No. _____

In The
Supreme Court of the United States

GAVIN MACKENZIE, individually and on behalf of those similarly situated; and MARK BURNETT, individually and on behalf of those similarly situated,

Petitioners,

vs.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL; ALLIED PILOTS ASSOCIATION; AMERICAN AIRLINES, INCORPORATED; and AMERICAN EAGLE AIRLINES, INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a union's role as exclusive bargaining representative result in an implied exception to the standing of transportation employees to challenge the results of arbitration as aggrieved employees under Section 3 First (q) of the Railway Labor Act (45 U.S.C. § 153 First (q))?

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PETITION FOR WRIT OF CERTIORARI

Gavin Mackenzie and Mark Burnett (Petitioners) respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered on December 23, 2014.

OPINIONS BELOW

The Memorandum Decision of the United States Court of Appeals for the Fifth Circuit filed December 23, 2014, is not officially published and is reprinted in the Appendix, App. at 1-8.[1] The Memorandum Decision of the United States District Court for the Northern District of Texas affirming the decision of the arbitrator is not officially published and is reprinted in the Appendix, App. at 9-20. The decision of Arbitrator George Nicolau that was the subject of the action in the District Court is reprinted in the Appendix, App. at 21-43. The Order of the United States Court of Appeals for the Fifth Circuit denying rehearing and rehearing en banc was filed January 26, 2015 and is reprinted in the Appendix, App. at 44-45.

[1] "App." refers to the pages of the Appendix to this Petition.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 23, 2014. Petitioners filed Petitions for Rehearing and Rehearing En Banc on January 6, 2015. On January 26, 2015, the Fifth Circuit denied the Petitions for Rehearing and for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S. Sup. Ct. Rules 13.1 and 13.3.

STATUTES INVOLVED

This case arises under Section 3 of the Railway Labor Act (45 U.S.C. § 153), as made applicable to the airline industry by 45 U.S.C. § 184. The applicable statutory provisions of 45 U.S.C. §§ 153 and 184 are reproduced in the Appendix, App. at 46-54.

STATEMENT OF THE CASE

This case arises under Section 3 of the Railway Labor Act (RLA) governing review of arbitration decisions (45 U.S.C. § 153). This section of the RLA is made applicable to the airline industry by 45 U.S.C. § 184. The district courts have jurisdiction to review arbitration decisions issued under the Railway Labor Act pursuant to Section 3 First (q) (45 U.S.C. § 153 First (q)).

Petitioners, GAVIN MACKENZIE and MARK BURNETT, are Commuter Jet (CJ) captains employed by American Eagle Airlines. Acting *pro se*, they brought this action on behalf of themselves and a class of pilots to set aside an arbitration decision issued April 9, 2010, by Arbitrator George Nicolau that affected their rights and the rights of other Eagle CJ pilots to transfer to jobs at American Airlines. App. at 2, 10.

Petitioners' claims arose under a multi-party agreement between the unions[2] representing pilots at American Airlines (AA or American) and American Eagle Airlines (Eagle) and the two carriers to provide pilots the opportunity to move between the two airlines. App. at 2-3, 10, 56-61.[3] This agreement is known as the "Flow-Through Agreement," "Letter 3" or "Supplement W." App. at 3, 10. ALPA represents the pilots at Eagle and APA represents the pilots at American. App. at 3. The Flow-Through Agreement was signed in May 1997. App. at 61.

The Flow-Through Agreement provides for Commuter Jet (CJ) Captains employed by Eagle to move to positions at American when American hires new pilots (flow-up). App. at 3, 10; see Paragraphs I.A, III.A, III.D (App. at 56, 57-58). It also provided that

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[2] The Allied Pilots Association (APA) and the Airline Pilots Association International (ALPA).

[3] The relevant parts of the Flow-Through Agreement are reprinted in the Appendix, App. at 56-61.

pilots employed at American would be able to move to Eagle if laid off from American (flow-down). App. at 3, 10; see Paragraphs I.B, IV.A, IV.B (App. at 56, 60).

Under the terms of the Flow-Through Agreement, Eagle CJ Captains are given priority in hiring at American for new positions.[4] Paragraphs III.A and III.D; App. at 57-58. An Eagle pilot receives an American seniority number once they are offered a position in an American new hire class even if the pilot is unable to move immediately to American because of operational reasons at Eagle. Paragraph III.B; App. at 57.

Conversely, American pilots can displace Eagle pilots if there are layoffs at American.[5] Paragraphs IV.A and IV.B; App. at 60.

The Flow-Through Agreement has priority if there is a conflict with the other collective bargaining agreements at the airlines. Paragraph I.C; App. at 56-57. It provides for arbitration of disputes and states: "The neutral's decision on any matter within his jurisdiction may be enforced in federal court against

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[4] American has to offer one out of every two new hire positions to an Eagle pilot. Paragraph III.A; App. at 57. If the Eagle pilot cannot take the position at American because of Eagle's operational needs, the pilot receives first priority for new American jobs once those operational needs end. Paragraph III.D; App. at 58.

[5] Except that "Eagle Rights" pilots – who waive their right to flow-up to American – cannot be displaced. Paragraphs III.F and IV.B(1); App. at 58-59, 60.

any and all parties pursuant to the Railway Labor Act, as amended." Paragraph VI.D; App. at 61.

Starting in June 2006, American began hiring new pilots, but did not offer any positions to Eagle pilots. App. at 4, 12. At the time American began hiring these new pilots, there were 527 Eagle pilots who had been placed on the American seniority list and received American seniority numbers pursuant to the Flow-Through Agreement. App. at 5 n.2.

American offered the new hire positions to pilots who had worked for TransWorld Airlines (TWA) before TWA's acquisition by American and who were on lay-off status. App. at 3-4, 11-12, 22-23. Prior arbitration decisions had determined that these pilots (referred to as TWA-LLC pilots) were equivalent to "new hire" pilots rather than pilots with the recall rights of American pilots who had been furloughed from jobs at American. App. at 3, 11; see USCA5 625-627.[6]

In a decision on liability, Arbitrator Nicolau concluded that American had violated the Flow-Through Agreement by not hiring 244 Eagle pilots for new hire positions that went to the TWA-LLC pilots. App. at 4, 12, 23. When the carriers and the unions could not agree on a remedy, Arbitrator Nicolau held further proceedings and issued a supplemental award on

[6] "USCA5" refers to the pages of the Fifth Circuit record on appeal.

the remedy. App. at 4, 12-13, 24, 38-42. The main features of Nicolau's remedy award provided:

- Only the most senior 35 Eagle pilots would go to American immediately, beginning in June 2010. App. at 4, 12, 36, 40.
- The first 286 Eagle pilots out of the 527 Eagle pilots with American seniority numbers would be required to make an irrevocable election by May 24, 2010 whether or not to flow-up to American.[7] App. at 4, 33-34, 38. Other than for the initial 35 pilots, this election would have to be made before any job at American was available for the pilot. App. at 33.[8]

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[7] Arbitrator Nicolau reached the 286 number by adding 42 pilots to the 244 pilots who had been denied jobs. The 286 included all the Eagle CJ Captains with greater American seniority than the least senior currently active TWA-LLC pilot. App. at 33.

[8] Arbitrator Nicolau stated (App. at 33): "Though the opportunity to transfer to American may not occur for some time . . . I have decided to make the choice irrevocable rather than allowing an affected pilot to choose one option and later choose another." At the time irrevocable elections had to be made in May 2010, pilots were told that, except for the initial 35 pilots in 2010, American estimated that the next 100 positions available for flow-up would not occur until 2012 and another 109 positions would become available in 2013. USCA5 758.

- Before any other Eagle Captains would be offered positions at American, American would recall 102 pilots furloughed on February 28, 2010 shortly before the remedy hearings commenced. App. at 4, 12-13, 31, 36, 41. The group of pilots on furlough included 83 of the TWA-LLC pilots. App. at 4, 31.
- After the rehire of the 102 recently-furloughed pilots, the remaining Eagle CJ Captains with American seniority and American pilots on furlough would be offered new hire positions as they become available based solely on American seniority order. App. at 13, 36-37, 41.
- The parties were instructed to enter into a preferential hiring agreement so that when additional new hire positions became available, American would offer one of every two new hire positions to an additional 824 Eagle CJ Captains, including Eagle Rights Captains, who did not have American seniority numbers. App. at 4-5, 37, 42.

Nicolau's award directly affected Petitioners and similarly-situated Eagle pilots. The award altered Petitioners' rights under the Flow-Through Agreement by (a) requiring an irrevocable election to go to American that was not a requirement of the Flow-Through Agreement, (b) subordinated Petitioners' flow-up rights to the recall of the 102 pilots who were furloughed while this case was pending before Arbitrator Nicolau and (c) altered future flow-up rights to a recall based

on straight American seniority, rather than the 1-for-2 and other priority hiring required by the Flow-Through Agreement.

Petitioners filed this action *pro se* in the Northern District of Texas. In response to Petitioners' complaint, ALPA, American and Eagle filed a motion to dismiss asserting that Petitioners could not meet the high standard necessary to set aside an arbitration decision under the Railway Labor Act. App. at 2, 14. No issue of Petitioner's standing was raised. App. at 5, 14. APA did not join in the motion. App. at 2 n.1.

The district court granted the motion to dismiss. The district court found that Nicolau had acted within the scope of his jurisdiction in fashioning the remedy. App. at 2. The district court did not discuss or address any issue of Petitioners' standing. App. at 9-20.

Petitioners appealed. At oral argument, the Fifth Circuit's Panel raised the issue of Petitioners' standing *sua sponte*. App. at 5-6. Thereafter, relying on its decision in *Mitchell v. Cont'l Airlines, Inc.*, 481 F.3d 225 (5th Cir. 2007), cert. denied, 552 U.S. 821, the Panel held that Petitioners lacked standing to challenge an arbitration award directly. The Panel held that Petitioners' sole remedy was an action against their union for breach of the duty

of fair representation.[9] App. at 5-8. The Panel dismissed the appeal by decision of December 23, 2014. App. at 1, 2, 8.

Petitioners filed petitions for rehearing and rehearing en banc on January 9, 2015. The petitions were denied on January 26, 2015. App. at 44-45.

[9] See *Vaca v. Sipes*, 386 U.S. 171, 185-187 (1967). In the non-RLA context, an employee can sue both the union for breach of the duty of fair representation and the employer for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185). See *DelCostello v. Teamsters*, 462 U.S. 151, 164-165 (1983). While the duty of fair representation also applies to transportation unions (*Air Line Pilots v. O'Neill,* 499 U.S. 65 (1991)), the ability to join the employer in the action may be more limited under the RLA than under the LMRA. *Czosek v. O'Mara*, 397 U.S. 25, 28-30 (1970).

REASONS FOR GRANTING THE WRIT

I. EMPLOYEE STANDING TO SEEK JUDICIAL REVIEW OF ADVERSE ARBITRATION AWARDS PRESENTS AN IMPORTANT ISSUE FOR THE ADMINISTRATION OF THE RLA'S SYSTEM OF MANDATORY ARBITRATION AND IS AN ISSUE ON WHICH THE CIRCUITS ARE IN CONFLICT.

A. The Fifth Circuit's Decision Impairs the RLA's System of Mandatory Arbitration That Includes a Statutory Right for Transportation Employees to Seek Judicial Review When Aggrieved by an Arbitration Decision.

1. Section 3 First (q) of the RLA's mandatory arbitration system gives aggrieved employees standing to seek judicial review of adverse arbitration decisions.

"Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994). The establishment of arbitration procedures was a mandatory and essential feature of the RLA. *Machinists v. Central Airlines*, 372 U.S. 682, 688-690 (1963); *Trainmen v. Chicago R. & I.R. Co.,* 353 U.S. 30, 34-37, 39 (1957). Under the RLA, arbitration of contract disputes is a statutory requirement. *Andrews v. Louisville & Nashville R. Co*., 406 U.S. 320, 322 (1972). Unlike the case for

other labor and employment contracts, arbitration under the RLA is not solely a matter of the parties' contractual agreements. Compare *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-649 (1986).

The RLA provides that any aggrieved employee can seek court review of an adverse arbitration decision: "If any employee or group of employees . . . is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order." 45 U.S.C. § 153 First (q).[10] Subsection First (q) was added to the RLA in 1966 in Public Law 89-456, 80 Stat. 208, in order to expand the jurisdiction of district courts to review RLA arbitration awards, including expanding the right of employees to seek judicial review of

[10] The jurisdictional provisions of 45 U.S.C. Section 153 apply to airline labor issues. 45 U.S.C. Section 184 requires air carriers and union to establish boards of adjustment to resolve grievances or disputes arising under agreements with "jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title." Contracts in the airline industry entered into under Section 184 are enforced in the same manner as railway labor contracts under Section 153. *Machinists v. Central Airlines*, 372 U.S. 682, 694-695 (1963).

unfavorable awards. *Walker v. Southern R. Co.*, 385 U.S. 196, 198 (1966).[11]

2. The Fifth Circuit's decision conflicts with the RLA's statutory language governing review of arbitration decisions.

In this case, relying on its prior decision in *Mitchell v. Cont'l Airlines, Inc.*, 481 F.3d 225 (5th Cir. 2007), cert. denied, 552 U.S. 821 (herein "*Mitchell*"), the Fifth Circuit held that Petitioner's sole remedy was an action against their union for breach of the duty of fair representation. App. at 6-8. The Fifth Circuit limited the RLA's statutory right of aggrieved employees to petition for review of arbitration decisions to cases involving "uniquely individual claims." App. at 7 n.4, citing *Mitchell*, 481 F.3d at 233 n.24. Otherwise, the employees' only remedy was to bring an unfair representation case. App. at 6, quoting *Mitchell,* supra, at 233.

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[11] Although Section 3 First (p) and (q) are applicable only to Adjustment Board decisions, the Circuits have uniformly applied the same statutory standards to review of arbitration panels created by employer-union agreements under Section 3 Second of the RLA (45 U.S.C. § 153 Second). *Bhd. of Ry., Airline & S.S. Clerks v. Kansas City Terminal Ry. Co*., 587 F.2d 903, 905-906 (8th Cir. 1978), cert. denied, 441 U.S. 907; *Ollman v. Special Bd.*, 527 F.3d 239, 246 n.8 (2d Cir. 2008). Arbitration in the airline industry function like the special adjustment boards authorized in Section 3 Second. *Chernak v. Southwest Airlines Co*., 778 F.2d 578, 580 (10th Cir. 1985).

The Fifth Circuit's limitation of the right to seek review to cases involving "uniquely individual claims" finds no support in the language or purpose of the RLA. The language of Section 3 First (q) requires only that an employee or group of employees be "aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award." 45 U.S.C. § 153 First (q). Employees or groups of employees may be aggrieved by an award that is narrowly addressed to their personal claims or one that adjudicates employee rights broadly. Indeed, the effects of broad decisions applicable to a large group of transportation employees ultimately fall on the individual employee as those broad decisions are implemented. A distinction between "uniquely individual claims" and other claims that aggrieve employees is a distinction without meaningful boundaries.

The Fifth Circuit in *Mitchell* analogized review of arbitration awards under the RLA to review of arbitration awards under the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA) where unions controlled the right to seek judicial review as they are the formal parties to the arbitration with an obligation to act for the collective interest as the exclusive representative. *Mitchell*, supra, 481 F.3d at 232-233. The Fifth Circuit concluded that there was no reason to treat cases under the RLA differently:

> Regardless of whether a CBA is established under the LMRA, NLRA, or RLA, its existence is premised on effectuating a key purpose

> behind federal labor statutes, viz., placing the interests of the group ahead of the interests of the individual employees. As we have previously recognized, it would be "paradoxical in the extreme" if a union that is vested with the exclusive authority to bring an employment grievance and pursue it up to and through binding arbitration were not likewise vested with the exclusive responsibility to instigate and prosecute a review of an arbitral award in court.

Id. at 233.

Limiting standing to seek review to the union because of its role as exclusive representative fails to take into account the significant differences between arbitration under the RLA and arbitration under other labor laws. This Court has cautioned against analogizing the RLA to other labor statutes without taking into account the differences between the statutory schemes. *Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570, 579, n.11 (1971) ("parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"). Review of arbitration decisions is a situation where the differences between the RLA and other labor laws overwhelm any similarities.

Unlike the NLRA or LMRA, the RLA requires arbitration. Mandatory arbitration is an essential aspect of the RLA. See *supra*, pp. 10-11. In contrast to

the RLA, parties subject to the NLRA or LMRA may forego arbitration entirely and rely on judicial[12] or economic[13] action to enforce their agreements. Carriers and their employees subject to the RLA cannot do so, but must arbitrate. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 324-325 (1972) (RLA does not permit employee to sue for breach of contract but must use RLA procedures to resolve contract disputes); *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 34-42 (1957) (courts can enjoin strikes over issues within jurisdiction of railroad adjustment boards).

Unlike the NLRA or LMRA, Congress enacted specific provisions in the RLA governing arbitration and court review of arbitration decisions. Section 3 First (q) is such a provision that is unique to the RLA. Section 3 First (q) has no counterpart in the NLRA or LMRA. Congress has amended the RLA to increase the ability of employees to seek review of adverse arbitration decisions. *Walker v. Southern R. Co.*, 385 U.S. at 198. There is, again, no parallel in the NLRA or LMRA to this Congressional action.

In the context of the RLA's mandatory arbitration process, the Fifth Circuit erred in relying upon the

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[12] *Smith v. Evening News Assn.*, 371 U.S. 195, 197-200 (1962) (suit under LMRA Section 301 (29 U.S.C. § 185) by individual employees to enforce collective bargaining agreement).

[13] Cf. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105-106 (1962) (implying no-strike obligation where dispute is subject to mandatory arbitration under collective bargaining agreement).

fact that the union – or in this case, the unions – were the formal parties to the arbitration rather than the individual employees. The RLA does limit judicial review to the parties to an arbitration, but allows "any employee or group of employees . . . aggrieved" by the decision to seek review. 45 U.S.C. § 153 First (q). Under the RLA "the individual employee's rights to participate in the processing of his grievances 'are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf.'" *Czosek v. O'Mara*, supra, 397 U.S. at 28 n.1, quoting *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 740 n.39 (1945), adhered to on rehearing, 327 U.S. 661 (1946). Since the right belongs to the employee and the union is only acting "in his behalf," the employee can exercise that right independently of the union at any time if the employee is dissatisfied with the union's performance. This includes invoking Section 3 First (q) to seek judicial review of an adverse arbitration decision even if the union does not do so.

Congress explicitly provided in the RLA that employees or groups of employees might seek judicial review of arbitration decisions. There is no reason to import rules from the NLRA or LMRA into this aspect of the RLA. Whether or not it makes good labor policy to allow unions to act for the collective interests in deciding whether to seek judicial review under the NLRA or LMRA, the RLA expressly addresses this issue. The language of Section 3 First (q) is unambiguous in giving transportation employees the right to seek review independently of their union. It is not the

Fifth Circuit's role to upset the balance Congress created in giving transportation employees the individual right to seek judicial review.

B. The Fifth Circuit's Decision Conflicts with Decisions by Other Circuits Holding That Section 3 First (q) Gives Transportation Employees the Right to Petition for Review of Arbitration Decisions.

Other Circuits have concluded that the RLA's language gives individual employees the right to seek review of arbitration decisions. *McQuestion v. N.J. Transit Rail Operations*, 892 F.2d 352, 354-355 (3d Cir. 1990); *Ollman v. Special Bd.*, 527 F.3d 239, 246 (2d Cir. 2008). See also, *Steward v. Mann,* 351 F.3d 1338 (11th Cir. 2003), affirming *Steward v. AirTran Airways, Inc.*, 221 F.Supp.2d 1307, 1311 (S.D. Fla. 2002).

In *McQuestion*, the Third Circuit held that the statutory language in Section 3 First (q) gave transportation employees standing to review adverse Adjustment Board decisions (892 F.2d at 354): "The statute embraces '*any* employee . . . aggrieved by the failure' of a division of the Board to make an award and authorizes 'such employee' to file a petition for review in the district court. Thus, confining ourselves to the literal wording of the statute, the appellants did have standing to seek review in the district court." Relying on the statute's language, the Third Circuit rejected the railroad's argument that review

under Section 3 First (q) should be limited to the parties to the Board proceeding. The Third Circuit noted that the employees affected by the decision were the real parties in interest (892 F.2d at 354) and accordingly concluded "we do not believe this argument of the railroad requires us to deviate from the literal language of the review statute." *Ibid.* For the same reason, the Third Circuit rejected the argument that the legislative history indicated that only "parties" to the Board proceeding could seek review: "Given the true parties in interest in these proceedings, we do not believe that the railroad's position can prevail in light of the clear statutory review language." *Ibid.*

The Second Circuit in *Ollman v. Special Bd.*, supra, 527 F.3d at 246 reached the same result based on the RLA's statutory language, stating: "Pursuant to 45 U.S.C. § 153 First (q), an aggrieved employee or other beneficiary of the order of the Board may file a petition for review in the district court for the district where the employee resides or where the principal operating office of the carrier is located."

C. The Fifth Circuit's Decision Conflicts With This Court's Decisions That the Policy of the RLA Requires Employees to Use the RLA's Arbitration System and Congress Intended Section 3 First (q) to Expand the Ability of Transportation Employees to Obtain Judicial Review.

This Court has recognized that the RLA gives individual employees the right to pursue arbitration before RLA adjustment boards. *Andrews v. Louisville & Nashville R. Co.*, supra, 406 U.S. at 325-326; *Czosek v. O'Mara*, supra, 397 U.S. at 28. In *Andrews,* this Court held that transportation employees had to use the RLA's arbitration process to resolve contract disputes and could not pursue these disputes outside of the RLA's arbitration process. *Id.* at 324-325. Similarly, once the RLA's arbitration procedures are utilized, the employee "is limited to the judicial review of the [Adjustment] Board's proceedings that the Act itself provides." *Id.* at 325.

Section 3 First (q) was added in 1966 to allow employees greater access to courts to review adverse arbitration decisions. *Walker v. Southern R. Co.*, 385 U.S. 196, 198 (1966). In *Walker*, this court noted that the RLA's 1966 amendments arose from findings by Congress that "if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by

which judicial review may be obtained." *Id.*, quoting from H.R. Rep. No. 1114, 89th Cong., 1st Sess., at 15; S. Rep. No. 1201, 89th Cong., 1st Sess., at 3.

In light of the RLA's language and its purpose as identified in this Court's decisions, it would make no sense to require employees to follow the RLA's mandatory arbitration provisions but deny them the right to seek court review of adverse outcomes.

The Fifth Circuit's decision does not give effect to the policy and purposes of the RLA. The RLA's requirement for mandatory arbitration of contractual disputes was part of the Congressional purpose to provide a comprehensive system for resolving disputes without interruption of transportation. 45 U.S.C. § 151a; *Hawaiian Airlines, Inc. v. Norris*, supra, 512 U.S. at 252. The provisions for judicial review – and particularly the provisions of Section 3 First (q) added in 1966 – were designed to achieve this goal by providing fair avenues for employees to challenge adverse arbitration awards. *Walker v. Southern R. Co.*, supra, 385 U.S. at 198. Restricting the right of review to "uniquely individual claims" fails to give aggrieved employees the full access to court Congress intended. The result is that disputes that may be very important for employees – the transfer and seniority issues presented in this case, for example – but that are not "uniquely individual claims" would be excepted from the purview of judicial review. Such disputes would be left to fester as industrial sores for the affected employees, increasing the danger of self-help and disruption of transportation systems. This is

the exact danger Congress sought to avoid by creating the RLA's system of mandatory arbitration.

D. Because the RLA Allows Petitions to Be Filed in Multiple Districts, Application of the Fifth Circuit's Rule of Standing Will Result in Arbitrary Outcomes Depending on Where Petitions Are Filed.

The RLA is national in scope as it governs a national transportation system. Just as arbitration under the RLA is mandatory, there is a need for a uniform national standard for how arbitration is conducted, including who can seek review of arbitration decisions. Congress provided for such national standards in Section 3 First and particularly in subsections (p) and (q) governing court actions and review. Subsection (q) was added by Congress particularly to address national problems as to the ability of transportation employees to obtain judicial review. *Walker v. Southern R. Co.*, supra, 385 U.S. at 198.

It seems self-evident that a national law requires a national standard as to standing. There cannot be one rule for transportation employees in Texas and another for those in Pennsylvania and New York.

But even if not self-evident, a uniform national rule is necessary under the RLA to avoid arbitrary results arising from the RLA's broad venue provisions governing where a petition for review can be filed.

The RLA contains broad venue provisions for petitions to review arbitration awards. The RLA provides that "the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates" a petition for review. 45 U.S.C. § 153 First (p) incorporated in 45 U.S.C. § 153 First (q).

Because of the interstate nature of the transportation industry, a petition to review an arbitration decision could be filed in multiple district courts in multiple Circuits. For example, in this case, Petitioners could have filed in district courts within the Second, Third or Eleventh Circuits, as the airline carriers involved all operate within those Circuits. All of these Circuits have held that the RLA permits aggrieved employees to seek review of adverse arbitration decisions. See cases cited *supra* at pp. 17-18.

It undermines the uniform application of the RLA to make an aggrieved employee's standing to file a petition to review depend on the Circuit in which the petition is filed. It equally undermines normal senses of justice to make Petitioners' standing turn on the happenstance that, as *pro se* plaintiffs, they were not sensitive to the issues of standing involved or the alternative venues that they could have invoked to ensure their standing to pursue their case.

The Fifth Circuit's decisions here and in *Mitchell* create a game of chance and happenstance as to a

transportation employee's ability to seek judicial review of arbitration decisions. Only employees unaware of their right to bring their case in a district outside of the Fifth Circuit will be affected. No rule of law should be permitted that is so easily evaded and becomes nothing more than a trap for the unsophisticated or the unwary. Likewise, requiring employees residing in Texas, Louisiana or Mississippi to bring actions outside of the districts where they live undermines the Congressional choice that such transportation employees should be able to sue in a local court "for the district in which [the employee] resides." 45 U.S.C. § 153 First (p), incorporated in 45 U.S.C. § 153 First (q).

CONCLUSION

For the foregoing reasons, Petitioners request that the petition for writ of certiorari be granted and that a Writ of Certiorari should issue.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-11098

GAVIN MACKENZIE, individually and on behalf of those similarly situated; MARK BURNETT, individually and on behalf of those similarly situated,

Plaintiffs-Appellants

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; ALLIED PILOTS ASSOCIATION; AMERICAN AIRLINES, INCORPORATED; AMERICAN EAGLE AIRLINES, INCORPORATED,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:10-CV-2043

(Filed Dec. 23, 2014)

Before STEWART, Chief Judge, and BARKSDALE and GRAVES, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants Gavin Mackenzie and Mark Burnett (collectively, Appellants) brought this proposed class action *pro se* under the Railway Labor Act, 45 U.S.C. § 151 *et seq.,* seeking declaratory relief from an arbitrator's remedy award. Appellants claimed that the arbitrator's remedy opinion and award should be vacated on the ground that the arbitrator exceeded the scope of his jurisdiction in fashioning the award. Defendants-Appellees American Airlines, Inc., American Eagle Airlines, Inc., and Air Line Pilots Association (collectively, Appellees)[1] filed a motion to dismiss. The district court granted the motion, concluding that the arbitrator did not exceed the scope of his jurisdiction in deciding the remedial issue before him. Because we hold that Appellants lack standing to challenge the arbitrator's award, the appeal is DISMISSED.

I.

This case arises out of a complex, four-party collective bargaining agreement. The four parties to the agreement were American Airlines (American);

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Though Allied Pilots Association was a named defendant, it did not join the other Defendants-Appellees in their motion to dismiss and it has not presented any argument on appeal.

American Eagle Airlines (Eagle); Allied Pilots Association (APA), the union representing American's pilots; and Air Line Pilots Association (ALPA), the union representing Eagle's pilots. Appellants are individual pilots for Defendant-Appellee Eagle. As such, they were represented in contract and employment matters with the airlines by their pilots' union, ALPA.

In 1997, American pilots called a strike against American, prompting President Clinton to invoke provisions of the Railway Labor Act (RLA) that required the affected parties to resolve their issues through mediation. The negotiations between representatives from each party resulted in a supplemental agreement known as Letter 3/Supplement W (Letter 3). Under Letter 3, Eagle pilots could move up, or flow through, to positions in American as they came available. Further, American pilots could move down to Eagle in the event that they were furloughed. Letter 3 provided procedures by which disputes arising under its terms were to be resolved. American, Eagle, APA, and ALPA were specifically named as parties to these dispute resolution procedures. The parties agreed to submit any grievance concerning the interpretation or application of Letter 3 to arbitration.

In 2003, a dispute arose as to whether Trans World Airline (TWA) pilots, recently acquired through a merger between American and TWA, were "new hires" under Letter 3. ALPA filed a grievance and the dispute was submitted to an arbitrator, who concluded that the TWA pilots were new hires under the terms of Letter 3. The arbitrator declined to resolve the

issue of whether Eagle pilots were entitled to positions in training classes at American instead of the TWA pilots designated as new hires, concluding that he lacked jurisdiction to provide the appropriate answer.

In 2008, ALPA filed a grievance to resolve this issue, which was submitted to arbitration proceedings before Arbitrator Nicolau. Nicolau found in favor of the Eagle pilots, concluding that they were entitled to the training classes at American. He remanded the issue of the appropriate remedy to the parties, but retained jurisdiction in the event that the parties could not agree on the proper remedy. When the parties were unable to agree on the appropriate remedy, they submitted the issue to Nicolau to resolve.

After considering the parties' arguments, prior arbitration awards, witness testimony, the evidence presented, and the competing equities, Nicolau issued a remedy opinion and award. The award provided the following: (1) 286 Eagle pilots were required to irrevocably elect whether to move up to American by May 24, 2010; (2) American was required to recall furloughed TWA pilots after the first 35 Eagle pilots moved up to American but before the remaining 251 Eagle pilots moved up; and (3) the affected parties were required to enter into a preferential hiring

agreement to cover the 824 Eagle pilots without American seniority numbers.[2]

Appellants filed suit against Appellees in district court seeking to set aside Nicolau's remedy opinion and award. Appellees filed a motion to dismiss, which the district court granted. After conducting its review of the arbitrator's decision, the district court held that Arbitrator Nicolau acted within the scope of his jurisdiction in fashioning the proper remedy.

Appellants timely appealed.[3] On appeal, Appellants seek vacatur of the arbitrator's remedy award, arguing: (1) the arbitrator exceeded his jurisdiction in making the award, or alternatively (2) the arbitrator improperly considered off-the-record evidence in violation of due process.

II.

Although neither party raised the issue of Appellants' standing to bring this appeal, we may raise the issue *sua sponte*. *See S.E.C. v. Forex Asset Mgmt., LLC,* 242 F.3d 325, 328 (5th Cir. 2001). If Appellants lack standing to bring this appeal, we lack the jurisdiction to decide the merits of this case. *In re Weaver,* 632 F.2d 461, 462 n.6 (5th Cir. 1980).

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[2] At the time of Nicolau's ruling, there were 1351 captains: 527 had American seniority numbers and 824 did not.

[3] The Appellants' appeal was stayed after American entered into bankruptcy in November 2011.

The court raised the issue of Appellants' standing during oral argument. In response to the court's inquiry on the issue of standing, Appellees asserted that our decision in *Mitchell v. Cont'l Airlines, Inc.,* 481 F.3d 225 (5th Cir.), *cert. denied* 552 U.S. 821 (2007), deprived Appellants of standing as a matter of law. We agree.

In *Mitchell,* individual flight attendants brought an action against their airline and union, seeking vacatur of an arbitral award. *Id.* at 230. There, relying upon precedent in cases governed by similar federal labor statutes, the court held:

> [W]hen a CBA formed pursuant to the RLA establishes a mandatory, binding grievance procedure and vests the union with the exclusive right to pursue claims on behalf of aggrieved employees, an aggrieved employee whose employment is governed by the CBA lacks standing to attack the results of the grievance process in court – the sole exception being the authorization of an aggrieved employee to bring an unfair representation claim.

Id. at 233. The court reasoned that such a holding was "necessary to effectuate the purposes behind federal labor statutes, which require that the interests of particular individuals be subordinated to the interests of the group at the contract-negotiation stage and beyond." *Id.* at 232. Consequently, "an aggrieved employee will generally lack standing to bring an RLA action." *Id.* at 233 n.24.

Letter 3 establishes a mandatory, binding dispute resolution procedure. Additionally, Letter 3 governs Appellants' employment at Eagle. Finally, by failing to pursue a duty of fair representation claim, Appellants cannot avail themselves of the "sole exception" prescribed by *Mitchell.* Appellants attempt to distinguish *Mitchell* by asserting that Letter 3 does not vest the union with the exclusive right to pursue claims on their behalf.[4] We disagree. Letter 3 specifically names American, Eagle, APA, and ALPA as the parties to the dispute resolution procedures. Moreover, Appellants state in their complaint that ALPA is the "certified collective bargaining agent" and "representative" of Eagle pilots. We therefore hold that Appellants lack standing to challenge the arbitration

[4] Appellants also argued during oral argument that they have standing pursuant to the plain language of 45 U.S.C. § 153 First(q), which provides that "[i]f any employee or group of employees . . . is aggrieved by any of the terms of an award[,] . . . then such employee or group of employees . . . may file in any United States district court . . . a petition for review of" the award. Appellants' argument finds support in *McQuestion v. N.J. Transit Rail Operations,* 892 F.2d 352, 354-55 (3d Cir. 1990), which held that the plain language of § 153 First(q) provides individual employees with uniquely individual grievances standing to seek judicial review under the RLA. Nevertheless, Appellants' argument is unavailing. In *Mitchell,* we distinguished *McQuestion,* determining that it may support providing standing to individual employees with "uniquely individual claims," but that its reasoning did not support standing where, as here, the employees' union pursued arbitration on behalf of all its members. *Mitchell,* 481 F.3d at 233 n.24.

award. *See Mitchell,* 481 F.3d at 233. Accordingly, we do not reach the merits of Appellants' claims.

III.

For the reasons herein stated, the appeal is DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GAVIN MACKENZIE and MARK BURNETT individually and on behalf of those similarly situated,	§	
Plaintiffs,	§	
v.	§	
AIR LINE PILOTS ASSOCIATION INTERNATIONAL, ALLIED PILOTS ASSOCIATION, AMERICAN AIRLINES, INC., and AMERICAN EAGLE AIRLINES, INC.,	§	CIVIL ACTION NO. 3:10-CV-2043-P
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Oct. 31, 2011)

Now before the Court is Defendants American Airlines, Inc., American Eagle Airlines, Inc., and Air Line Pilots Association International's motion to dismiss. (Docket #55.) After careful consideration of the Parties' briefing and the applicable law, the Court hereby GRANTS the motion.

A. The Parties.

Defendant American Eagle Airlines, Inc. ("Eagle" or "AE") is a subsidiary of Defendant American

Airlines, Inc. ("American" or "AA"). Defendant Air Line Pilots Association ("ALPA") is the collective bargaining agent for the Eagle pilots. Defendant Allied Pilots Association ("APA") is the collective bargaining agent for the American pilots.[1]

Plaintiffs Gavin MacKenzie and Mark Burnett ("Plaintiffs") are Eagle pilots who were and are eligible to transfer to American pursuant to the Flow-Through Agreement. Under Arbitrator Nicolau's ("Nicolau") remedy decision, Plaintiffs must make an irrevocable decision whether to accept a transfer to American according to a specified time line. (Docket #1 ¶ 20.) Plaintiffs seek to represent a class of 244 individuals, all of whom are Eagle pilots who must make the same election.

B. The Flow-Through Agreement.

In 1997, ALPA, APA, Eagle, and American negotiated a four-party collective bargaining agreement known as the Flow-Through Agreement. The Flow-Through Agreement allowed Eagle pilots to "flow-up" to American when American was hiring new pilots. It also allowed American pilots to "flow-down" to Eagle during pilot furloughs at American. The Flow-Through Agreement states that at least one of every two "new hire" positions per "new hire" class at

[1] For purposes of this order, the movant defendants will be referred to collectively as "Defendants." Defendant Allied Pilots Association filed an answer in this case. (Docket #48.)

American will be offered to Eagle captains in order of seniority. (Docket #1 ¶ 11.)

C. Events of 2001.

In 2001, American acquired the assets of Trans World Airlines ("TWA") in bankruptcy. TWA had filed for bankruptcy in January of that year. In February, TWA, LLC was established to operate the debtor airline under a separate air carrier operating certificate. In April, American purchased the assets of TWA. In November 2001, the former TWA pilots were placed on the AA seniority list.

A dispute arose among the Parties about whether the TWA LLC pilots who had never flown at American, should be considered "new hires" for purposes of the Flow-Through Agreement.

D. The Underlying Arbitrations.

Unable to resolve the dispute among themselves, ALPA filed a grievance that was assigned to arbitration before Arbitrator John LaRocca ("LaRocca"). LaRocca held the former TWA pilots should be treated as "new hires" under the Flow-Through Agreement.

In May 2008, the Parties submitted another issue to arbitration with Arbitrator George Nicolau ("Nicolau"). This dispute was about whether Eagle pilots with AA seniority numbers were entitled to attend training classes at American beginning in June

2007, when American began to recall former-TWA-"new hire" pilots,

Nicolau held a hearing in June 2009 and issued a liability decision in October 2009. Nicolau concluded that, in light of the LaRocca decision that characterized the TWA pilots as "new hires", the Flow-Through Agreement entitled Eagle pilots with AA seniority numbers to one of every two AA training class slots beginning in June 2007. He noted there had been twenty training classes at American between June 6, 2007 and March 18, 2009. Those classes had been attended by 244 TWA "new hire" pilots and no Eagle pilots.

After the Parties tried unsuccessfully to agree on a remedy, Nicolau conducted a hearing. On April 9, 2010, he issued a remedy order, which requires American to offer the 286 most senior Eagle captains holding AA seniority numbers the opportunity to flow-up to American according to a prescribed timetable.[2] Once elections are made, the opportunity to transfer to American shall be offered to the 244 most senior Eagle captains who elect the advancement. The first 35 Eagle captains who choose to flow-up to American shall be placed in training classes beginning no later than June 2010. Following that transfer, American

[2] In other words, the choice to flow-up to American was given to 286 Eagle captains. This was the number of active Eagle captains who held seniority numbers above the least senior active TWA "new hire" pilot.

must recall its furloughed American pilots based on seniority until the most junior American pilot furloughed has been offered recall. Following the offer and recall, the remaining Eagle pilots with AA seniority numbers who elected to transfer and those American pilots presently on furlough shall be entitled to enter and re-enter active service at American in seniority order. Of those Eagle captains who transfer, those who are in the 244 shall be entitled to receive compensation and benefits as of the day they would have transferred had they been in one of the June 6, 2007 – March 18, 2009 training classes. (Docket #57-3 at 43-44.)

E. Plaintiffs' Complaint.

Plaintiffs seek vacatur of Nicolau's remedy opinion under the Railway Labor Act, arguing Nicolau lacked jurisdiction to construct a new agreement that mandated an irrevocable election to flow-up. Plaintiffs contend Nicolau's decision conflicts with an earlier arbitration ruling by Arbitrator Richard Bloch, who determined Eagle captains retained their right to flow-up after expiration of the Flow-Through Agreement. (Docket #60-5.)[3]

[3] In June 2008, Arbitrator Richard Bloch held in a related arbitration dispute "[t]he effect of the expiration of Supp. W [Flow-Through Agreement] 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 numbers." (Docket #60-5 Ex. C.)

F. Basis for Dismissal

Defendants move under Rule 12(b)(6) to dismiss Plaintiffs' Complaint because Plaintiffs have not satisfied the RLA's narrow standard for vacating an arbitration award. (Docket #56 at 9 (quoting *Union Pac. R.R. Co. v. Sheehan,* 439 U.S. 89, 91 1978), which held the scope of judicial review of an arbitration award under the RLA is "among the narrowest known to the law.").)

Plaintiffs respond by arguing that Nicolau exceeded the jurisdiction given to him by the Flow-Through Agreement by forcing Eagle pilots with AA seniority numbers to make an irrevocable decision to transfer to American or lose the right to flow-up. (Docket 20-1 at 13.) They argue this take-it-or-leave-it remedy stripped them of their legal right to flow-up. Plaintiffs contend this legal right was given to them by Arbitrator Bloch. Plaintiffs essentially contend Bloch's ruling vested 520 Eagle CJ Captains with an interminable right to flow-up. They argue Nicolau exceeded his jurisdiction by putting limitations on Plaintiffs' exercise of that right and by limiting the choice to flow-up to only 286 Eagle captains (the number of active Eagle captains who held seniority numbers at American that were above the lease senior active former TWA new hire pilot.) (Docket # 20-1 at 10, 12-13.)[4]

[4] Plaintiffs also question the merits of Nicolau's decision – specifically, his ruling on downstream damages, his award of

(Continued on following page)

The RLA was enacted to promote stability in labor-management relations in the "important national" railroad industry. *Sheehan,* 439 U.S. at 94. Long ago, Congress extended the RLA to air carriers. 45 U.S.C. § 181. The RLA provides for the creation of an Adjustment Board, which is charged with resolving "minor disputes" arising out of the interpretation of collective bargaining agreements. *Sheehan,* 439 U.S. at 94. "Congress considered it essential to keep these so-called 'minor disputes' within the Adjustment Board and out of the courts." *Id.* "The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations." *Id.*

Accordingly, 45 U.S.C. § 153 First (q) allows for judicial review of arbitration awards in very limited circumstances, one of which is when the arbitration board fails to conform, or confine itself, to matters within the scope of its jurisdiction. *Sheehan,* 439 U.S. at 93.[5] A court must affirm an arbitral award if the

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compensation and benefits, and his award of preferential hiring rights. (Docket #60-1 at 11.) Because these arguments challenge Nicolau's resolution of the merits of the case, not the jurisdictional basis for his ruling, the Court may not second-guess or disturb those findings. If an arbitrator has not exceeded his authority, "the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509 (2001).

[5] Courts have applied these restrictions on judicial review to the airline context, despite language in the RLA that says airlines are not subject to the provisions of § 153. 45 U.S.C. § 181.

arbitrator is "arguably construing or applying the contract and acting within the scope of his authority." *United Paperworkers Int'l Union v, Misco, Inc.,* 484 U.S. 29, 38 (1987). If the arbitrator has not exceeded his authority, "the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509 (2001). The Fifth Circuit has made clear that a district court's review of an arbitrator's decision is "extremely deferential." *Nat'l Gypsum Co. v. Oil, Chem. & Atomic Workers Intl Union,* 147 F.3d 399, 401 (5th Cir.1998). When reviewing an arbitration award, a district court is particularly constrained. "As long as the arbitrator's decision 'draws its essence from the collective bargaining agreement' and the arbitrator is not fashioning 'his own brand of industrial justice,' the award cannot be set aside." *Weber Aircraft Inc, v. General Warehousemen and Helpers Union Local 767,* 253 F.3d 821, 824 (5th Cir. 2001); *see Teamsters Local No. 5. v. Formosa Plastics Corp.,* 363 F.3d 368, 371 (5th Cir. 2004).

Nicolau was required to issue a remedy for those Eagle pilots who should have been, but were not, included in the AA training classes. Nicolau heard testimony from several Eagle pilot representatives. (Docket # 57-3 at 35.) He recognized the remedy issues involved were complex and inter-related. (Docket #57-3 at 38.) He carefully considered the purpose, language, and circumstances surrounding the Flow-Through Agreement as he crafted his remedy. Nicolau

ultimately concluded that 286 Eagle pilots with AA seniority numbers should be entitled to make a choice about whether they want to flow-up to American. He further concluded, in light of the expiration of the Flow-Through Agreement and in the interest of achieving finality in this litigation, the pilots' choices will be irrevocable. (Docket #57-3 at 41.)

Bloch's decision addressed whether certain Eagle Captains' retained their rights to flow-up to American after expiration of the Flow-Through Agreement in 2008. Bloch held that those Eagle CJ captains with AA seniority numbers who have completed TOE training did retain the right to flow-up after the Flow-Through Agreement expired. Nothing in Bloch's the 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.

Nicolau addressed those particular issues in his decision implementing a remedy for the pilots who were entitled, but were not permitted, to attend past training classes. In his ruling, Nicolau placed a time limit on the pilots' election to flow up and made the decision irrevocable. He did not take away any rights the Eagle pilots had under Bloch's decision.

Of necessity, the Nicolau remedy had to be implemented going forward. Nicolau recognized that pilots had made their decisions about flowing up several years prior – some as many as ten years prior. He opted to give those pilots another opportunity to

make an election so they could consider the changed circumstances since their previous elections. Because the Flow-Through Agreement had expired and in the interest of finality for everyone, Nicolau decided to impose a time limit for the elections to be made and made those elections irrevocable.

Nicolau had broad discretion to interpret and apply Bloch's award as well as to provide an equitable remedy for the violation at issue in the grievance before him. When coming to his decision on this issue, Nicolau considered the facts that the Flow-Though Agreement had expired and that finality was in everyone's interest. His decision drew its essence from the collective bargaining agreement and Nicolau acted within his authority to place this limitation on the Eagle pilots' rights.

Plaintiffs also argue that Nicolau's remedy award was not confined to remedying the issue of whether Eagle pilots were entitled to attend AA training classes beginning in June 2007. (Docket #60-1 at 3.) They contend generally that his "nuanced, multi-facted" award violated the RLA and the Flow-Through Agreement because it was not confined "strictly to decisions as to the questions so specifically submitted to [him]." (Docket #60-1 at 3, 4.)

A careful reading of Nicolau's remedy opinion leads the Court to conclude 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.

Plaintiffs' question "regarding 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. (Docket # 60-1 at 10.)

Nicolau issued a thoughtful, thorough, and detailed remedy opinion that evinced his consideration of all Parties' concerns and demonstrated his efforts to accurately identify the issues and resolve the Parties' disputes. "Arbitration law wisely relies upon the experience, perspective, understanding of industrial practice, and knowledge of logistics and economics, of the officer chosen as arbitrator." *Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment CSX Transp. N Lines v. CSX Transp., Inc.,* 455 F.3d 313, 1316 (11th Cir. 2006).

Nicolau was asked to formulate a remedy for those Eagle pilots who had been deprived the opportunity to attend AA training classes. His opinion took into consideration the Parties' competing interests, their history and agreements, and other related arbitration rulings. The Nicolau remedy is not irrational and in no way attempts to fashion some new "brand of industrial justice." His final remedy undoubtedly drew its essence from the collective bargaining agreement. Thus, the Court GRANTS Defendants' motion to dismiss and rejects APA's argument that Nicolau exceeded his jurisdiction in deciding the issue(s) before him.

SO ORDERED, this 31st day of October 2011.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES
DISTRICT JUDGE

In the Matter of the Arbitration Between Allied Pilots Association - and - Air Line Pilots Association and American Airlines, Inc. and American Eagle Airlines, Inc. (SuppW/Letter 3; Grv. FLO-0108 Remedy)	**OPINION AND AWARD** (Filed Apr. 9, 2010)

APPEARANCES

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On March 29, 2008, ALPA filed a grievance in which it claimed that American Eagle CJ Captains with AA Seniority numbers as a result of the flow-through provisions of the now expired Supplement W/Letter 3 were entitled to attend AA training classes beginning June 6, 2007 instead of those TWA-LLC pilots designated by Arbitrator LaRocco in FLO-0903 as "equivalent to new hires."

That same question was raised before Arbitrator LaRocco in the remedy phase of FLO-0903, but his ruling was that he lacked jurisdiction to provide an answer because the Parties' previously stipulated remedy question did not encompass that issue. He also said:

> The Arbitrator's remarks herein should not be construed to express any opinion on whether ALPA and/or AE waived any right to seek the additional relief it requested herein in any subsequent case.
>
> (FLO-0903, 10/28/08, PP.31-32)

As a result of that determination, this grievance was moved forward and was placed before me on June 1, 2009. At that hearing, the Parties agreed on what I have characterized as a narrow question, i.e.:

> Were American Eagle pilots who hold American Airline seniority numbers entitled to attend AA training classes beginning in June 2007?

They also agreed, if this question was answered in the affirmative, that the question of remedy was to

be returned to them for determination, with the arbitrator retaining jurisdiction in the event a resolution was not reached.

By the time the June 1, 2009 hearing had taken place, there had been 20 training classes at AA in the period between June 6, 2007 and March 18, 2009. No Eagle Captains with AA seniority numbers were in those classes. However, there were 244 TWA "new hire" pilots, all of whom had been "recalled" from furlough along with AA pilots who had previously been furloughed from active AA positions.[1]

In my October 18, 2009 decision, I stated that there were, as in previous cases, equities on both sides of the dispute. I also said that I understood and fully appreciated those arguments, but that the first question was whether what the Parties had agreed to in SuppW/Letter 3 answered the question at hand. If it did, consideration of the competing equities, as Arbitrator LaRocco had previously noted, were best left to the Parties, particularly when they had the foresight of leaving any remedy, if the question was answered in the affirmative, in their hands.

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[1] Only one TWA-LLC pilot entered training in the June 6, 2007 class. At the time this occurred, there were 155 Eagle Captains with AA seniority senior to that pilot. As the classes continued the number of TWA-LLC pilots attending them increased, with their numbers filling the bulk of the class seats during the nine classes held during first six months of 2008.

For reasons fully set forth in the Opinion, I did answer the submitted question in the affirmative, stating in the Award:

> As stated in the foregoing Opinion, American Eagle pilots who hold American Airline seniority numbers were entitled to attend AA training classes beginning in June 2007.
>
> In accordance with the instructions of the Parties, the matter is remanded to ALPA, AE, AA and APA to formulate an appropriate remedy.
>
> Jurisdiction will be retained for a period of one year, a period that may be extended by agreement of the Parties. In the event that agreement on an appropriate remedy is not reached during the period of retained jurisdiction, any Party may, by motion, request that jurisdiction be exercised over the question of remedy. However, such request shall not be made within ninety days of the date of this Award.

As it was, the Parties could not agree on a remedy and that question was returned to me, with hearings held on February 25 and 26 and March 30, 2010. Prior to those hearings, position statements were filed setting forth the views of the Parties on the remedy question. All agreed on one thing, that the question was complex and the answer difficult.

Upon studying those positions and arguments in detail and reviewing the earlier proceeding as well as my October 18, 2009, Award and the prior awards, I

opened the remedy hearings by advising that I did not intend to require an Eagle pilot to go to American who does not wish to do so and did not intend, whatever award I might render, that any pilot flying for American end up on the street as a direct result of the required transfer of Eagle Captains. I reinforced that view as the hearings continued so that the Parties would be well aware of my considered views.

During the hearing, in addition to lengthy opening statements and continued presentations of the respective views of the two airlines and the two unions, I heard testimony from James Anderson, Senior Principal, Employee Relations, Flight at American, Kye Johanning, Lead Economic Analyst at ALPA, Eagle Captain Robert Higgins, Michael Burtzlaff, a Principal in American's Finance Group, Cathy McCann, Vice President, People at Eagle, Captain Bill Couette, an Eagle Captain and Vice President, Administration at ALPA, American Captain Ralph Hunter and First Officer Steven Salter, American Captains Douglas Gabel, Jeff Hefley and Glen Morris, former TWA employees, and Kenneth Cooper, former Assistant Director in ALPA's Representation Department.

The testimony of APA witness Hunter and ALPA witness Cooper dealt primarily with the question of whether or not it was obligatory under the now expired Supplement W/Letter 3 for a non-Eagle Rights Captain to flow up to American at the time an offered opportunity was available (Tr. 189-214, 315-324, Hunter; 325-339, Cooper).

The testimony of ALPA witness Johanning and American witness Burtzlaff dealt with damages issues, affecting those who were unable to flow up to American because they were not given the opportunity to attend the aforesaid training classes, and the so-called ripple or downstream damages for those who were unable to move into higher Eagle positions because of the inability of those ahead of them to move to American. ALPA took the position that both groups were damaged and that such damages should be awarded (Tr. 78-110,177-181, Johanning; ALPA Ex.1 & 1A). American's analysis was that those whose movement to American was delayed did not suffer a monetary loss in overall compensation (Tr. 118-148, Burtzlaff; AA Ex. 1). Both American and Eagle also argued that downstream damages were not just highly speculative, as confirmed through Vice President McCann's testimony as to how and why pilots bid (Tr. 149-164), but were also wholly inappropriate.

The testimony of Captains Gabel, Hefley and Morris, former TWA pilots called by APA, dealt with the purchase of the airline by American, the technicalities, process and progress of the transition, and the status and role of TWA-LLC, the subsidiary created at the time of purchase. The purpose of this testimony, aided by a timeline (APA Ex.4) and other exhibits (APA Ex.1-3,5-9), was to demonstrate that TWA-LLC was a needed vehicle in a large and complicated merger; that all employed at TWA-LLC fully expected to become American pilots as American officials told them they would; that a number of them did

so, and that it is not appropriate, when the facts of the transition are objectively viewed, to characterize them as "new hires." APA also argued, on different equitable grounds, that 292 of the 382 pilots such as First Officer Salter hired by American in 2001 prior to the events of 9/11 are entitled to return before any of the 244 Eagle pilots can attend class. These are pilots furloughed post-9/11, who were placed below all former TWA pilots when the AA/TWA seniority lists were merged.

There was also testimony by Eagle Captain Higgins, who is presently on short-term disability and, as a consequence, is unable to use his first-class medical. The question regarding the status and right of a pilot such as Captain Higgins, who might be unable to move to American because of such an impediment, has been resolved by a Stipulation, one of the few issues on which the Parties have agreed, that will be part of my Award.

The Positions of the Parties

Both ALPA and Eagle contend that, in order to remedy the previously found breach, 244 Eagle CJ Captains with AA numbers are entitled to flow-up to AA ahead of any new hires and any AA pilots junior to the TWA "new hires" and that said movement, which is in seniority order, is obligatory for each Eagle CJ Captain. Where they differ is on the pace of that movement. ALPA maintains that the pilots, who have waited long enough, should move without delay.

Eagle maintains that a pace as swift as ALPA seeks would cripple the operations of the airline and that, as a consequence, the move should be limited to no more than 20 pilots a month, beginning 60 days after the Award. Twenty a month because that is the maximum Eagle can spare at any one time and 60 days hence because that is the time Eagle needs to train those replacing pilots who are leaving. ALPA says it understands the constraints Eagle advances, but argues that such metering should be ordered only to resolve a remedial issue that cannot be solved by other means, and that, in any event, all affected pilots must continue to be properly compensated during any further period of delay.

APA, as previously stated, is of the opinion that the above mentioned American pilots hired in 2001, the bulk of the so-called "AA Legacy" pilots, come first and that the Eagle pilots must wait. American, because it says it would have recalled those pilots if it had known that recalling TWA "new hires" was improper, takes the same position. In addition, APA, for reasons of equity, believes an additional 154 furloughed pilots should be recalled before Eagle pilots begin transferring to AA.

The Parties also disagree over the damage issue. Here, the dispute is between the companies and ALPA. The Association contends that each pilot who was unable to flow-up is entitled to every element of compensation and every benefit he would have received if he had moved to American at the time he was entitled to do so, such time to be measured by the

presence of the TWA-LLC pilots in the June 6, 2007-March 18, 2009 training classes. ALPA also contends that the compensation and benefits must go beyond seniority credit for pay and pension purposes as Eagle suggests, but must also include AA sick leave, vacation and health insurance differentials; retroactive participation and credit in both American retirement plans, American Airlines, Inc. Retirement Benefit Program-Fixed Income Plan (the "A Plan") and the American Airlines, Inc. Pilot Retirement Benefit Program-Variable Income Plan (the "B Plan"). Other than length of service credit for pay purposes, American, contending that there was no overall compensation loss, insists, as a result, that no other compensation or increased benefit is warranted. Both American and Eagle also forcefully argue that, if damages are awarded, the Companies are entitled to an offset or credit for amounts Eagle flow-through pilots earned at Eagle in excess of the amounts they would have earned at AA if they had transferred between June 6, 2007 and March 18, 2009.

ALPA also contends that those pilots prevented from moving higher in Eagle's ranks because of the delay occasioned by the breach are also entitled to damages. By ALPA's calculation, these downstream damages, absent requested interest, total $21.9 million; $19.7 million in lost wages and $1.2 million in Company 401(k) contributions. This amount, ALPA says, should not be paid by Eagle, which did not cause the breach, but by American, which had decided to bring the TWA "new hire" pilots into the

training classes rather than following the precepts of SuppW/Letter 3. Though not being held responsible for these damages, Eagle asserts they are speculative and unjustified. American vigorously opposes any such downstream damages. Like Eagle, it contends they are speculative and, given the bidding patterns of pilots, that any determination of the appropriate recipients would be fraught with uncertainty. It also argues that any consideration of downstream damages is just not encompassed within the narrow, disputed question with which this proceeding began. That question was whether Eagle pilots with AA seniority numbers were entitled to attend AA training classes. Once that question was answered, the only remaining issue was what remedy should be fashioned for those pilots, not others.[2]

Discussion and Analysis

As every one understands, the remedy issues presented in this case are complex and inter-related. All four Parties (APA, ALPA, AA and Eagle) have vigorously and effectively presented their evidence and arguments, including strong equitable arguments on behalf of all affected pilots. In light of the complex and inter-related nature of the issues, I elected to announce certain aspects of my decision to the Parties

[2] Eagle raised some other remedy issues. However, they were predicated on the assumption that moving to AA was mandatory and the consequent need for a hardship provision. In view of my ruling, set forth below, these questions need not be addressed.

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. During those discussions I provided the Parties further guidance about the resolution of the remedial issues. 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. Indeed, as set forth above, the positions of the parties on the key issues addressed herein remain far apart, Nonetheless, in the face of an impending Award, each of the Parties has been helpful and cooperative in my efforts to finalize an Award with sufficient clarity and detail to facilitate implementation.

It should also be said that I have taken into consideration some facts that were not known until after the proceeding was underway. First, I was advised that 102 AA pilots, of whom 83 were former TWA-LLC "new hire" pilots who had been serving at American since their 2007-2009 recalls, were furloughed on February 28, 2010. However, anticipated furloughs that were to take place in April were canceled. Additionally, I was advised that American, except as a possible result of this Award, anticipates no additional training in 2010. All of this, as well as the competing equities, which will be discussed, has been taken into consideration in reaching my conclusions.

I had, stated at the outset that I did not intend to require any Eagle CJ Captain to transfer to American

if he chose not to do so. I reached that conclusion, which I repeat here, for two reasons. The first is that, in my judgment, the now expired Supp W/Letter 3 did not require it. Though it could be argued that those who did not elect to "forfeit the opportunity to secure a position on the AA Pilots Seniority List" pursuant to Article III.F. at the completion of CJ Captain IOE were obligated to accept the actual position when offered, the language of Supp W/Letter 3 does not support that conclusion. Other subsections of Article III, such as III. H., I. and J., speak of a CJ Captain who "accepts a new hire position." 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.

The second reason is that SuppW/Letter 3 was crafted in 1997. Much has changed since then. As I and other arbitrators have pointed out, no one anticipated 9/11, no one anticipated the magnitude of the resultant furloughs, and mergers were not even discussed. Moreover, those pilots who did not chose Eagle Rights status did so at a very different time in a very different landscape. 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.

It is therefore my conclusion that a choice should be made. Obviously, the choice should be extended to the 244 CJ Captains who would have had the

opportunity to attend the aforesaid training classes, I am also of the opinion that the choice should be given to an additional 42 CJ Captains, for a total of 286. That includes all active Eagle CJ Captains who have greater seniority than the least senior currently active TWA-LLC pilot.

The choice these pilots make is to be made in light of the remedial components spelled out herein. Once these pilots are made aware of the compensation and benefits available to them if they choose to flow-up to American pursuant to the timetable set forth herein, a timetable consistent with the needs of the companies and the equities inherent in the history and prior anticipations of all other pilots, their choice will be irrevocable. The opportunity to flow-up, clearly at times uncertain except for the first 35, will be offered to the 286 senior Eagle CJ Captains with AA numbers. The compensation and benefits attached to a flow-up choice will be granted to the most senior 244 of the 286 who choose this advancement. If less than 244 of the 286 choose to flow-up, the compensation and benefits will only be offered to that lesser number, whatever it may be, with such compensation and benefits offered to no other Eagle pilot. Though the opportunity to transfer 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.

As stated, the 244 Eagle CJ Captains who choose to transfer to American should have been at the Company earlier; the first on June 6, 2007, and the remainder on the July 3, 2007-March 18, 2009, class dates at the pace measured by the class attendance of the remaining 243 TWA-LLC pilots. The retroactivity of the compensation and benefits to be offered has been determined with those dates in mind. I have also decided that, for these 244 Eagle CJ Captains, undeniable considerations of equity require that retroactivity also be applied to any "time to Captain" requirement. Therefore, the Award provides that, for such purposes, the "time of transfer" should be measured from the time that Captain would have transferred to AA had the breach not occurred.

If any one of the 244 Eagle CJ Captains chooses to flow-up to American and is subsequently enrolled in a training class, his transfer to American, save for the exception noted above, shall be no different, than transfers that had previously occurred pursuant to the now expired Supp W/Letter 3, including placement and restrictions.[3]

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[3] In all other respects, these CJ Captains who choose to flow-up to AA must meet American's criteria for employment at the time of transfer. However, it should be noted that the Parties have stipulated, as reflected in the Award, that an Eagle CJ Captain who is unable to flow to AA because he does not have an FAA First Class Medical Certificate or is on the long-term sick

(Continued on following page)

Once that Eagle CJ Captain transfers to American, he shall receive length of service for pay purposes retroactive to the date he would have transferred during the June 6, 2007-March 18, 2009 period. Prospectively, that Eagle CJ Captain who transfers will also receive the greater vacation and sick bank credit he would have earned if had been at American on the date he should have transferred. Those Eagle CJ Captains within the group of 244 who transfer will also become participants in America's A Plan on the day they become American employees. However, as was done when TWA pilots became American employees, the one year waiting period shall be waived and the period between the time they should have transferred and the time they actually transferred shall be credited, but solely for vesting purposes. At the time that Eagle CJ Captain transfers to American, the Company, by means legally permissible as set forth in the Award, will also make contributions to the B Plan for the period that Captain should have transferred at a rate equal to the Super MD-80 First Officer rate of 73 hours, which is the reserve guarantee.

I turn now to the movement of Eagle CJ Captains to American. Here, competing equities come sharply into play. The Eagle CJ Captains have waited a long time to exercise the opportunity to transfer. On the other hand, the individual TWA pilots are not at fault for that delay. They were employees of a failing,

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list or disability list does not forfeit the opportunity to flow-up at a later date.

bankrupt company whose assets were purchased by American and had little control over their fate. They, along with the Eagle CJ Captains and those pilots hired by American in 2001, were all caught up and severely impacted by the events of 9/11; events which no one anticipated and which has affected all to this day. In constructing what follows I have taken all of those equities into consideration.

The Award provides that 35 Eagle CJ Captains who choose to flow-up to American shall be placed in training beginning no later than June 2010, with said training to be in two tranches if needed. The Award also provides that there shall be no furloughs as a direct result of these transfers. If, for other reasons, 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.

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.

Following that offer and recall, the remaining Eagle CJ Captains 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. Of those Eagle CJ

Captains who transfer, those who were in the previously referenced 244 shall be entitled to receive the previously referenced compensation and benefits as of the day they would have transferred if they were in one of the June 6, 2007-March 18, 2009 training classes.

What remains is the downstream damage question. I am not persuaded that the requested payment of monetary damages, with their calculation and distribution so unclear and imprecise, is a suitable means of dealing with the effect on those pilots below the Eagle CJ Captains with AA numbers. A more appropriate means is to concentrate on the job opportunities which were unavailable as a result of the above described events that will become available following contractually required recalls. There are presently 1351 Captains at Eagle, 527 have AA seniority numbers, 824 do not. Through a system of preferential hiring, 824 future pilot job opportunities at AA should be made available to Eagle pilots who do not have AA seniority numbers. When job opportunities become available at 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 following limitation. Eagle will make every attempt to release a sufficient number of pilots to meet the aforesaid ratio. It will not, however, be required to release more than 20 pilots per month should release of a greater number result, in its judgment, in severe operational difficulties. If any one of the present day Captains declines the above opportunity

when available, an Eagle pilot who has become a Captain after the date of this Award shall have the option of electing, that opportunity until such time as 824 pilot positions have been filled by Eagle Captains pursuant to this paragraph. This system of preferential hiring should be a matter of agreement between the directly affected Parties. The Award that follows so provides.

The Undersigned, acting as the Arbitrator pursuant to the Agreement of the Parties and having duly heard their proofs and allegations, therefore renders the following

AWARD

As stated in the foregoing Opinion, American Airlines shall offer to the 286 most senior Eagle CJ Captains holding AA seniority numbers the opportunity to elect to flow-up to American. Said election, which is to be made after said Captains are advised of the remedial components set forth herein, shall be irrevocable, and shall be made no later than May 24, 2010. Once elections are made, the opportunity to transfer to American with the remedial components set forth herein shall be offered to the 244 most senior CJ Captains of the 286 who elect this advancement. If less than 244 Eagle CJ Captains so elect, the remedial components set forth will only be offered to that lesser number.

Said CJ Captains who elect the opportunity must meet the criteria for employment at American at the time of transfer, with the "time of transfer" for the purposes of "time to Captain" measured from the time each CJ Captain would have transferred to American had the breach not occurred. By agreement of the Parties, any Eagle CJ Captain who is unable to transfer to American because he does not have a FAA First Class Certificate or is on Eagles' long-term sick list or disability list does not forfeit the opportunity to transfer at a later date provided American's eligibility criteria, as set forth herein, are met.

Except as noted above, those Eagle CJ Captains transferred to American shall be transferred in the same fashion as those CJ Captains who previously transferred pursuant to the now expired Supplement W/Letter 3, including placement and restrictions.

Once an above referenced Eagle CJ Captain electing to transfer becomes an employee of American, he shall receive length of service for pay purposes retroactive to the date he would have transferred but for the placement of TWA-LLC pilots in the June 6, 2007-March 18, 2009 training classes.

Prospectively, an above referenced Eagle CJ Captain who transfers to American will receive the greater vacation and sick bank credit he would have earned if he had been at American but for the placement of

TWA-LLC pilots in the aforesaid training classes. Those Eagle CJ Captains within the group of 244 CJ Captains who transfer will become participants in American's A Plan on the day they become American employees, with the one year waiting period waived and the period between the time they should have transferred and the time they actually transferred credited solely for vesting purposes. Additionally, at the time said CJ Captain transfers to American, the Company will make contributions to the B Fund for the period that Captain should have transferred to American, which contributions shall be at the MD-Super 80 First Officer reserve guarantee rate of 73 hours. In the event such contributions are not legally permissible during the first year of said Captain's employment at American, the remainder of such contributions will be made, to the extent legally permissible, in the second year. Any remaining contributions shall be paid as taxable compensation.

The first 35 Eagle CJ Captains who elect to transfer to American shall be placed in training beginning no later than June 2010, with said training to be in two tranches if needed.

There shall be no furloughs as a result of these transfers. If, for other reasons, a furlough is deemed necessary during 2010, 35 pilots furloughed shall receive two additional months furlough pay in the amounts set forth in the AA/APA Agreement. Such

additional pay shall be awarded beginning with the most senior pilot in each month of furloughs and then to each less senior pilot in that month until a total of 35 pilots have been awarded the additional pay.

Following the aforesaid transfer, before any additional Eagle 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.

Following that offer and recall, the remaining Eagle CJ Captains with AA seniority numbers who choose to transfer when and as future positions become available and those American pilots presently on furlough shall be entitled to enter and re-enter active service at American in American seniority order. Said Eagle CJ Captains transferring to American shall be transferred in the same fashion as those CJ Captains who previously transferred pursuant to the now expired Supplement W/Letter 3, including placement and restrictions. Upon their transfer, those CJ Captains within the previously referenced 244 CJ Captains shall be entitled to receive the above referenced compensation and benefits as of the day they would have transferred but for the placement of TWA-LLC pilots in the June 6, 2007-March 18, 2009 training classes.

The affected Parties are directed to enter into a preferential hiring agreement pursuant to which American, at the time hiring resumes, will 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, subject to the following limitation. Eagle is to make every attempt to release a sufficient number of pilots to meet the aforesaid ratio. It will not, however, be required to release more than 20 pilots per month if doing so would, in its judgment, create severe operational difficulties.

Should any of the present day Eagle Captains decline the above offered pilot position opportunity, an Eagle pilot who becomes a Captain after the date of this Award, shall have the right to elect said opportunity in seniority order until such time as 824 pilot positions have been filled by Eagle Captains pursuant to this paragraph.

Jurisdiction will be retained in the event there is any dispute regarding the interpretation or application of this Award.

/s/ George Nicolau
George Nicolau, Arbitrator

ACKNOWLEDGMENT

On this 9th day of April, 2010 I, George Nicolau, affirm, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing as my Opinion and Award in the above matter.

/s/ George Nicolau
George Nicolau

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11-11098

GAVIN MACKENZIE, individually and on behalf of those similarly situated; MARK BURNETT, individually and on behalf of those similarly situated,

Plaintiffs-Appellants

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; ALLIED PILOTS ASSOCIATION; AMERICAN AIRLINES, INCORPORATED; AMERICAN EAGLE AIRLINES, INCORPORATED,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITIONS FOR REHEARING AND REHEARING EN BANC

(Filed Jan. 26, 2015)

(Opinion: December 23, 2014, 5 Cir., ___, ___ F.3d ___)

Before STEWART, Chief Judge, and BARKSDALE and GRAVES, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
UNITED STATES CIRCUIT JUDGE

United States Code

TITLE 45 – RAILROADS

CHAPTER 8 – RAILWAY

LABOR SUBCHAPTER I –

GENERAL PROVISIONS

45 U.S.C. § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided –

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

* * *

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time

limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

* * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment

boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be

considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any

dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

(May 20, 1926, ch. 347, Sec. 3, 44 Stat. 578; June 21, 1934, ch. 691, Sec. 3, 48 Stat. 1189; Pub.L. 89-456, Sec. 1, 2, June 20, 1966, 80 Stat. 208, 209; Pub.L. 91-234, Sec. 1-6, Apr. 23, 1970, 84 Stat. 199, 200.)

United States Code

TITLE 45 – RAILROADS

CHAPTER 8 – RAILWAY LABOR

SUBCHAPTER II – CARRIERS BY AIR

45 U.S.C. § 184. System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

(May 20, 1926, ch. 347, Sec. 204, as added Apr. 10, 1936, ch. 166, 49 Stat. 1189.)

15 Mar 02

Letter 3
SUPPLEMENTAL AGREEMENT
between and among
AMERICAN AIRLINES, INC.
and the
AIRLINE PILOTS
in the service of
AMERICAN AIRLINES, INC.
as represented by
THE ALLIED PILOTS ASSOCIATION
and
AMR EAGLE, INC.
EXECUTIVE AIRLINES, INC.
FLAGSHIP AIRLINES, INC.
SIMMONS AIRLINES, INC.
WINGS WEST AIRLINES, INC.
and the
AIR LINE PILOTS
in the service of
EXECUTIVE AIRLINES, INC.
FLAGSHIP AIRLINES, INC.
SIMMONS AIRLINES, INC.
WINGS WEST AIRLINES, INC.
as represented by
THE AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL

AMERICAN AIRLINES EMPLOYMENT OPPORTUNITIES and FURLOUGH PROTECTION

THIS LETTER OF AGREEMENT is made and entered into by, between, and among AMERICAN AIRLINES, INC., and the pilots in the service of AMERICAN AIRLINES, INC., as represented by the ALLIED PILOTS ASSOCIATION, and AMR EAGLE, INC., EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC., SIMMONS AIRLINES, INC., and WINGS WEST AIRLINES, INC., and the pilots in the service of EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC., SIMMONS AIRLINES, INC., and WINGS WEST AIRLINES, INC., as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL.

I. Preamble

A. This Supplemental Agreement governs American Airlines, Inc. ("AA") employment opportunities for a pilot employed at any commuter carrier (or its successor) which is majority owned by AMR Eagle, Inc., or any successor(s) to AMR Eagle, Inc. (hereinafter referred to as "AMR Eagle, Inc."). All commuter carriers which are majority owned by AMR Corp. or an affiliate shall be operated within AMR Eagle, Inc. and shall be governed by this Supplemental Agreement.

B. This Supplemental Agreement also governs employment opportunities at AMR Eagle, Inc. for furloughed AA pilots.

C. 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.

D. [Omitted].

E. [Omitted].

* * *

III. Employment Opportunities at AA for AMR Eagle, Inc. Pilots

A. 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.

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. The pilot's AA occupational seniority date and number will be established as if he were able to fill such new hire position at AA and had attended the new hire training class referenced in Paragraph III.A. above. Such pilot's length of service for pay purposes, data of hire for pension purposes, and length of service for vacation accrual will be established in accordance with III.C. below. The number of such CJ Captains will not exceed the difference between the number of CJ Captains who are able to fill new

hire positions at AA and the number of new hire positions which must be offered to CJ Captains in accordance with Paragraph III.A. above.

C. A CJ Captain's (1) placement on the AA Pilots Seniority List (except as provided in Paragraph III.B. above which is only applicable for placement on the AA Pilots Seniority List in order to establish an AA occupational seniority date and number), (2) length of service for pay purposes, and (3) "date of hire" for pension purposes will be based on the date such pilot is entered on the AA payroll. Such pilot's length of service for vacation accrual will be based on the cumulative total of the pilot's service at AMR Eagle, Inc. and AA.

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.

E. [Omitted].

F. 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 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).

G. A CJ Captain who is awarded a new hire position at AA will be issued the lowest seniority number at AA in the applicable new hire class, subject to AA's policy concerning the assignment of seniority numbers to new hire pilots who have previous service in other employee classifications. AMR Eagle, Inc. pilots will receive their AA seniority number in order of their seniority at AMR Eagle, Inc.

H. A CJ Captain who accepts a new hire position at AA may bid and will be awarded a bid status vacancy based upon such pilot's AA seniority at the time of his transfer to AA. Such pilot must fulfill a one year lock-in in the bid status which is awarded or assigned. Such pilot will not be required to serve a probationary period at AA.

I. [Omitted].

J. A CJ Captain who accepts a new hire position at AA may be withheld from such position for operational reasons, provided the pilot is paid the greater of the rate of pay for the CJ Captain flying being performed at the applicable AMR Eagle, Inc. pay rates, or the highest equipment rate of pay for the AA bid status from which withheld up to the applicable AA monthly maximum. Such withholding will be limited to a maximum of six (6) months.

IV. Furlough Protection at AMR Eagle, Inc. for Pilots Furloughed from AA.

A. A pilot furloughed from AA may displace a CJ Captain at an AMR Eagle, Inc. carrier provided that the number of CJ Captain positions available to furloughed AA pilots will be limited to the total number of CJ Captain positions at AMR Eagle, Inc. less the number of Eagle Rights CJ Captains.

B. A furloughed AA pilot may displace

1. A CJ Captain, other than an Eagle Rights CJ Captain, who has not been awarded a seniority number at AA, in reverse order of AMR Eagle, Inc. seniority; and then

2. A CJ Captain who has accepted a position on the AA Pilots Seniority List pursuant to Paragraph III.B. above, or a CJ Captain who was previously furloughed from AA, in reverse order of AA seniority.

C. [Omitted].

D. Eagle Rights CJ Captains are not subject to displacement by furloughed AA pilots, or any pilot who has been awarded an AA seniority number pursuant to Paragraph III.B. above.

[Subparagraphs E through K omitted].

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VI. Dispute Resolution Procedures

A. The parties to the Dispute Resolution Procedures will be AA, APA, ALPA, and AMR Eagle, Inc. (individually and as representative of Executive

Airlines, Inc., Simmons Airlines, Inc., Flagship Airlines, Inc., and Wings West Airlines, Inc., and any other commuter carriers which are majority owned).

B. The parties agree to arbitrate any grievance alleging a violation of this Supplemental Agreement on an expedited basis directly before a single neutral arbitrator jointly selected by all the parties. The jurisdiction of the neutral shall be limited to disputes involving the interpretation or application of this Supplemental Agreement.

C. [Omitted].

D. All of the parties agree to establish a list of five (5) neutrals as a permanent panel of arbitrators to resolve disputes over the interpretation and application of this Supplemental Agreement. AA, AMR Eagle, Inc., ALPA and APA may each sequentially strike a name from this list, and the remaining neutral shall hear and decide the dispute. The order of striking will be determined by lot. 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.

VII. [Omitted].

IN WITNESS WHEREOF, the parties have signed this SUPPLEMENTAL AGREEMENT this 5th day of May 1997.

[Signatures Omitted].