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' REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

1. Appellees AIR LINE PILOTS ASSOCIATION INTERNATIONAL ("ALPA"), AMERICAN AIRLINES, INC. ("AA" or "American") and AMERICAN EAGLE AIRLINES, INC. ("AEA" or "Eagle")[1] place undue reliance on generalizations arising from the deferential standard of review applicable to Railway Labor Act ("RLA") arbitration decisions.

The issue in this case is not the general rule of deference, but whether on the facts of this case Arbitrator Nicolau's decision "draw[s] its essence" from and is "grounded in" the parties' contract (*Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters*, 391 F.3d 613, 617 (5th Cir. 2004)) or if he "dispense[d] his own brand of industrial justice." *BNSF Ry. Co. v. Bhd. of Maint. of Way Emps.*, 550 F.3d 418, 424 (5th Cir. 2008). These issues go to the arbitrator's jurisdiction. The deferential standard of review does not apply when an arbitrator exceeds his jurisdiction. *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989).

Nicolau was charged with providing a remedy for the Eagle pilots unlawfully denied 244 jobs at American. Instead, he did the opposite. He failed to give the Eagle pilots a meaningful remedy for the violation of their rights. He took away the Eagle pilots rights established in the Flow-Through Agreement and in

[1] ALPA, American and Eagle have filed a joint brief in opposition. APA has filed a separate letter brief stating its non-opposition to Appellants' efforts to have Arbitrator Nicolau's decision vacated. For purposes of this Reply Brief, ALPA, American and Eagle are referred to as "Appellees" and APA is referred to as APA.

prior arbitrations. He created new flow-up procedures that benefitted non-Eagle pilots, particularly the TWA Staplees who, until Nicolau's decision, could flow-up to American only after the Eagle pilots had done so. In summary:

- He awarded only 35 jobs to the Eagle pilots—14% of the number of jobs unlawfully denied.
- He took away the Eagle pilots vested flow-up seniority—established by Arbitrator Bloch—by requiring those with the greatest American seniority (286 of 527 pilots) to make an irrevocable election to go to American years before any job at American would be available for them in order to keep their vested American seniority rights. The terms of the Flow-Through Agreement required a pilot to elect acceptance of a position only when there was an actual position for the Eagle pilot to transfer into.
- He subordinated the flow-up rights of the Eagle pilots under the Flow-Through Agreement to the rights of laid-off American pilots under the American/APA contract. The express provisions of the Flow-Through Agreement made the Flow-Through Agreement prevail in the event of a conflict with the American/APA contract.
- He further subordinated the rights of Eagle pilots by taking away their right to flow-up under the priority or one-for-two provisions in the Flow-Through Agreement (Paragraphs III.A and D) and substituted flow-up by American seniority number. This allowed the TWA Staplees to jump ahead of the Eagle pilots when jobs opened up. In

this one stroke, Nicolau completely set aside Arbitrator LaRocco's prior decision that held that the TWA Staplees were "new hire" pilots for purposes of the Flow-Through Agreement and were not entitled to be recalled to American on the basis of American seniority ahead of the Eagle pilots.

While Appellees argue that Nicolau had to make hard choices in a complex case and also gave benefits to the Eagle pilots once they eventually got to American (see Appellees' Brf. pp. 11-13, 15-16), nothing in the rule of deference allows an arbitrator to take away contract rights in exchange for some other remedial benefits or to rewrite the contract simply because the issues are difficult, hard or complex. The arbitrator's duty is to follow the contract, not rewrite it.

2. Contrary to Appellee's argument (Appellees' Brf. p. 17), the due process violation was raised before the district court. Appellants argued that the March 30 hearing did not take evidence and "was conducted sub rosa in Washington D.C." USCA5 713.

The Appellees err in asserting that the March 30 hearing was just a permissible off-the-record discussion. Appellees' Brf. pp. 18-19. The due process issue here is whether Nicolas could rely on off-the-record *evidence* in formulating his decision. Off-the-record evidence violates due process (*Kinoy v. Mitchell,* 67 F.R.D. 1, 15 (S.D.N.Y. 1975)), undermines judicial review to ensure that an arbitrator's award has some basis in the facts (see *NF&M Corp. v. United Steelworkers of America*, 524 F.2d 756, 768 (3rd Cir. 1975)) and subverts the arbitration process where it appears that Nicolau issued a decision that was simply

the parties' sub rosa settlement agreement disguised as an arbitration award. Appellants' Brf. pp. 49-52.

REPLY ARGUMENT

A. CONTRARY TO APPELLEES' ARGUMENT, NICOLAU'S REMEDY DOES NOT DRAW ITS ESSENCE FROM THE FLOW-THROUGH AGREEMENT, BUT IMPOSES NEW TERMS AND REQUIREMENTS IN CONFLICT WITH THE PROVISIONS OF THE AGREEMENT.

Appellees place too much reliance on the deferential scope of review of an arbitrator's remedial order. Before an arbitration award is entitled to deferential review, the court must determine if the award "draw[s] its essence" from and is "grounded in" the parties' contract (*Cont'l Airlines, Inc. v. Int'l Bhd. of Teamsters*, 391 F.3d 613, 617 (5th Cir. 2004)) or if the arbitrator instead "dispense[d] his own brand of industrial justice." *BNSF Ry. Co. v. Bhd. of Maint. of Way Emps.*, 550 F.3d 418, 424 (5th Cir. 2008). Whether an arbitrator has exceeded his authority is an issue for judicial resolution. *Piggly Wiggly Operator's Warehouse, Inc. v. Piggly Wiggly Operator's Warehouse Independent Truck Drivers' Union Local No. 1*, 611 F.2d 580, 583 (5th Cir. 1980). A Court will set aside an arbitration decision that adds new matters to the agreement; adding to the parties' contract is beyond the arbitrator's authority. *Torrington Co. v. Metal Products Workers, Local 1645*, 362 F.2d 677, 680, 681-682 (2nd Cir. 1966).

Contrary to Appellees' argument (Appellees' Brf. pp. 9-11), Nicolau's remedy is not derived from either the text or purposes of the Flow-Through Agreement. Instead, his remedy adds to, changes and conflicts with the Flow-

Through Agreement and the rights Eagle pilots had under the Flow-Through Agreement and prior arbitration decisions. Nicolau's award was therefore beyond his authority.

As Appellants show in their opening brief (pp. 31-48), Nicolau's remedy conflicts with the terms of the Flow-Through Agreement, creates new and arbitrary distinctions between the Eagle pilots with American seniority numbers, puts the TWA Staplees ahead of the Eagle pilots' right to flow-up to American and creates new flow-up rights for Eagle pilots without American seniority numbers. By restricting,[2] delaying[3] and denying[4] Eagle pilots' ability to flow-up to American, Nicolau's remedy frustrates the purpose of the Flow-Through Agreement to enable Eagle pilots to flow-up to American.

This is not a case of "unscrambling" an egg. The alternative hypotheticals Appellees offer (Appellees' Brf. p. 12) are simply straw men. The supposed difficulties are irrelevant. Whatever the difficulties Nicolau faced, those difficulties or complications do not justify him in rewriting the contract or replacing the terms of the Flow-Through Agreement with new and different terms.

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[2] Requiring only 286 of the 527 pilots with American seniority numbers, and none of the remaining 824 pilots who obtained new flow-up rights, to make an irrevocable election whether or not to flow-up before any job at American existed for them.

[3] Putting the 102 laid-off pilots ahead of the Eagle pilots and basing future flow-up on American seniority rather than the priority (Paragraph III.D) or one-for-two (Paragraph III.A) provisions of the Flow-Through Agreement.

[4] Pilots who declined to make the required irrevocable election lost the American seniority number they had obtained under Paragraph III.B and in which they were vested under Arbitrator Bloch's prior award.

Appellees' argument seeks to imply that Nicolau had to make hard choices and that the court must respect his choices whatever they were. But that is not the issue. The fact that Nicolau might have had to make choices, or even difficult oned, does not mean—logically or legally—that *any* choice he made is therefore justified. An arbitrator does not have *carte blanche* for any decision which might be reached. *International Assoc. of Machinists v. Hayes Corp*., 296 F.2d 238, 243 (5th Cir. 1961) aff'd on rehearing 316 F.2d 90 (5th Cir. 1963). "The arbitrator is not a free agent dispensing his own brand of industrial justice. And if the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts." *Id.*, 296 F.2d at 243.

Rather, the question is whether the choices Nicolau made were consistent with the terms of the Flow-Through Agreement and its purposes. While Appellees argue that Nicolau's choices were consistent with the Flow-Through Agreement, they were not. See Appellants' Brf. pp. 31-48. Nothing in Appellees' arguments in their brief to this Court shows otherwise.

1. Requiring an irrevocable election before a job exists conflicts with the Flow-Through Agreement's provisions that require an offer of an existing job before the Eagle pilot would need to accept the offer.

Appellees argue Nicolau's imposition of an "irrevocable election" on the first 286 Eagle pilots gave them a "second opportunity" to decide to go to American. Appellees' Brf. p. 13. Appellees argue that nothing in the Flow-Through Agreement prohibits this remedy. *Ibid.* Appellees argue that Nicolau

"could have bound the Eagle CJ Captains to their original decision on whether to transfer to American and not given them a second opportunity to make that decision." *Ibid.*

Nothing in the Flow-Through Agreement requires any form of election by Eagle pilots to go to American. Rather, the Flow-Through Agreement requires an offer of a position at American followed by an acceptance by the Eagle pilot. Paragraph III.G, H, I. Until that offer is made, there is no "first" or "second" or any election. Nicolau's requirement of an irrevocable election before any job at American exists is an entirely new requirement, entirely different from the offer/acceptance procedure provided for in the Flow-Through Agreement.[5]

Under the Flow-Through Agreement, Eagle pilots had no obligation to elect to transfer until a new hire class was offered and could be taken. That was the only point at which a pilot had to decide whether to move to American. That was the only point at which a move from Eagle to American could actually take place. Until there was a position available for the pilot to take, an Eagle pilot could not be "awarded a new hire position at AA" (Paragraph III.G), could not "accept[] a new hire position," could not bid for a vacancy at American and could not "fulfill a one year lock-in in the bid status which is awarded or assigned" (Paragraph III.H).

[5] The only election referred to in the Flow-Through Agreement is the opportunity for an Eagle pilot to elect status as an "Eagle Rights" pilot and consequent protection from displacement in a flow-down of pilots laid off from American. Paragraph III.F. Nicolau's "irrevocable election" requirement has nothing to do with Eagle Rights status.

Paragraph III.I makes the requirement of an existing position that can be accepted for a transfer even clearer. Paragraph III.I requires that an Eagle pilot who "accepts a new hire position at AA must qualify for the initial bid status position which such pilot is awarded or assigned at AA," including the physical requirements and an FAA First Class Medical Certificate, cannot be on disability or on a long term sick list and "at the time such pilot accepts a position at AA, he must meet AA's then current criteria for future promotion to Captain at AA." Paragraph III.I. None of these provisions would have any meaning if an Eagle pilot was required to accept a transfer to American or was bound to go to American before a position was available for him/her. Without an existing position to take, there would be no way to know if the Eagle pilot qualified for the "initial bid status position," if he/she met the necessary physical medical certification requirements, was not on disability or long-term sick leave or if he/she met Americans "then current criteria" for promotion to Captain.[6]

Appellees' "second opportunity" argument is a red herring. The Eagle pilots never had a "first opportunity" to move to American since they had never previously been offered any American job to which they could transfer. The Eagle pilots' only had American seniority numbers under Paragraph III.B of the Flow-Through Agreement, not actual jobs. These seniority numbers were obtained precisely because the pilots could not take a position in an existing training class

[6] Eagle pilots transferring to American typically begin working in First Officer positions on American jets and would ultimately move up to Captain as they gain experience and qualifications.

because they were subject to an 18 month to two-year training freeze at Eagle (Paragraph III.E). Instead, they received an American seniority number in place of a position in the new hire class. They then had to wait until the training freeze expired. At that point, they could exercise priority "based on . . . AA seniority" for new hire classes when American was hiring. Paragraph III.D.

It is undisputed that the first point at which the held-back Eagle pilots with American seniority numbers could exercise American seniority for new hire classes arose in June 2007 when American again started new hire classes. The Eagle pilots, however, did not get their first opportunity to take a new hire job at American at that point. Instead, American by-passed the Eagle pilots and hired TWA Staplees for the new hire classes, resulting in the violation of the Flow-Through Agreement that Nicolau was to remedy.

Appellees assert that Nicolau "could have bound" the pilots to their original decision to transfer to American (Appellees' Brf. p. 13). The Flow-Through Agreement did not require Eagle Pilots to move to American until a current position at American was offered to and accepted by the Eagle pilot. Appellants' Brf. pp. 36-38. Under the Flow-Through Agreement, there is only one opportunity to move to American, and that opportunity arises when a position is available to be taken. No Eagle pilot could even arguably be bound to move to American until a real position was offered to the pilot and he/she accepted that offer. Nicolau himself rejected the argument that pilots were "bound" by their previous statement of willingness to go to American at the time they initially

obtained American seniority numbers but had been held back because of Eagle training freezes. USCA5 654-655.

Since the decision or election required by the Flow-Through Agreement is at the time a position at American is available to be taken, requiring any earlier "pre-position" and "irrevocable" election is contrary the Flow-Through Agreement's provisions. It imposes an entirely new requirement on the Eagle pilots that the terms of the Flow-Through Agreement did not require. For the same reason, since the ability to transfer to American is determined when the position is accepted and the Eagle pilot can meet the physical and other criteria required for the position under Paragraph III.I, the requirement of an "irrevocable election" in advance of a job does not advance any goal of the Flow-Through Agreement. No matter what prior decision to go to American the Eagle pilot made or when he/she made it, the actual transfer to American will still depend on each pilot's ability to qualify for the position once a position becomes available to be accepted, the pilot's current medical status at that time and American's criteria for promotion to Captain at the time the position opens up.

In these circumstances, requiring an advance "irrevocable election" serves only one discernable purpose: To cull out Eagle pilots with high American seniority numbers from the pool who were entitled to flow-up to American. In so doing, the primary beneficiaries of this culling-out are the TWA Staplees; with fewer Eagle pilots with high seniority entitled to new hire positions at American, the opportunity for TWA Staplees to move to American increases. However, it

was the Eagle pilots, not the TWA Staplees, who were the intended beneficiaries of the Flow-Through Agreement.

Appellees argue that Nicolau's requirement of an irrevocable election was justified by interests of finality. Appellees' Brf. p. 14. Any issue of "finality" derives entirely from notions of equity or fairness that are extrinsic to the Flow-Through Agreement. A need for finality is nothing more than Nicolau's own sense of industrial justice. Neither Nicolau nor Appellees explain how requiring an irrevocable election for only 286 out of 527 Eagle pilots with American seniority numbers, and for none of the 824 Eagle pilots for whom Nicolau created new flow-up rights, contributes to any issue of finality. There is no finality where only 21% of the Eagle pilots who would have flow-up rights[7] had to make this irrevocable election and the remaining 79% did not. This is simply arbitrary line-drawing.

2. Giving laid-off American pilots priority in recalls based on the APA-American Contract conflicts with the requirement of the Flow-Through Agreement that it controls in the event of conflict.

Appellees assert that Nicolau's decision to give rehiring priority to the 102 laid-off American pilots draws its essence from the Flow-Through Agreement because the Flow-Through Agreement does not prohibit this type of remedy. Appellees' Brf. p. 14. Appellees note that these layoffs occurred after the

[7] That is, only 286 of 1351 Eagle pilots: The 1351 is based on 527 Eagle pilots with American Seniority (including the 286 who had to make the irrevocable election) plus the 824 pilots who gained flow-up rights under Nicolau's decision.

proceedings were underway (*ibid*.) and therefore presented issues of "competing equities" for Nicolau to resolve (*id.* at p. 15).

Appellees' fundamental error is that the recall issues for these 102 pilots arose under their separate collective bargaining agreement between APA and American and not under the Flow-Through Agreement. Rights derived from the AA/APA contract do not derive or draw any essence from the Flow-Through Agreement. In directing that recalls of the 102 laid-off pilots "shall be administered in accordance with the AA/APA Agreement" (USCA5 659), Nicolau was not applying the Flow-Through Agreement at all but applying the AA/APA agreement. In directing that these recalls proceed under the AA/APA agreement, Nicolau ignored the express requirement in Paragraph I.C of the Flow-Through Agreement (USCA5 721) that "in the event of a conflict, the provisions herein shall apply."

Appellants opening brief (Appellants' Brf. pp. 41-42) addresses the key issue that a two-party contract was subordinate to the rights under the Flow-Through Agreement. Appellees ignore this issue entirely. Rather than attempting to explain how giving preference to rights under the AA/APA contract was consistent with a remedy for a violation of the Flow-Through Agreement, Appellees simply involve general notions of "competing equities" and not any provision of the Flow-Through Agreement itself. Appellees' Brf. p. 15.

However, for purposes of the Flow-Through Agreement, there were no competing equities. The layoff and recall rights of the 102 pilots was governed by the AA/APA agreement and that agreement—whatever it provided—was

subordinate to the rights of Eagle pilots under the Flow-Through Agreement. The parties had already balanced the "competing equities" by making Eagle pilots rights under the Flow-Through Agreement superior to pilot rights the other collective bargaining agreements. Nicolau was not free to rebalance these "equities" and give preference to pilot rights under the AA/APA contract. As far as the Flow-Through Agreement is concerned, the AA/APA agreement is irrelevant to the rights of the Eagle pilots or any remedy for violation of their flow-through rights.

To be sure, in initially hiring TWA pilots in preference to Eagle pilots with flow-up rights, and in then laying off these pilots, American created a pickle for itself and a problem for the pilots it laid off. But, as Appellants argued in their opening brief (at p. 43), the remedy for the laid-off pilots was under the AA/APA contract, not under the Flow-Through Agreement. The same would be true as to any American pilots laid off because Eagle pilots were transferred to American as part of a remedy for American's violation of the Flow-Through Agreement. American, if its inability to recall these pilots because of the flow-up of Eagle pilots violated the pilots' rights under the AA/APA contract, could pay them damages if these pilots were unjustly left unemployed. As American caused this problem by its violation of the Eagle pilots' flow-up rights, American is no position to object to having to compensate other pilots left unemployed as a result of American's own actions. Appellees entirely fail to address this issue. See Appellees' Brf. pp. 14-15.

3. Appellees offer no justification for Nicolau's decision to make American seniority, rather than the terms of the Flow-Through Agreement, govern the transfer of the remaining Eagle pilots with vested flow-through rights.

In their opening brief (Appellants' Brf. pp. 44-47), Appellants argue that Nicolau exceeded his jurisdiction by directing that the remaining Eagle pilots with American seniority numbers (after the first 35 were transferred to American) "shall be entitled to enter and re-enter active service at American in AA seniority order" when positions become available at American. USCA5 659. As Appellants point out, Nicolau's use of American seniority was contrary to the terms of the Flow-Through Agreement that gave held-back Eagle pilots priority in new hire classes (Paragraph III.D) and, for other Eagle pilots, the right to be hired one-for-two in new hire classes (Paragraph III.A) even if they were interspersed with or below the TWA Staplees on the American seniority list.

Appellees make no response at all to this argument. They present no justification for Nicolau's decision to replace the flow-up rights under Paragraph III.A and D with overall American seniority.

4. Nicolau's remedy decision that directly harms the interests of the 527 Eagle pilots with American seniority and flow-up rights cannot be justified by the difficulty of calculating downstream damages or devising a remedy for the 824 Eagle pilots without American seniority or flow-up rights.

Appellees argue that Nicolau's award of new flow-up rights to the 824 Eagle Captains without American seniority was an appropriate remedy for the complicated "downstream damages" issue and did not affect Appellants' rights in

any event. Appellees' Brf. pp. 15-16. At the same time, however, Appellees cite Nicolau's resolution of the downstream damages issue as supporting Appellees' contention that Nicolau's award as a whole was a resolution of complex issues and a comprehensive, thoughtful, through and detailed remedy to resolve the parties' disputes. Appellees' Brf. p. 11 and pp. 16-17.

As Appellants argue in their opening brief (pp. 47-48), this aspect of Nicolau's decision represents nothing more than imposing a new agreement based on Nicolau's notions of equity and fairness. While Appellees argue that these 824 Eagle pilots were "unquestionably . . . harmed" by the delay in more senior pilots moving to American (Appellees' Brf. p. 15), these pilots' rights were outside the scope of the issues in this case. Nicolau's prior decision (USCA5 618 - USCA5643) concerned a violation of the rights of the 527 Eagle pilots with American seniority and flow-up rights. His conclusion on the merits concerned only those pilots: "American Eagle pilots who hold American Airline seniority numbers were entitled to attend AA training classes beginning in June 2007." USCA5 643. This group of 527 pilots—not the other 824 pilots—was the only group for whom Nicolau was to fashion a remedy. *Ibid.*

Nicolau's decision as to a remedy for the 527 pilots whose rights were the subject of his decision on the merits cannot logically be justified by the difficulties of providing downstream damages for the different group of 824 Eagle pilots without flow-up rights and whose rights, if any, were not a subject of Nicolau's decision on the merits. Even if the issue of downstream damages for these 824 pilots could be appropriately added to the remedy phase of this case, Appellees

cannot logically rely on the difficulty in resolving the downstream damages issues as justifying deference to Nicolau's decision as to the 527 Eagle pilots who were the subject of his decision on the merits.

Appellees' arguments demonstrate the danger of conflating these issues as if they are all part of the same case. Appellees rely on the difficulty of providing a downstream damages remedy for the 824 pilots as a justification for deference to Nicolau's decisions as to the remedy for the 527 pilots that were the pilots covered by the merits decision and for whom a remedy was to be made. Similarly, amalgamating these different pilot groups into one "remedy" heightens the danger of compromising the interests of one group to reach an overall decision.

Compromising the interests of the 527 pilots to favor the 824 pilots is exactly what happened here. The "irrevocable election" requirement does not benefit any of the 286 pilots forced to make that election, but benefits the 824 pilots given new flow-up rights by culling out senior pilots who would be ahead of the 824 pilots in moving to American. Giving recall priority to the 102 laid-off American pilots does not benefit the 527 Eagle pilots denied flow-up rights, but makes giving new flow-up rights to the 824 Eagle pilots more acceptable to the parties, as the new flow-up rights for the 824 pilots will not impact the recall rights of these 102 pilots. Making future jobs depend on American seniority adversely affects the rights of the 527 Eagle pilots with flow-up rights, but benefits the TWA Staplees represented by APA and again makes giving new flow-up rights to 824 Eagle pilots (represented by ALPA) more acceptable. Indeed, it is this very kind of apparent trade-offs that support Appellants' argument that Nicolau's decision

was not an arbitration decision at all, but a disguised settlement agreement. Appellant's Brf. pp. 22, 50-52.

It is easy to see why the two unions would find these outcomes acceptable even if it means sacrificing the interests of the Eagle pilots with American seniority. APA ensures that the pilots it represents, particularly the TWA Staplees, get the priority for American jobs that APA sought unsuccessfully before Arbitrator LaRocco.[8] ALPA gains new flow-up benefits for 824 Eagle pilots it represents that it could not negotiate directly at the time the Flow-Through Agreement expired.

The airlines benefit as well. Eagle retains the services of experienced CJ Captains for a longer period and limits future transfers to no more than 20 pilots a month when jobs open up at American. USCA5 660, 664. American placates the union representing its pilots (APA) and the larger group of TWA Staplees, while harming only a smaller group of Eagle pilots whose transfer to American has already been delayed by years.

Such trade-offs have no place in arbitration. These are matters that are only appropriate for collective bargaining and the forging of new agreements.

[8] LaRocco determined that the TWA Staplees were "new hires" and not laid-off American pilots entitled to recall before the Eagle flow-up pilots. See USCA5 619, 625-627 (discussing LaRocco's decision on this issue).

B. THE INTRODUCTION OF OFF-THE-RECORD EVIDENCE AT THE MARCH 30 HEARING WAS NOT AN OFF-THE-RECORD DISCUSSION BUT THE INTRODUCTION OF CRITICAL OFF-THE-RECORD EVIDENCE GOING TO THE BASIS FOR NICOLAU'S DECISION ON THE REMEDY.

Appellees argue that the off-the-record process at the March 30 hearing was not raised to the district court (Appellees' Brf. pp. 17-18), was a proper off-the-record discussion to which Appellants' union (ALPA) consented (*id.* at pp. 18-20).

First, this issue was raised in the district court. Appellants argued that the March 30 hearing did not take evidence, involved only the parties' lawyers and "was conducted sub rosa in Washington D.C." USCA5 713. Appellants also argued that Nicolau's award contained terms that had previously been proposed in settlement proposals in the related LaRocco arbitration in FLO-0903, including the requirement of an "irrevocable choice" to flow-up. USCA5 711, 716. This presented the due process and "sub rosa" hearing issues sufficiently for the district court to have addressed them—either on the merits or by allowing discovery to determine what had transpired at the March 30 hearing. See *Matter of Fairchild Aircraft Corp*., 6 F.3d 1119, 1128 (5th Cir. 1993) ("the argument must be raised to such a degree that the trial court may rule on it").

Additionally, since this case arises from the granting of a motion to dismiss, this Court is free to consider the additional amplification of the due process issue contained in the Appellants' opening brief in determining if Appellants' due process argument can survive a motion to dismiss. See discussion at Appellants' Brf. pp. 29-31. Appellants sufficiently raised this issue to the district court to permit this Court to consider the amplification of this matter Appellants have

provided. This is particularly appropriate, as Appellants did not obtain a copy of the March 30 transcript until after this appeal was filed. Appellants' Request For Judicial Notice, filed April 25, 2014, p. 2 at ¶ 3, p. 9 at ¶ 2.

Second, the due process issue is not whether off-the-record discussions may be permissible. This is not a case of off-the-record discussions. This is a case where the arbitrator and the parties' lawyers deliberately introduced off-the-record *evidence* that Nicolau thereafter apparently relied upon for his decision. See *Vasha v. Gonzales*, 410 F.3d 863, 873 (6th Cir. 2005) (opinion of Moore, J.) (ALJ's receipt of off-the-record evidence was a violation of due process because it deprived party of neutral judge); *id.* at 877 (opinion of Sutton, J.) (no due process violation where ALJ disclosed the off-the-record evidence on the hearing record). The receipt of off-the-record evidence is a serious violation of due process. *Kinoy v. Mitchell,* 67 F.R.D. 1, 15 (S.D.N.Y. 1975): "Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation." Accord: *In re Matter of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981); *Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) ; *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986). See also *Deep South Broadcasting Co. v. FCC*, 347 F.2d 459, 463-465 (D.C. Cir. 1965) (remanding for open hearing where FCC received off-the-record evidence in reaching its decision).

Appellants' representation by their union (ALPA) is not a sufficient answer to this issue. Unlike the cases cited by Appellees (Appellees' Brf. pp. 19-20), the issue is not a question of notice of the hearing but the receipt of and reliance on off-the-record evidence. Judicial review by the courts, even under the most

deferential of standards, would be undermined if arbitrators could decide cases using off-the-record evidence. There would be no way to determine if any of this evidence actually supported the arbitrator's findings or determinations. Even under deferential standards of review, there must still be a review of the evidence: "if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." *NF&M Corp. v. United Steelworkers of America*, 524 F.2d 756, 768 (3rd Cir. 1975). Accord: *Electronics Corp. v. International Union of Electrical, Radio and Machine Workers, Local 272*,492 F.2d 1255, 1257-1258 (1st Cir. 1974). See also, *International Chemical Workers v. Day & Zimmermann, Inc.*, 791 F.2d 366, 371 fn. 4 (5th Cir. 1986) ("A review of the record reveals that these were not irrational conclusions on the part of the arbitrator.").

This is especially the case here. In this case, Appellants contend that the off-the-record discussions subverted the open arbitration process by having Nicolau issue a decision that was simply the parties' sub rosa settlement agreement disguised as an arbitration award. Appellants' Brf. pp. 49-52. Nicolau himself acknowledge relying on non-record evidence. USCA5 653. He put this issue forward himself, stating (USCA5 653): "While this consultation process was helpful to me in further defining the issues and understanding the competing views and considerations, the Award that follows is my Award; it does not represent the "agreement" of any of the four parties." This is surely a case where Nicolau's

protestations are simply "too much."[9] His spontaneous denial that he was not rubber-stamping the parties' off-the-record agreement carries the undeniable implication that his award is indeed a product of the parties' settlement agreement. The absence of evidence of what actually took place at the arbitration precludes Appellants from have a record that they could use to establish the true facts underlying Nicolau's ruling, the basis for it, or to show that it really was a product of a corrupt design to present a settlement in the guise of an arbitration decision.

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: July 11, 2014.

KATZENBACH LAW OFFICES

By s/ Christopher W. Katzenbach
Christopher W. Katzenbach
Attorneys for Plaintiffs-Appellants GAVIN MACKENZIE and MARK BURNETT

[9] "The lady doth protest too much, me thinks." Shakespeare, *Hamlet*, Act III, scene ii.

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2014, a true and correct copy of the foregoing document was served on counsel listed below via electronic transmission in portable document format (.pdf) through the EM/ECF internet web system for this Court in this Case:

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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' Reply Brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 5,480 words.

Dated: July 11, 2014.

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