actually 241 pilots.

[17] The five-year delay was from June 2007, when the Eagle pilots should have started moving to American to 2012 and 2013, when American said flow-up would take place. USCA5 749.

history of Letter 3/Supplement W as well as the previous assurances and promises of transfer to American Airlines." USCA5 749.

Appellants informed the Court that, contrary to the statements American had made in May 2010, American began conducting new hire classes in November 2010 and Eagle "flow-through" pilots began attending new hire classes "this month, January 2011; a full year earlier than previously stated" by defendants. USCA5 749. [18]

On August 2, 2011, the Court dismissed the separate, but related case entitled *Stewart v. American Eagle Airlines, Inc.*, 3:10-CV-2275-P. On September 12, 2011, the Court requested the parties to submit status reports in light of the Court's ruling in *Stewart*. USCA5 769.

Appellees' status report[19] urged the District Court to follow its ruling in *Stewart*. USCA5 773-774: "Defendants Eagle, American and ALPA believe that these conclusions [in *Stewart*] are dispositive of Plaintiffs' asserted grounds for vacating Arbitrator Nicolau's remedial award." USCA5 774.

Appellants' status report urged the District Court "for the reasons stated below and in their previous supporting briefs and memoranda" to require American, Eagle and ALPA to answer the complaint and compel discovery to begin. USCA5 777. In their status report, Appellants noted that Nicolau had

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[18] The Court granted the motion to extend time for filing a motion for class certification. USCA5 767.

[19] The positions in this status report were those of Eagle, American and ALPA. APA took no position on the motion to dismiss. USCA5 774.

divided the pilots with American seniority numbers into separate groups and required an irrevocable election only for the first 286 flow-through pilots and not for the 241 additional Eagle pilots who also had American seniority numbers. USCA5 784, 786-787. Appellants argued that the Flow-Through Agreement itself did not require irrevocable elections and that Agreement did not obligate a pilot to move to American until he was able to accept an offered position. USCA5 784. Appellants argued that requiring this election conflicted also with Arbitrator Bloch's Award and the terms of the Flow-Through Agreement that provided that Eagle pilots had the right to accept or decline a new hire position at American at the time of the new hire position and the pilots' transfer to American. USCA5 785. Appellants argued that Nicolau's asserted interest in "finality" conflicted with his decision to extend flow-through rights to the additional 824 Eagle pilots without American seniority numbers even though the Flow-Through Agreement had expired. USCA5 784.

Appellants stated—as they had stated in their earlier motion for extension of time to file a motion for class certification—that American had told the 286 pilots required to make the irrevocable election that flow-up would not occur until 2012 and 2013, but in fact American conducted the entire flow-up in January through May 2011. USCA5 786-787. Appellants argued that American's estimated transfer dates of 2012 and 2013 caused many of the pilots to decline to make an irrevocable election to flow-up. USCA5 787.

As to the 241 additional Eagle pilots with American seniority numbers who did not have to make the irrevocable election whether or not to flow-up, Appellants

argued that Nicolau's decision to have them flow-up to American based on American seniority numbers conflicted with the process under the Flow-Through Agreement that one Eagle pilot would be hired for every two new hire positions. Appellants argued that Nicolas's decision as to these 241 pilots allowed the former TWA pilots to be placed in new training classes ahead of the Eagle pilots, contrary to the "one out of every two" positions that the Flow-Through Agreement required be offered to Eagle pilots. USCA5 788. In a Response to a Supplemental Status report filed by Appellees (USCA5 795), Appellants again noted that American continued to hire the former TWA pilots into new classes while holding the 241 Eagle pilots with American seniority numbers at Eagle. USCA5 797.

Additionally, in their status report, Appellants stated that they needed discovery to investigate (a) why, after LaRocco's May 2007 decision that hiring TWA pilots would trigger the flow-up rights of Eagle pilots, American ignored that decision in June 2007 and thereafter in not recognizing the Eagle pilots flow-up rights (USCA5 779-781) and (b) why the allegedly "expedited" arbitrations under the Flow-Through Agreement had been subjected to years of agreed-upon delays (USCA5 781-782, 783).

4. The District Court's Ruling.

The district court granted the motion to dismiss. The court concluded that Nicolau "acted within the scope of his jurisdiction by establishing a compensation plan for the 244 Eagle captains who were entitled to training class slots beginning in June 2007." USCA5 807. The district court also concluded that the "'rights of the remaining 234 pilots of the 520 pilots who held American Airlines pilot

seniority numbers' was not before Arbitrator Nicolau and was beyond the scope of his jurisdiction." USCA5 807.

The district court rejected Appellants' argument that Arbitrator Nicolau's decision was contrary to Arbitrator Bloch's decision, concluding that "Nothing in Bloch's [] ruling prevents another arbitrator from placing limits on that right. Bloch did not address the timing of the pilots' decisions to exercise their flow-up rights or the irrevocability of the decisions." USCA5 806. The district court stated that Nicolau "did not take away any rights the Eagle pilots had under Bloch's decision." USCA5 806. The district court concluded that Nicolau acted within his authority by requiring an irrevocable election: "Because the Flow-Through Agreement had expired and in the interests of finality for everyone, Nicolau decided to impose a time limit for the elections to be made and made those elections irrevocable." USCA5 806. The district court concluded that this ruling "drew its essence from the collective bargaining agreement and Nicolau acted within his authority to place this limitation on the Eagle pilots' rights." USCA5 806-807.

The district court concluded that Nicolau's "opinion took into consideration the Parties' competing interests, their history and agreements, and other arbitration rulings," the decision "in no way attempts to fashion some new 'brand of industrial justice'" and the "final remedy undoubtedly drew its essence from the collective bargaining agreement." USCA5 807-808.

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SUMMARY OF ARGUMENT

1. While review of arbitration awards is narrow (*Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 783 fn. 3 (5th Cir. 2012); *Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters*, 391 F.3d 613, 617 (5th Cir. 2004)), an arbitrator's decision must have "a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement" (*Executone Info. Systems, Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994)). An arbitrator "does not sit to dispense his own brand of industrial justice." *BNSF Ry. Co. v. Bhd. of Maint. of Way Emps.*, 550 F.3d 418, 424(5th Cir. 2008).

Arbitrator Nicolau violated these restrictions on his authority. (A) He imposed a new requirement, on only a part of the Eagle pilot group, to make an irrevocable election to flow-up before a position was available. The terms of the Flow-Through Agreement did not require an election until there was a position in a new hire class and the position was offered to and accepted by the Eagle pilot. (B) He gave 102 TWA furloughed pilots hired in violation of the Flow-Through Agreement the right to be recalled pursuant to the American/APA contract ahead of Eagle pilots who were unlawfully denied the jobs with American. The Flow-Through Agreement gives controlling priority to the Flow-Through Agreement when in conflict with the parties' other contracts. (C) He required transfer of the remaining Eagle pilots with flow-up rights to be done by American seniority number. The terms of the Flow-Through Agreement required flow-up on the basis that (a) one out of every two new hire positions be offered to Eagle pilots and (b) Eagle pilots who had been held back because of a training freeze or operational

constraint had first priority in new hire positions. (D) He directed the parties to enter into a new agreement for flow-up rights for 824 pilots did not have flow-up rights under the contract, including Eagle Rights Pilots who had previously elected *not* to flow-up so they could obtain protection from being displaced in a flow-down.

2. Nicolau developed his award out from off-the-record evidence and discussion, including discussions involving the parties' settlement meeting that occurred the night before the March 30 hearing. This violated fundamental rights of due process. *Totem Marine Tug & Barge, Inc. v. North American Towing*, 607 F.2d 649, 652-653 (5th Cir. 1979). His award should be set aside for violating due process. *Bhd. of Locomotive Eng'rs v. St. Louis Sw. Ry. Co.*, 757 F.2d 656, 661 (5th Cir. 1985).

ARGUMENT

A. STANDARD OF REVIEW.

A district court's decision to dismiss under Rule 12(b)(6) is reviewed de novo. *Bass v. Stryker Corp*., 669 F.3d 501, 506 (5th Cir. 2012) (citing *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741 (5th Cir. 2010)). All well-pleaded facts are accepted as true and the court views the facts in the light most favorable to the nonmoving party. *Id.* (citing *Jebaco Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 318 (5th Cir. 2009)). In ruling on a motion to dismiss, the court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated

into the complaint by reference, and matters of which a court may take judicial notice." *Funk v. Stryker Corp.*, 631 F.3d 377, 783 (5th Cir. 2011). Accord: *Collins v. Morgan Stanley Dean* Witter, 224 F.3d 496, 498-499 (5th Cir. 2000), citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir. 1993).

Other circuits have considered allegations contained in a plaintiff's opposition papers and arguments in appellate briefs in ruling on a motion to dismiss. So long as the allegations are consistent with the complaint, they serve to clarify the allegations in the complaint or to show that a complaint should not be dismissed. *Dawson v. General Motors Corp.*, 977 F.2d 369, 372-373 (7th Cir. 1992); *Early* v. *Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992) ("while the allegations in Early's reply to the motion to dismiss were indeed not evidentiary, a plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint, in order to show that there is a state of facts within the scope of the complaint that if proved (a matter for trial) would entitle him to judgment."). See also *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146-1147 (7th Cir. 2010) (holding that Supreme Court's decisions in *Twombly* and *Iqbal* requiring a complaint to contain allegations showing a plausible basis for a claim did not preclude consideration of facts alleged in briefs on appeal in reviewing a motion to dismiss); *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1138-1139 (9th Cir. 2001) (allegations in reply brief on appeal).

The Supreme Court in *Pegram v. Herdrich*, 530 U.S. 211 (2000) approved this approach. *Id.* 530 U.S. at 230 ("Any lingering uncertainty about what Herdrich has in mind is dispelled by her brief, which explains that this allegation, like the others, targets medical necessity determinations.") & *id.* at fn. 10 ("Though this case involves a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and the complaint should therefore be construed generously, we may use Herdrich's brief to clarify allegations in her complaint whose meaning is unclear.").

B. ARBITRATOR NICOLAU VIOLATED HIS DUTY TO BE FAITHFUL TO THE CONTRACT BY ADDING NEW REQUIREMENTS TO AND SUBTRACTING FROM THE CONTRACT RIGHTS OF EAGLE PILOTS IN THE FLOW-THROUGH AGREEMENT IN FAVOR OF HIS OWN SENSE OF FAIRNESS OR INDUSTRIAL JUSTICE.

In reviewing an arbitration decision under the Railway Labor Act ("RLA"), this Circuit considers: (1) whether the Board failed to comply with the RLA's requirements; (2) whether the Board failed to confine itself to matters within the scope of its jurisdiction; and (3) whether the Board's decision was the result of fraud or corruption. *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 783 fn. 3 (5th Cir. 2012); *Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters*, 391 F.3d 613, 617 (5th Cir. 2004). This Circuit will review an arbitration to determine if there has been a denial of due process rights. *Ballew*, supra, 668 F.3d at 783 fn. 3; *Bhd. of Locomotive Eng'rs v. St. Louis Sw. Ry. Co.*, 757 F.2d 656, 661 (5th Cir. 1985).

While extremely deferential, this review is neither *pro forma* nor toothless. Rather, court review ensures that the arbitration award "draw[s] its essence" from and is "grounded in" the parties' contract. *Cont'l Airlines*, supra, 391 F.3d at 617, 619. Review ensures that an arbitrator's jurisdiction "is shaped by the underlying

collective bargaining agreement" (*Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n,* 889 F.2d 599, 602 (5th Cir. 1989)) and has "a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement" (*Executone Info. Systems, Inc. v. Davis,* 26 F.3d 1314, 1325 (5th Cir. 1994)). Accord: *Houson Lighting & Power Co. v. I.B.E.W.*, 71 F.3d 179, 183 (5th Cir. 1995).

An arbitrator's role is "confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *BNSF Ry. Co. v. Bhd. of Maint. of Way Emps.*, 550 F.3d 418, 424(5th Cir. 2008), quoting from *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An arbitrator may not "enforce some abstract equitable consideration" (see *BNSF Ry. Co.*, supra, 550 F.3d at 427) or base an award "on general considerations of fairness and equity instead of the precise terms of the agreement." *Appalachian Reg'l Healthcare, Inc. v. United Steelworkers of Am.*, 245 F.3d 601, 604-605 (6th Cir. 2001) (collecting cases). Accord: *HMC Management Corp. v. Carpenters District Council,* 750 F.2d 1302, 1304-1305 (5th Cir. 1985) (vacating arbitration where "arbitrator's opinion was based on his sense of what was improper behavior on the part of an employer.").

To be sure, an arbitrator "may look beyond the written contract when interpreting a collective bargaining agreement if the instrument is ambiguous or silent upon a precise question." *Delta Queen Steamboat Co.*, supra, 889 F.2d at 602; *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union,* 831 F.2d 72, 75(5th Cir. 1987). In going outside the contract's language, an arbitrator "can

look to implied terms as well as the parties' practice, usage, and custom." *BNSF Ry. Co.. v. Brotherhood of Maintenance of Way Employees*, 550 F.3d 418, 424. However, an arbitrator's interpretation of a contract may not be "wholly baseless and completely without reason." *Id.* at 424. An arbitrator will "exceed the scope of its jurisdiction if [he] ignores an explicit term in a CBA" (*id.* at 425) and "arbitral action contrary to express contractual provisions will not be respected" (*Delta Queen Steamboat Co.*, supra, 889 F.2d at 604). Similarly, courts will set aside an award that "imposes additional requirements that are not expressly provided in the agreement". *Appalachian Reg'l Healthcare, Inc. v. United Steelworkers of Am.,* supra, 245 F.3d at 604. "[W]here the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end. " *Delta Queen Steamboat Co.*, supra, 889 F.2d at 602.

In this case Arbitrator Nicolau violated these well-settled restrictions on his authority.

- Requiring irrevocable elections in advance of any offer of a position conflicted with the terms of the Flow-Through Agreement that pilots did not move to American until there was a position in a new hire class, it was offered to and accepted by the Eagle pilot.
- Requiring irrevocable elections from only half of the Eagle pilots with American seniority (only 286 out of 527) was arbitrary and irrational; if the agreement justified requiring an election for 286 of the pilots, why not for all 527, or also for the additional 824 pilots who had no

American seniority but would get flow-up rights under Nicolau's decision?

- Allowing the 102 TWA furloughed pilots hired in violation of the Flow-Through Agreement to be recalled pursuant to the American/APA contract ahead of all but 35 of the pilots who were denied employment in violation of the Flow-Through-Agreement made the TWA pilots rights under the American/APA contract superior to the Eagle pilots rights under the Flow-Through Agreement. This conflicts with the provisions in the Flow-Through Agreement that give its terms priority when in conflict with the parties' other contracts.
- Requiring flow-up of the remaining pilots with American seniority to be on the basis of American seniority number conflicts with how flow-up is done under the terms of the Flow-Through Agreement. Flow-up under the Flow-Through Agreement required (Paragraph III.A) one out of two new hire positions be offered Eagle pilots on the basis of Eagle seniority, except that (Paragraph III.D) Eagle pilots who, after qualifying for a new hire class, had been held back because of a training freeze or operational constraint had first priority in new hire positions when the freeze or operational constraint ended.[20]

[20] As discussed below, this aspect of Nicolau's decision allowed TWA Staplees to jump ahead of Eagle pilots, contrary to LaRocco's previous ruling that the Staplees were to be treated as "new hire" pilots for purposes of the Flow-Through Agreement.

- Granting new flow-up rights for 824 pilots who did not have American seniority numbers, including Eagle Rights Pilots who had previously elected *not* to flow-up, is a completely new agreement replacing the now-expired Flow-Through Agreement. Directing the parties to negotiate the terms for this flow-up demonstrates that Nicolau was not interpreting an existing contract, but directing the parties to negotiate a new one based on his sense of industrial justice.

For any one of these reasons, Nicolau's remedy award went beyond his authority and outside his jurisdiction.

In addition, Nicolau developed his award from off-the-record evidence and discussion, including discussions involving the parties' settlement meeting that occurred the night before the March 30 hearing. This violated fundamental rights of due process. For this reason as well, the District Court's decision should be reversed.

1. Nicolau's Requirement For An "Irrevocable Election" For Only Part Of The Pilots Entitled To Flow-Up Is Both Arbitrary And Contrary To the Terms Of The Flow-Through Agreement That Required An Election To Flow-Up Only When A Position At American Was Available, Offered And Accepted.

Nicolau required the 286 pilots in the first group to make an irrevocable election by May 24, 2010 whether or not to flow-up to American. The remaining 241 pilots also with American seniority numbers (the third group) were not required to make such an election.

Other than for the 35 pilots who were to be put in training classes immediately, the remaining 251 pilots in this first group had to make this election

before any job was available at American. It was potentially years before a job would become available. They were told after Nicolau's decision that flow-up for these pilots would not start until 2012. Accordingly, these pilots would have to gamble that, when a job at American eventually opened up 18 months or more later, there would be no personal or professional barriers to accepting it. They would have to gamble that, years down the road, their personal financial situation would permit them to transfer to American[21] or that family lifestyle concerns would permit the disruptions that moving to American could entail.[22] As an "irrevocable" election, the pilot would be forced to move to American, even if that move would be a hardship financially or personally, as they would now longer have a right to their position at Eagle.

The Flow-Through Agreement did not require a pilot to elect to flow-through at any time before being offered a position in a new hire class at American. A pilot elects to flow-up to American only after a new hire position is offered to him and the pilot accepts it.

The contract language requiring offer and acceptance of an existing position in a present new hire class is unambiguous. Positions at American are "offered to the CJ Captains" when a new hire class is formed. The positions are offered "in order of their AMR Eagle, Inc. seniority." Paragraph III.A. A pilot prevented

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[21] A pilot flowing-up would move from Captain at Eagle to a First Officer position at American. Typically, this would result in a pay decrease for several years while the pilot moved up at American to better-paying positions.

[22] A senior pilot at Eagle would have a better choice of routes. A new hire at American would have to take the less-desirable routes.

from attending a new hire class because of a training freeze or operational constraint is entitled to the new available new hire position when the training freeze or operation constraint ends. Paragraph III.D.[23] A pilot who "is awarded a new hire position" is issued a seniority number at American at that point. Paragraph III.G. A pilot "who accepts a new hire position" may then bid for vacancies. Paragraph III.H. A pilot "who accepts a new hire position" must still qualify for the initial bid status position the pilot is awarded, a pilot "who accepts a new hire position" must have the appropriate medical certification and "at the time such pilot accepts a position at AA" he must meet American's current criteria for promotion to Captain. Paragraph III.I. Similarly, a pilot "who accepts a new hire position" at American may be "withheld from such position for operational reasons" for up to six months. Paragraph III.J.

The only circumstance where a pilot must make an election earlier is if the pilot wants to obtain the benefits of being an Eagle Rights Pilot. Paragraph III.F. That election is made at the time the pilot completes IOE for a CJ Captain position or at the time the pilot can demonstrate hardship. *Ibid.* In that single case, the pilot may "elect to forfeit the opportunity to secure a position on the AA Pilots Seniority List" and "will not be eligible for a future new hire position" at American. *Ibid.* A pilot electing Eagle Rights status is thereafter protected

[23] The held-back pilot still gets an American seniority number based on the new hire class the pilot qualified for. Paragraph III.B. That seniority number later governs the order in with Eagle pilots get priority for new classes when their hold-backs end. Paragraph III.D.

against displacement in any flow-down of pilots from American. Paragraph IV.B(1); Paragraph IV.D.

Nicolau himself recognized that the Flow-Through Agreement did not require a pilot to accept a flow-up position at American when it was offered. USCA5 654. As to the pilots with American seniority numbers, he also held that their prior election to flow-up was not an irrevocable obligation either. USCA5 654-655.

Nicolau's justification for imposing a new requirement—outside of the contract—was his perception that the Agreement had expired and "finality, in my judgment, is to the interest of all." USCA5 656. Nicolau identifies nothing in the Agreement itself that requires any election in advance of the offer of a new hire position. The fact that the Agreement had expired has no logical connection to a new requirement of an irrevocable election. Nicolau does not rely on any bargaining history, past practice or industrial custom in imposing an irrevocable election requirement.

Additionally, Arbitrator Bloch had already decided that the Eagle Captains with American seniority would continue to have rights under the Flow-Through Agreement. His prior Award provided (USCA5 734) (emphasis supplied):

> The effect of the expiration of Supp. W in May 2008 on Eagle pilots' employment opportunities is as follows: The *right to flow-up is to be retained* by Eagle CJ Captains who, prior to May 1, 2008, completed IOE and received AA seniority number.

Under Bloch's Award, the provisions of the Flow-Through Agreement continued to govern the rights of the Eagle pilots with American seniority numbers, as this is the flow-up right they "retained." Imposing a new "irrevocable election" requirement that is not part of the Agreement added new conditions on the rights Bloch declared the pilots had and modified the agreement that governed those rights.

The district court held that Bloch's ruling did not prevent another arbitrator from placing limits on the rights Bloch had declared because Bloch did not address the timing of the pilots' decisions to exercise their flow-up rights or the irrevocability of the decisions. USCA5 806. The district court stated that Nicolau "did not take away any rights the Eagle pilots had under Bloch's decision." USCA5 806.

In placing new conditions on the exercise of flow-up rights, Nicolau changed the rights the pilots had under Bloch's decision to continue to flow-up under the terms of the Flow-Through Agreement. The Flow-Through Agreement did not require an election to flow-up until a position was offered the pilot that the pilot could accept. Since the Agreement did not require a pilot to flow-up until an actual new hire position was available, offered and accepted, Nicolau's decision to require a pre-offer irrevocable election—years in advance of any offer or available position—was a material change in the Agreement. It took away the right of Eagle pilots to make the flow-up decision at the time a position was offered and in light of their financial and personal situation that existed at that specific time.

In addition, Nicolau did not impose the irrevocable election requirement on all the pilots. He only imposed this requirement on the first group of 286 pilots. The next 241 pilots, also with American seniority numbers, were not required to make any irrevocable election. The additional 824 pilots without American seniority numbers—but who could not flow-up to American under Nicolaus "Son of Letter 3" terms—did not have to make an irrevocable election either.

In fact, under Nicolau's decision, Eagle Rights Pilots, *who had made an election not to flow-up* in order to gain the protection against displacement in a flow-down, were now relieved of the consequences of that election. Nicolau put the Eagle Rights Pilots in with the other pilots who could flow-up to American under his Son of Letter 3 standards.

In sum, this requirement is not grounded in the Agreement or derived from its terms. It imposes new terms contrary to the flow-up terms in the Agreement itself. It imposed this requirement arbitrarily on only the 286 Eagle pilots with the lowest American seniority numbers and not on the other 241 pilots with American seniority numbers or the other pilots who were given the new opportunity to flow-up. In these circumstances, the requirement of a pre-offer irrevocable derives only from Nicolau's personal sense of what as fair or "to the interests of all." This is exactly the kind of arbitration decision that courts set aside as not being derived from the contract but instead from the arbitrator's own sense of industrial justice.

2. Nicolau's Decision To Give Rehiring Preference To TWA Pilots Pursuant To The American/APA Contract Is Contrary To The Specific Provisions Of The Flow-Through Agreement That Made Rights Under the Flow-Through Agreement Superior In The Event Of Conflict.

244 Eagle pilots were unlawfully denied jobs at American. However, after an initial 35 Eagle pilots could flow-up, Nicolau gave the next hiring priority to the 102 pilots laid off on February 28. The pilots laid off on February 28 were not covered by the Flow-Through Agreement. As Nicolau recognized, their employment and recall rights were governed by the separate American/APA contract. Nicolau stated: "before any additional CJ Captains are transferred, recalls to AA shall be administered in accordance with the AA/APA Agreement ..." USCA5 659.

In giving priority to the jobs under the terms of the AA/APA agreement, Nicolau subordinated the remedy rights under the Flow-Through Agreement to the recall rights under the American/APA contract. The Flow-Through Agreement expressly stated the opposite rule. Paragraph I.C of the Flow-Through Agreement provided (USCA5 721) that "in the event of a conflict, the provisions herein shall apply."

The purpose of this provision was to prevent two parties from making agreements that undermined the rights provided for in the four-party Flow-Through Agreement. Arbitrator LaRocco had recognized this fact in his ruling that the TWA "Staplees" were new hire, not laid off, pilots for purposes of Paragraph III.A of the Flow-Through Agreement. USCA5 18 (¶ 12), 639, 641. LaRocco's reasoning rested on the reasonable proposition that the four parties to the Flow-

Through Agreement could not have intended that two of them could make separate agreements that "could effectively nullify" the terms of the Flow-Through Agreement. USCA5 639, 641.

Exactly the same situation is present in this case. American hired the 102 pilots (at least 83 of them who were former TWA pilots) starting a month *after* LaRocco ruled that these were "new hire" pilots and their recall triggered the operation of the rights of the Eagle pilots under the Flow-Through Agreement. These were the new hiring events that resulted in Nicolau's finding on the merits in FLO-0108 that American violated the Flow-Through Agreement by not hiring 244 Eagle pilots for these new hire classes. In hiring and then placing these 102 pilots under the recall priority of the American/APA agreement, American and APA have attempted to make a two-party agreement control over the terms of the four-party Flow-Through Agreement and nullify the flow-up rights of Eagle pilots.

Nicolau's decision rewards American's and APA's effort to nullify rights under the Flow-Through Agreement. In allowing the recall of these 102 pilots to be governed by the American/APA agreement, rather than by the rights of Eagle pilots under the Flow-Through Agreement, Nicolau gave priority to rights under the American/APA contract. This was contrary to the express language of the Flow-Through Agreement that both gave the Eagle pilots the right to the jobs in the first place and that made the flow-up rights of Eagle pilots superior in the event of a conflict with a two-party contract.

In sum, the Flow-Through Agreement required that these jobs should have been given to the Eagle pilots in the first place. The remedy for that violation

cannot provide for less rights or lower priority for the Eagle pilots. In particular, because the Flow-Through Agreement controls over the parties' separate collective bargaining agreements, Nicolau cannot make the recall rights in the American/APA agreement control over the right to these jobs given the Eagle pilots in the Flow-Through Agreement.

While Nicolau may have felt concern that the plight of the 102 furloughed pilots was not their fault, that concern is entirely extraneous to the provisions of the Flow-Through Agreement. In making the Flow-Through Agreement controlling, the parties necessarily contemplated that the Eagle pilots' rights under the Flow-Through Agreement would trump rights of other pilots under their separate collective bargaining agreements. The parties made the choice to have the Flow-Through Agreement control. Revising this priority is beyond Nicolau's authority to apply the contract as written by the parties. He cannot ignore the priorities the contract establishes in favor of his own sense of fairness.

Moreover, the 102 pilots are not without a remedy. They have a right to bring a grievance under the American/APA contract for violation of the recall rights in that agreement. They can get damages for any lost pay because not recalled in the priority required by the American/APA contract. But their remedy is under that American/APA contract only, not before Nicolau or under the Flow-Through Agreement. Nicolau has no authority to award the former TWA pilots rights superior to those of the Eagle pilots injured by American's failure to hire them in June 2007 and thereafter. It was for these Eagle pilots that Nicolau was to provide a remedy, not for the 102 furloughed pilots.

3. Making Transfer Of The Remaining Pilots With Flow-Up Rights Depend On Relative American Seniority Gave The Former TWA Pilots Priority For New Jobs, Contrary To the One-For-Two And Eagle Pilot Priority Provisions in Paragraphs III.A and III.B Of The Flow-Through Agreement.

Nicolau ordered that the third group of pilots with American seniority numbers (those remaining from the group of 286 and 241 additional pilots) "shall be entitled to enter and re-enter active service at American in AA seniority order" when positions become available at American. USCA5 659. This group of pilots had their flow-up rights protected under Arbitrator Bloch's decision because they held American seniority numbers when the Flow-Through Agreement expired.

The Flow-Through Agreement provides for flow-up in two ways: Under Paragraph III.A, where the Eagle pilots receive one out of two positions in each new hire class on the basis of Eagle seniority. If a pilot qualified under Paragraph III.A, but was held back because of a training freeze or operational constrain, the Eagle pilot still obtained an American seniority number (Paragraph III.B) and, later, when the hold-back ended , the pilot received "priority based on his AA seniority in filling a new hire position in the next new hire class." Paragraph III.D.[24]

Under the Flow-Through Agreement's provisions, therefore, the remaining Eagle pilots were entitled to either one-of-two new hire positions, without regard to American seniority, or to priority ahead of any other new hires. Since the TWA Staplees were to be treated as "new hire" pilots under Arbitrator LaRocco's

[24] This priority based on American seniority was between Eagle pilots held-back from their initial new hire class. Paragraph III.D.

decision, an Eagle pilot would, at the minimum under Paragraph III.A, be hired one-for-one with any TWA pilot in a new hire class. If the Eagle pilot fell under Paragraph III.D, he would receive priority over all other new hires except fellow Eagle pilots to whom Paragraph III.D also applied. [25] In either case, the TWA pilots could not jump ahead of the Eagle pilots even though the TWA pilots had American seniority numbers.

Nicolau's remedy reverses the flow-up process under the Flow-Through Agreement.

First, by mandating that American seniority be the determining factor in transferring, he nullified the operation of Paragraph III.A's "one out of two" rule and LaRocco's determination that the TWA Staplees were "new hire" pilots for purposes of Paragraph III.A. For example, each of the 154 Eagle pilots with the American seniority numbers awarded by LaRocco in FLO-0903 (USCA5 620) would have been entitled to go to American one-for-one with the TWA Staplees, even though these pilots were at the bottom of the American seniority list and below the Staplees.[26] Since each TWA Staplee was a "new hire" pilot, Paragraph

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[25] Since the TWA pilots were not kept from attending a new hire class because of a training freeze or operational reasons at Eagle, they could not be held-back pilots for purposes of priority under Paragraph III.D.

[26] Arbitrator LaRocco's Remedy Award placed these 154 Eagle pilots at the bottom of the list, but made them retroactive to April 30, 2008, so that these pilots would have their flow-through rights vested under Arbitrator Bloch's decision. LaRocco October 20, 2008 Supplement Opinion and Award on Remedy, FLO-0908, at pp. 29, 32. While LaRocco's decisions are not part of the record in this case, they are referred to in the Complaint (USCA5 18) and in the motion papers before the District Court (USCA5 600, 601, 710-711) and are part of the record in the related *Stewart* case (3:10-CV-02275-P) also before Judge Solis. See Exhibits 9 (May 11,

III.A required an Eagle pilot to be offered a slot in a new hire class every time a "new hire" TWA Staplee was offered a slot in that new hire class. American seniority was irrelevant under Paragraph III.A; the only question was if American was hiring into a new hire class and if a TWA "new hire" pilot (or other new hire pilot) was hired into one of the new hire class slots.

By making American seniority controlling, however, the TWA Staplees could move to American without regard to the "one out of two" rule in Paragraph III.A. The TWA pilots could take all new hire positions without letting the Eagle pilots with less American seniority take even the one out of two positions Paragraph III.A promised them.

Second, Nicolau nullified the priority under Paragraph III.D for Eagle pilots held back from new hire classes due to training freezes or operational constrains. These Eagle pilots had first priority for any new hire positions. Because they had priority, any Eagle pilot in this category would go to American ahead of any of the TWA Staplees.

Again, Nicolau reversed this process. Under Nicolau's decision, these Eagle pilots lost their priority and could move to American only if their American seniority was greater than a TWA Staplee. As a result, Eagle pilots with American seniority were held back at Eagle while the TWA Staplees moved up to American

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2007 decision) and 10 (October 20, 2008) to the Declaration of Jeff Vockrodt, filed 12/30/2010, Docket No. 145 in 3:10-CV-02275-P. The Court may, and is requested to, take judicial notice of these documents. *ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 n.2 (5th Cir. 1981). *Kinnett Dairies, Inc. v. Farrow*,580 F.2d 1260, 1277 n. 33 (5th Cir. 1978).

because they had been placed above Eagle pilots on the seniority list. USCA5 788, 797.[27]

4. The New Flow-Through Rights Nicolau Created Were Beyond His Authority To Interpret And Apply The Flow-Through Agreement.

In giving a remedy for 824 pilots without American seniority, Nicolau left any semblance of contract interpretation behind. Instead, he created a new agreement based on his notions of equity and fairness.

First, Nicolau was not interpreting the Flow-Through Agreement or remedying its violation in providing a remedy for the 824 pilots. These pilots did not have flow-through rights that were violated when American hired the TWA pilots. The 244 Eagle pilots with American seniority were the pilots whose rights were violated.

There is nothing in the Flow-Through Agreement that provides for damages for pilots whose rights were not violated. Nothing in the Flow-Through

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[27] The merits decision by Arbitrator LaRocco in FLO-0903 (May 11, 2007) more fully describes how the TWA pilots were added to the American seniority list. In particular, the Staplees were added to the bottom of the American seniority list in effect as of April 10, 2001. LaRocca May 11, 2007 Decision pp. 8, 15-16. When the TWA pilots were added, five Eagle flow-through pilots were above the Staplees and 15 Eagle flow-through pilots were listed in the midst of the Staplees. LaRocca May 11, 2007 Decision p. 15. In his remedy decision, Arbitrator LaRocco described the state of the list respecting Eagle pilots: "As of April 2008, 388 AE flow-through pilots held AA seniority numbers between 8416 and 11876. These AE flow through pilots are interspersed throughout this range with some below the large block of former TWA pilots integrated into the AA seniority list near the bottom of the list." LaRocco October 20, 2008 Decision p. 5. As noted above, the 154 American seniority numbers LaRocco awarded Eagle pilots were thereafter put at the bottom of this seniority list, below the TWA Staplees.

Agreement, for instance, provides any right for Eagle pilots to move up at Eagle when a CJ Captain flows-up to American. If there is such a right, it can only be contained in the separate collective bargaining agreement between Eagle and ALPA, not in the Flow-Through Agreement.

Second, Nicolau's instruction to the parties "to enter into a preferential hiring agreement" (USCA5 663) is clear statement that he was not interpreting an existing contract or drawing the essence of his decision from an existing contract. He is telling the parties to negotiate a new agreement with new terms, such as a limit of 20 flow-ups to American in any month, which he believes are fair or appropriate. That is not contract interpretation; it is contract formation. USCA 660.

Third, Nicolau ordered Eagle Rights Pilots included in this new flow-up agreement. Eagle Rights Pilots, however, had given up the fight to flow to American in exchange for protection from being displaced by an American pilot flowing down in a furlough. The Flow-Through Agreement expressly provided that Eagle Rights Pilots elected "to forfeit the opportunity to secure a position" at American and "will not be eligible for a future new hire position at [American]". Paragraph III.F.

C. THE OFF-THE-RECORD PROCEDURE AT THE MARCH 30 HEARING VIOLATED APPELLANTS' RIGHTS TO DUE PROCESS.

As stated above, this Court has recognized that an arbitration award under the RLA may be reviewed for lack of due process. *Ballew v. Continental Airlines, Inc.*, supra, 668 F.3d at 783 fn. 3. The fundamental requirements of due process

are "adequate notice, a hearing on the evidence and an impartial decision by the arbitrator." *Int'l Bhd. Of Elec. Workers v. CSX Transp. Inc.*, 446 F.3d 714, 720 (7th Cir. 2006). This case presents a serious violation of due process. Nicolau's decision was a product of off-the-record discussions that undermined the impartiality of his judgment.

Arbitrator Nicolau decision acknowledges that he had off-the-record discussions on the remedy. USCA5 653. The March 30 transcript confirms that fact. TR p. 363:19-21; TR pp. 364-365; TR p. 365:21 – p. 366:1. Since there was no discovery in the District Court, what really happened off-the-record is presently unknown to Appellants, although they raised the issue of his sub rosa hearing with the District Court (USCA5 712) and the fact that Nicolau's award contained the "irrevocable election" requirement that had been part of earlier settlement proposals. USCA5 711, 716.

This off-the-record process deprived Appellants and the other pilots of "a hearing on the evidence and an impartial decision by the arbitrator." *Int'l Bhd. Of Elec. Workers v. CSX Transp. Inc.*, supra, 446 F.3d at 720. It calls into question whether Nicolau was exercising his own independent judgment or simply putting into the form of an arbitration award the parties' agreements.

Fundamental to arbitration and the deference given arbitration by the courts is the principal that the parties have bargained for the arbitrator's judgment. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the

facts and of the meaning of the contract that they have agreed to accept."). That principal is eviscerated if an arbitrator's award is not based on his own honest judgment but is, instead, based on off-the-record evidence or information as to how the parties secretly want him to rule. See *Totem Marine Tug & Barge, Inc. v. North American Towing*, 607 F.2d 649, 652-653 (5th Cir. 1979) (decision vacated where arbitrator received *ex parte* information concerning remedy).

There is also every reason to believe that the parties desired Arbitrator Nicolau to put their desired settlement in the form of a neutral arbitration award that they could shelter under. Any direct settlement would be subject to court review under the standards governing the duty of fair representation ("DFR"). Nicolau's direction that the parties were to enter into a new contract suggests that Nicolau already knew that that the parties were agreeable to this new contract if they could get the other issues resolved in the way Nicolau did.

If the unions had violated their DFR in settling the case, Appellants could have brought an action in court directly as a "hybrid" DFR/breach of contract case. E.g., *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 328-29 (1969); *Brock v. Republic Airlines, Inc.*, 776 F.2d 523, 525 (5th Cir. 1985). Once a DFR breach is shown, any arbitration result would be irrelevant. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976):

> But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been dishonest, in bad faith, or discriminatory; for in that event error and injustice of the grossest sort would multiply. * * * Congress has put its blessing on private dispute settlement arrangements provided in collective

> agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity.

Airline seniority issues have frequently resulted in DFR lawsuits where a union has favored one group of pilots over another or otherwise acted in bad faith or arbitrarily. *Bernard v. Air Line Pilots Assn.*, 873 F.2d 213, 216-217 (9th Cir. 1989). See also *Steffens v. Brotherhood of Ry. Employees*, 797 F.2d 442, 445 (7th Cir. 1986) (allegations "the union and employer had colluded to deprive plaintiffs of their rights under the collective bargaining agreement. . . . This is enough to state a claim for a hybrid duty of fair representation suit.").

A settlement along the lines of Nicolau's decision would have supported a hybrid claim arising from arbitrary actions and apparent favoritism of the former TWA pilots. Requiring only some of the Eagle pilots to make irrevocable elections and not others is arbitrary. The group this requirement was imposed on was the group senior to the currently active TWA pilots. USCA5 655. It would be a reasonable inference that the irrevocable election requirement—particularly when coupled with the misleading information that flow-ups would not occur until 2012—was designed to cull out more senior Eagle pilots so the TWA pilots could move up in seniority. The furloughed TWA pilots were favored by requiring their reinstatement before the majority of the Eagle pilots that were discriminated against could move to American. The flow-up process for the remaining Eagle pilots with American seniority changed from a "one-of-two" flow-up under Paragraph III.A, or priority flow-up under Paragraph III.D, to flow-up based entirely on overall American seniority, a change that again favored the TWA

pilots. ALPA, the union representing the Eagle pilots, could hardly agree to favor the TWA pilots represented by the APA without exposing itself to liability to the pilots ALPA represented.

Additionally, this change gave a benefit for the other 824 Eagle pilots ALPA represented that lost flow-up opportunities when the Flow-Through Agreement expired. The flow-up preference for TWA pilots would be irrelevant for the 824 pilot group, since these 824 pilots had no flow-up rights at all. ALPA could see it in its interest to get new benefits for 824 voting union members even at the expense of a lesser number of more senior pilots with flow-up rights who would be leaving ALPA anyway to move to American and representation by APA.

At this point, Appellants do not know what took place off the record. Ascertaining these facts will require discovery outside the arbitration record itself. *Sanco Steamship Co. v. Cook Industries,* 495 F.2d 1260, 1265 (2d Cir. 1973) (remanding case for discovery on issue of bias of arbitrator).

CONCLUSION

The judgment of the District Court should be reversed. The District Court should be directed to vacate and set aside Arbitrator Nicolau's Award of April 9, 2010 and the case should be remanded for further proceedings.

Dated: April 25, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of the foregoing APPELLANTS' BRIEF has been made on counsel listed below by electronic copy through the Court's CM/ECF Electronic Case Filing System at the email addresses listed opposite their names on this 25th day of April 2014.

Dated: April 25, 2014.

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CERTIFICATION PURSUANT TO RULE 32(A)(7)

I certify that, pursuant to Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure, the Appellants' Brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 13,846 words.

Dated: April 25, 2014.

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