ALLIED PILOTS ASSOCIATION EQUITY DISTRIBUTION ARBITRATION

In the Matter of	
DISTRIBUTION OF EQUITY BY ALLIED PILOTS ASSOCIATION	**DECISION AND AWARD**

Arbitrator: Stephen B. Goldberg

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I. STATEMENT OF FACTS

A. American Airlines Bankruptcy Proceedings

AMR Corp., the parent company of American Airlines (collectively, "American," "AA," or "the Company"), filed for Chapter 11 bankruptcy on November 29, 2011. *See In AMR Corp.*, Case No. 11-15463 (Bankr. S.D.N.Y. 2011). In the bankruptcy proceedings, American sought to reduce its labor costs by proposing modifications to its collective bargaining agreements ("CBA," "labor contract," "contract" or "collective bargaining agreement") with the Allied Pilots Association ("APA" or the "Union") and other unions. *See id.*, dkt. nos. 2034 and 2041. American ultimately filed a motion to abrogate APA's then-existing 2003 CBA pursuant to 11 U.S.C. § 1113. That motion was granted by the bankruptcy court on September 5, 2012. *Id.*, dkt. no. 4293.

During the course of the bankruptcy litigation, American and APA undertook negotiations for a new CBA. The new agreement was ratified by APA on December 7, 2012, submitted to and approved by the bankruptcy court on December 19, 2012, and became the effective CBA between American and APA as of January 1, 2013 (the "2013 CBA"). The 2013 CBA included substantial concessions from the 2003 CBA including, for example:

- a freeze of the defined benefit pension plan (known as the "A Plan");
- elimination of the option for pilots to obtain a "lump sum" payment from the A Plan;
- changes to scheduling rules;
- authorization for American to engage in greater outsourcing of flying;
- loss or reduction of certain pay premiums (e.g., night pay, international pay); and
- loss or reduction of certain benefits (e.g., active medical, retiree medical).

In exchange for these concessions, the 2013 CBA and an attendant Memorandum of Understanding between American, APA, US Airways, and the US Airways Pilots Union (the "MOU"), that was entered into in contemplation of the planned merger between American and US Airways, also included certain changes that were favorable to the pilots in comparison to the 2003 CBA. Those changes included a general increase in hourly wages and increased contributions from American to the pilots' defined contribution retirement plan ("B Plan").

In negotiating the 2013 CBA, APA agreed with American and American's other unsecured creditors that APA would receive 13.5% of the total equity of the post-bankruptcy American that would be distributed to American's unsecured creditors in the bankruptcy. The equity is to be distributed from American to APA in the form of publicly-traded stock. In return for this equity interest, APA agreed to release such bankruptcy claims as it might have arising out of the abrogation of the 2003 CBA.

In seeking to maximize the amount of equity that it would receive in its negotiations with American, APA initially relied on its estimate of the financial harm to pilots resulting from the

concessions in the 2013 CBA. Andrew Yearley of Lazard Frères & Co. LLC, who was APA's financial advisor and representative in these negotiations, testified, however, that estimates of harm to the pilots were not the controlling factor in the negotiations.[1] Rather, the key factor was the equity interests received by pilot unions in other airline bankruptcy cases—namely, the Northwest (11%), United (10%) and Delta (15%) bankruptcies. Thus, while the specific harm suffered by APA as a result of the 2003 CBA abrogation was a consideration in the equity interest negotiations, it was not outcome determinative regarding the percentage of APA's equity interest.

B. The APA Equity Distribution Plan

When it became likely that APA would receive a significant percentage of the unsecured creditors' equity, APA formed a special committee to analyze and provide options for the distribution of the equity to pilots represented by APA. The Equity Distribution Committee ("EDC") was formed on October 5, 2012. The EDC members were CA Michael Mellerski, CA Mark Stephens, FO Michael MacMurdy, CA Doug Pinion, and FO David Quinlan.[2]

From October 2012 to March 2013, the EDC worked to develop an equity distribution plan. Its conclusions were presented to the APA Board of Directors and a final Equity Distribution Plan was adopted by the APA Board of Directors on April 3, 2013. The "Overarching Principles" of the Distribution Plan were stated to be:

1. The Distribution shall be based on contractual damages forward-looking from the effective date of the Collective Bargaining Agreement (CBA), Jan. 1, 2013;
2. The damages shall be assessed relative to the Green Book[3] prior to the abrogation of the CBA under Section 1113; and,
3. The methodology and eligibility criteria shall recognize that the total value of the equity stake is insufficient to make the pilot group whole with regard to those contractual damages.[4]

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[1] Mr. Yearley's Declaration (¶ 16-18) states, in relevant part:

> [T]here are several reasons why these valuation analyses were not the controlling factor in the negotiation over the Equity Stake. First . . . APA's calculation was based on estimates and assumptions that were highly uncertain and subjective. If actually disputed before the Bankruptcy Court, any one of those assumptions (and the estimates resulting from them) could have been subject to significant litigation risk.
>
> Second, it was my understanding based on advice of counsel, that the question of whether APA, as a matter of law, was entitled to a claim as a result of modifications to its collective bargaining agreement under Section 1113 of the Bankruptcy Code involved significant litigation risk.
>
> Finally, and perhaps most importantly, the negotiation was significantly guided by precedent financial outcomes realized by other pilot unions in network carrier bankruptcies such as United Airlines, Northwest Airlines and Delta Airlines. Not only were American and its advisors focused on these precedents but the Creditors' Committee was also sensitive to these prior benchmarks because, as a fiduciary to all unsecured creditors, any recovery agreed with APA would result in less recovery to other unsecured creditors.

[2] EDC members range in seniority from number 311 to number 6764 on the AA seniority list, and their age range is 49-59.

[3] (Footnote added). The Green Book is the 2003 CBA.

[4] Equity Distribution: APA Board of Directors-Approved Eligibility and Allocation at 2.

According to APA, the guiding principles of the Equity Distribution Committee also recognized that specific harm to pilots is highly uncertain, and that neither the Company nor APA could hold back any significant portion of the equity stake for later distribution.[5] APA also asserted that it has an institutional interest in limiting the disparity between the payouts received by pilots while still acknowledging that some pilots were likely to be more harmed by changes in the 2003 CBA than others.[6] Finally, APA noted that "the importance of many contract changes cannot be fully assessed on a purely quantitative basis."[7]

With these principles in mind, the EDC developed a distribution plan based on four "silos," each of which, according to APA, was intended to account for different financial harms caused by the concessions in the 2013 CBA. The four distribution silos are: (1) Inverse Seniority, (2) Per Capita, (3) Years of Service, and (4) Pension. The purpose and general methodology of each silo is stated by APA to be:

1. Inverse Seniority Silo

The Inverse Seniority Silo was intended to mitigate financial harm from contractual changes that disproportionately affected junior pilots. Such changes, according to the testimony of EDC members, include increased work hours and outsourcing of flying, both of which delay junior pilots from advancing into more lucrative flying positions. Because, according to the EDC, even senior pilots may be harmed by these changes, albeit to a lesser degree, the methodology adopted for this silo distributes to the most junior pilot twice as much equity as that received by the most senior pilot, with each pilot in between those two extremes receiving a distribution on a linear scale. This silo was prorated for pilots who will reach mandatory retirement (at age 65) before the end of the 2013 CBA's six-year term because the financial harm accounted for in this silo affects only active pilots.[8]

2. Per Capita Silo

The Per Capita Silo was intended to mitigate financial harm from contractual changes that tend to affect all pilots equally or for which it was impossible to predict which categories of pilots would be affected. Such changes include reduced medical benefits for active pilots and changes in pilots' work schedules. In this silo, the EDC's methodology called for each pilot to receive an equal share of the equity distribution. The Per Capita Silo is also prorated for pilots who will reach mandatory retirement before the end of the 2013 CBA's six-year term.

3. Years of Service Silo

The Years of Service Silo was intended to mitigate financial harm related to seniority, pay rate, and proximity to retirement, including the loss of subsidized medical insurance for

[5] APA Statement of Position at 4-6.
[6] APA Statement of Position at 13; Declaration of EDC Member Mark Stephens ¶ 73.
[7] APA Statement of Position at 13.
[8] This means, for example, that a pilot forced to retire after the third year of the six-year 2013 CBA will receive a 50% fractional share of what would otherwise be his or her Inverse Seniority Silo distribution.

retirees, elimination of the lump sum pension plan option, loss of profit sharing, changes to the international pay premium, and changes to vacation. Each of these harms, according to APA, is related to a pilot's years of service, defined as the difference between the pilot's Occupational Date and the effective date of the 2013 CBA.[9] In order to avoid unnecessary complexity, APA chose to create a single silo based upon years of service, rather than separate silos based on seniority, pay rate, and proximity to retirement. Each pilot's equity distribution from this silo is proportional to his or her years of service. The silo is not prorated because at least some of the financial harm that it is intended to mitigate occurs after retirement.

4. Pension Silo

The Pension Silo was intended to mitigate the financial harm resulting from the "freeze" of the pilots' defined benefit pension plan (the A Plan). As a result of the freeze, retiring pilots will receive only the benefit they would have been entitled to receive as of the freeze date (November 1, 2012). The loss caused by the freeze of the A Plan is mitigated in part by the 2013 CBA, which provides that American will increase its contributions to the defined contribution plan (the B Plan) from 11% to 14%, and eventually to 16%.

The EDC adopted a methodology for the Pension Silo that attempts to do the following: (i) estimate the value of the pension a pilot would have received from the A Plan if it had not been frozen, and (ii) subtract from that non-frozen A Plan value (a) the value of the frozen A Plan the pilot will receive from American and (b) the value of the pilot's increased contributions from American to the pilot's B Plan. The Pension Silo was not prorated.

5. Allocation of the Equity Interest Among the Silos

In determining the appropriate allocation of the equity interest among the four silos, the EDC relied to some extent on American's analysis of projected cost savings to it over the six-year term of the 2013 CBA, an analysis that had been developed by American for the negotiations concerning the 2013 contract. The EDC used American's estimates of cost savings to it of each of the concessions in the 2013 contract as a rough proxy for the harm to pilots occasioned by each of those concessions, assigning the estimated cost savings/harm to pilots to one of the four silos.

The EDC used American's cost savings estimates rather than attempting to calculate actual harm to pilots resulting from the 2013 CBA concessions because of the difficulty it encountered in attempting to determine the harm that pilots would sustain under the concessions in the 2013 CBA. According to APA (Statement of Position at 30):

> . . . [F]or the most part, these harms have not yet occurred (and had not occurred at all when the Committee started its work on the equity distribution scheme). These harms are incredibly difficult to predict, with projections varying based on assumptions about future business

[9] "Occupational Date" is the approximate date a pilot actually begins to perform work for American, with certain exceptions discussed below. As a matter of course, American assigns a pilot's Occupational Date as 47 days after the pilot is hired by American, which accounts for the average training time required before a pilot begins working.

> decisions of American, trends in the airline industry, pilot behavior, and many other factors. While the Equity Distribution Committee carefully considered all available data, [it declined] to make the equity distribution scheme dependent solely on a series of guesses about the future effects of dozens of different concessions in the 2013 CBA. . . .

The EDC, however, modified American's estimates in two important respects. It considered pension costs over a twelve year period, the average remaining career of AA pilots, rather than using American's six-year estimate. It also included an estimate of savings from changes in the Scope clause of the CBA, to which American had assigned no value.

Based upon this analysis, the EDC assigned $1.08 billion, which amounted to 32.6% of the equity interest, to the Pension Silo, $1.127 billion (34%) to the Inverse Seniority Silo, $551 million (16.6 %) to the Per Capita Silo, and $555 million (16.8 %) to the Years of Service Silo. The EDC was concerned, however, that these figures presented an impression that its calculations of the harm to the pilots attributable to each of these silos were precise, which it knew not to be the case. Accordingly, it decided to round the percentage allocations to each of the four silos as follows: 30% to the Pension Silo, 30% to the Inverse Seniority Silo, 20% to the Years of Service Silo and 20% to the Per Capita Silo. In doing so, the EDC was also guided by its interest in minimizing the disparity between the amount of the equity allocations to the pilots in order to avoid the hard feelings and internal union conflict that would follow an equity distribution in which some pilots received amounts vastly in excess of those received by other pilots.[10] The EDC's calculations showed that rounding the percentages to 30-30-20-20 succeeded in reducing disparities, and, the EDC concluded, was not substantially inconsistent with its admittedly imprecise estimates of harm drawn from American's cost-savings estimates. Accordingly the EDC recommended the 30-30-20-20 silo division to the APA Board of Directors.

The Board of Directors, in turn, accepted the EDC's proposed allocation among silos. It did so, according to APA:

> . . . because it was roughly in accord with the imprecise cost-savings data and the Board's sense of the relative importance of the silos, while minimizing the variance in payouts. Alternative allocations, especially those that placed greater weight on the Pension Silo, would have disrupted this balance and increased the variance in the payouts.[11]

6. Equity Distribution Eligibility Criteria

The basic eligibility principle established by the EDC was that all pilots who were active on January 1, 2013, would be eligible to receive a share of the equity from all four silos. Any

[10] EDC Chairman Michael Mellerski testified that the EDC "didn't think $300,000 disparities was in the best interest of the union. So that was one factor in our recommendation on the silo allocations." Tr. 411:8-11.
[11] APA Post-Hearing Brief at 4-5 (internal citations omitted).

pilot who became active between January 1, 2013, and August 1, 2013, would also be eligible to receive a share from all four silos, provided the pilot were to sign an enforcement letter and accompanying promissory note agreeing to remain an active pilot at American for at least twelve months. The purpose of this requirement, according to APA, was to deter pilots from briefly returning to American solely to claim a share of the equity distribution.

The EDC also established eligibility rules for special categories of pilots. To the extent there were challenges to those rules or their application, they are discussed below.

C. The General Lump Sum Dispute Resolution Procedure and the APA Equity Arbitration Procedure

The Equity Distribution Plan includes a General Lump Sum Dispute Resolution Procedure, applicable to:

> . . . any dispute about the distribution of a Lump Sum Payment, including any dispute over APA's methodology for allocating such funds, the factors used to determine the allocation of funds, or the amount allocated to any pilot. . . .[12]

Pursuant to the General Lump Sum Dispute Resolution Procedure, the question before the Arbitrator, in the event of challenges to the APA Board of Directors Allocation decisions, is:

> . . . whether to uphold the APA Board of Directors' allocation decisions and, if not, what specific modifications to the decisions are required. Prior to requiring any changes to APA's distribution methodology, eligibility criteria, or other factor in the APA Board of Directors' allocation decision, the arbitrator must find that APA's actions or inactions are either arbitrary, discriminatory, or in bad faith.

The Procedure further provided:

> The arbitrator shall issue a written decision and award stating whether the Board of Directors' allocation decision is upheld and, if not, what specific modifications are required to be included in a revised method of allocation. The decision will include a statement of reasons for the decision whether or not it upholds the Board of Directors' proposed method.

Pursuant to the General Lump Sum Dispute Resolution Procedure, Professor Stephen B. Goldberg was selected as Arbitrator and a detailed APA Equity Arbitration Procedure ("Arbitration Procedure") was established. A pilot who wished to contest the amount of the

[12] Equity Distribution: APA Board of Directors-Approved Eligibility and Allocation at Appendix A.

equity allocation that he/she had received was required to submit a challenge to that allocation no later than May 20, 2013.[13]

The Arbitration Procedure provided for limited discovery in the form of document requests, and permitted pilots to request that witnesses appear and provide testimony at the scheduled hearing on the merits of all challenges. Pursuant to the Arbitration Procedure, the Arbitrator conducted a procedural hearing on June 13-14, 2013, to resolve discovery disputes, motions to dismiss, and issues relating to the consolidation of challenges.

Subsequent to the procedural hearing, a hearing on the merits (the "Merits Hearing") was held on July 16-20, 2013. Thereafter, Supplemental Hearings were held on August 14, 2013 (to hear additional evidence and argument related to the challenges of former TWA pilots to their Equity Fund allocations and challenges of certain former American Eagle pilots related to data and calculation errors) and September 11, 2013 (to hear additional evidence and argument related to challenges to the distribution of funds from the Inverse Seniority Silo). All challengers were notified of their right to present evidence and argument at these hearings and to submit written evidence and argument to the Arbitrator.

During the pendency of the Arbitration Procedure, APA maintained a website accessible to all pilots, both APA members and non-members, on which the following documents were posted: (i) general equity distribution documents, including the Equity Distribution Plan, the 2003 CBA, and the 2013 CBA; (ii) all Orders of the Arbitrator; (iii) APA's motions, notices and responses to motions; (iv) the challenging pilots' challenges, motions, requests and responses to motions; (v) APA's Statement of Position and supporting declarations and exhibits; and (vi) hearing exhibits and transcripts. All documents posted on the APA website, as well as all testimony and documents received into evidence at the Merits Hearing and the Supplemental Hearings, constitute the record in this matter.

II. STANDARD OF REVIEW

The question before the Arbitrator, in reviewing the methodology and allocation decisions made by the EDC and adopted by the APA Board of Directors is, as set out in the General Lump Sum Dispute Resolution Procedure, whether those decisions were arbitrary, discriminatory, or in bad faith. Inasmuch as these standards of review are identical to those that have been developed by the courts in determining whether a union has violated its duty of fair representation, I shall be substantially guided by court decisions and doctrine interpreting and applying the duty of fair representation.

A. Purpose and Origins of Duty of Fair Representation

The duty of fair representation ("DFR") was first enunciated by the Supreme Court in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202-03 (1944), and applies to unions covered by both the Railway Labor Act (*id.)* and the National Labor Relations Act. *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 76 (1991) (*O'Neill I*).

[13] Each pilot was able to determine the amount of his/her Equity Fund allocation from the APA DataVerification and Payout Website as of April 29, 2013.

B. Highly Deferential Tripartite Standard

The United States Supreme Court has likened the DFR to "the duty owed by other fiduciaries to their beneficiaries." *O'Neill I*, 499 U.S. at 74. Courts have devised a three-part test to determine whether challenged conduct runs afoul of the DFR: "[A] union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith.'" *Id.* at 67 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). In making this determination, courts engage in a "tripartite" inquiry, examining each element separately. *Griffin v. Air Line Pilots Ass'n, Int'l*, 32 F.3d 1079, 1083 (7th Cir. 1994).

This inquiry is "highly deferential." *See O'Neill I*, 499 U.S. at 78 (citing "the wide latitude that negotiators need for the effective performance of their bargaining responsibilities"); *see also United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 374 (1990) ("The doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a 'wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.'") (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)); *Landry v. The Cooper/T. Smith Stevedoring Co., Inc.*, 880 F.2d 846, 852 (5th Cir. 1989) ("A union does not breach its duty of fair representation . . . through simple negligence or a mistake in judgment.").

1. Arbitrary Union Action

"[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *O'Neill I*, 499 U.S. at 67 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)); *see also Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46 (1998) ("A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation."). As the Supreme Court also stated in *Marquez*, "[t]his wide range of reasonableness gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong." *Id.* at 45-46 (internal quotations omitted).

2. Discriminatory Union Action

Courts have held that a union's conduct is discriminatory within the meaning of the DFR only if such conduct is "invidious," *O'Neill I*, 499 U.S. at 81, or "intentional, severe, and unrelated to legitimate union objectives." *Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010) (quoting *Amalgamated Ass'n of Street, Elec. Ry & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301 (1971)).

Thus, "[t]he fact that a union adopts a position which favors one group of employees over another does not amount to a breach of the duty of fair representation." *Turner v. Air Transport Dispatchers' Ass'n*, 468 F.2d 297, 300 (5th Cir. 1972). In particular, as long as distinctions between employees are "relevant," such distinctions do not run afoul of the DFR. *Steele*, 323 U.S. at 203 (contrasting permissible distinctions based on seniority, skill, and function with impermissible distinctions based on race). As the Supreme Court has explained,

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); *see also Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 712 (2d Cir. 2010) ("[T]here is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives"); *Ryan v. New York Newspaper Printing Pressmen's Union No. 2*, 590 F.2d 451, 457 (2d Cir. 1979) ("The Union was trying to make the best out of a bad situation, and it was almost inevitable that the Union's drawing of a line would hurt someone.").

3. Bad Faith Union Action

"A union acts in bad faith when it acts with an improper intent, purpose, or motive . . . encompass[ing] fraud, dishonesty, and other intentionally misleading conduct." *Merritt*, 613 F.3d at 619 (internal quotations omitted); *see also O'Neill v. Air Line Pilots Ass'n, Int'l*, 939 F.3d 1199, 1203 (5th Cir. 1991) (*O'Neill II*) (requiring a union's misstatements to be "sufficiently egregious or so intentionally misleading to be invidious and therefore meet the demanding standard of a bad faith breach of [the] DFR") (internal quotations omitted).

C. Prior Cases Addressing Pilot Unions' Distribution Plans

Several courts have considered challenges to pilot unions' equity distribution plans in the wake of airline bankruptcies.

1. *Bondurant v. Air Line Pilots Association, International*

Bondurant arose in the wake of the 2005 bankruptcy of Northwest Airlines. There, former pilots challenged a distribution scheme that used the effective date of the Bankruptcy Restructuring Agreement as a strict cutoff for determining eligibility for full claim shares. *Bondurant v. Air Line Pilots Ass'n, Int'l*, 679 F.3d 386, 391 (6th Cir. 2012). Specifically, the union presumed that any pilot who was actively employed on the effective date of the Bankruptcy Restructuring Agreement would remain employed throughout the duration of the agreement. If a pilot had retired or otherwise left Northwest Airlines prior to the effective date of the Bankruptcy Restructuring Agreement, that pilot would receive a share of the claim based upon the actual number of months worked during the 85-month concessionary period. *Id*. Pilots who had participated in the Pilot Early Retirement Program all retired after the cutoff date. In addition, older pilots who retired after the cutoff date or who continued flying as "Second Officers" past the age of 60 received special benefits under the challenged distribution scheme. *Id*.

Plaintiffs—regular retirees who reached the retirement age of 60 and left the airline before the effective date of the Restructuring Agreement—claimed that the cutoff date for determining full claim eligibility was arbitrary and discriminatory and therefore ran afoul of the duty of fair representation. *Id*. at 392. In particular, plaintiffs argued that the distribution scheme was arbitrary insofar as it granted full claim eligibility to pilots who were employed on the cutoff date but left well before the termination of the agreement. *Id.* The *Bondurant* court rejected this contention, reasoning that the challenged distribution scheme simply amounted to an "imperfect compromise," because the union was attempting to compensate the pilots fairly, but at the same time, distribute shares as quickly as possible so as to protect the value of the claim. *Id*. at 392-93 ("Without endorsing the union's approach as the best possible method for allocating the claim, we are also satisfied that the union tried to distribute the shares 'quickly and fairly' and that its selection of the cutoff date was by no means 'wholly irrational.'").

The *Bondurant* plaintiffs also argued that the distribution plan at issue was discriminatory. While the court acknowledged that some pilots fared better than others under the challenged scheme, it noted that "there is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives." 679 F.3d at 393 (quoting *Vaughn v. Air Line Pilots Ass'n Int'l*, 604 F.3d 703, 712 (6th Cir. 2010)). The court further reasoned that "[u]nions represent diverse interests and sometimes have to make decisions that affect certain members more harshly than others" and that "[t]his proposition is especially true in the context of employer bankruptcy, which can present unique challenges for a bargaining representative." *Id.*

The court also found no evidence of unlawful age discrimination:

> The mere fact that the plaintiffs, who were older than the early retirees, did not similarly benefit from the union's distribution scheme is insufficient to create an inference that the union intended to discriminate against them because of their age. Moreover, the union also awarded full claim shares to a number of pilots (those who secured Second Officer positions) who were older than the plaintiffs--an aspect of the distribution scheme that considerably weakens any link between the cutoff date and discriminatory age animus.[14]

2. *Mansfield v. Air Line Pilots Association*

In *Mansfield v. Air Line Pilots Association International*, No. 1:06-cv-06869, 2009 WL 2386281 (N.D. Ill. July 29, 2009), senior pilots employed or formerly employed by United Airlines challenged a union's allocation method after United filed for bankruptcy. The union's Master Executive Council (MEC), charged with developing a distribution plan for the convertible notes that United issued to its pilots, considered a number of alternatives before adopting a final distribution plan. Under the plan that was ultimately adopted (the "GAP 2" plan), the allocations were based on each pilot's lost accrued benefits and future lost benefits. Under an alternative plan that was ultimately rejected (the "GAP 1" plan), allocations would

[14] *Id.* (internal citation omitted).

have been based only upon accrued benefits. *Id*. at *3. More senior pilots fared worse under the plan that was ultimately adopted than they would have fared under the rejected plan. *Id*. at *6. The plaintiff pilots presented evidence in the form of testimony from one member of the MEC and emails among MEC members indicating that, despite statements to the contrary, the MEC had decided early on to reject the GAP 1 plan. The plaintiffs also submitted evidence demonstrating that 13 of the 15 members of the MEC fared better under GAP 2 than GAP 1.

The court held that the fact that the adopted allocation method "favored one group of pilots over another [was] not by itself indicative of a breach of the duty of fair representation," but nevertheless declined to grant summary judgment in favor of defendants. *Id*. at *5-6. Specifically, the court held that a jury could find from the plaintiffs' evidence that the union had "engaged in an elaborate show of soliciting expert advice and pilot opinion," and was telling pilots that it was considering GAP 1, when in fact it had already rendered a decision as to which allocation method to adopt. *Id*. at *6.[15]

III. DISCUSSION

A. Silo Allocation Challenges

1. The Union should not have allocated equity among silos; every pilot should be given an equal share.

Several pilots filed challenges asserting that allocation of the equity among silos prior to awarding each pilot's share was arbitrary, and that an equal distribution of equity among all pilots would have been fairer, simpler, less divisive, and more transparent. APA, however, offered a legitimate basis for its use of the silo structure, stating:

> The APA adopted a silo system because it allowed the union to account for a variety of harms associated with the concessions in the 2013 CBA, without necessitating an impossible inquiry into the specific financial impact of each and every concession. Indeed the term "silo" was adopted from the Delta ALPA MEC and the Northwest ALPA MEC, both of which constructed what they called silo systems for distribution of the money they received as a result of their carriers' bankruptcies. *See Gilliland v. Air Line Pilots Ass'n Int'l*, 741 F. Supp. 2d 1334 (N.D. Ga. 2009); *Bondurant v. Air Line Pilots Ass'n*, 679 F.3d 386 (6th Cir. 2012).[16]

According to Equity Distribution Committee member Mark Stephens:

> Q. [Mr. Rosenthal] . . . What is a silo, and why did you decide to use that approach?

[15] *Gilliland v. Air Line Pilots Ass'n, Int'l*, No. 1:07-cv-3082-TCB (N.D. Ga. Oct. 15, 2009), involved a challenge to a pilot union's distribution of funds acquired following the Delta Air Lines bankruptcy, but was dismissed as time-barred. Hence, the court did not consider the validity of the challenge to the union's distribution plan.

[16] APA Statement of Position at 7-8.

> A. . . .We weren't really reinventing the wheel here. The previous unions had done it. What it allowed us to do was take disparate damages that came from different sources, group them together, and deal with them collectively without the need or the ability to calculate individual damages. . . . [I]t gave us max flexibility to deal with the fact that there were disproportionate harms that affected different demographics of pilots . . . .
>
> So we basically hopped onto the bandwagon of what the previous unions had decided to do because we thought that it would be effective. In fact, as we went through the process, it did turn out to be an effective way to look at it . . . .[17]

Another challenger argument for distributing equity equally without regard to the harm suffered by different pilot groups as a result of the concessions in the 2013 contract was that in light of the pay increases, the majority of pilots will make more money during the term of the 2013 contract than they would have under the 2003 contract. Hence, no pilots were actually harmed by the concessions in the 2013 contract. Accordingly, APA need not concern itself with redressing nonexistent harm, but should distribute the equity equally.

The short answer to this contention is that regardless of the amount of the pay increase, distinct pilot demographic groups sustained more or less harm as a result of the contract concessions. While for some demographic groups the amount of the pay increase might have been enough to make up for the harm resulting from the concessions, that may not have been true for other pilot groups. Hence, an equal distribution of the equity, while simple and transparent, would have created its own fairness issues, no less and perhaps more significant than those of which the challengers complain here.

Finally, despite its primary focus on mitigating the different types of harm sustained by different pilot groups, APA was not insensitive to the interest underlying the demand for equal distribution – that disparities in the amounts received by pilots would be regarded as unfair and would produce dissension in the pilot ranks. To the contrary, the testimony showed that both the EDC and the APA Board of Directors considered, when debating the amount to be allocated to each silo, the APA concern about reducing the distributional disparity among pilots.[18]

The fact that APA chose not to make the elimination of disparities its central goal in distributing the equity among pilots, but rather chose to give primacy to remedying differing degrees of harm to different pilot groups and lesser, but nonetheless genuine attention to reducing inequality, was consistent with the "Overarching Principles" of the Equity Distribution Plan (*see* pp. 2-3, *supra*) and does not render its equity distribution method arbitrary, discriminatory, or in bad faith.[19]

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[17] Tr. 80:4-81:5.

[18] *See* testimony of EDC Chairman Mellerski, quoted at page 5, n.10.

[19] Some pilots asserted that they were told by APA representatives, prior to the ratification vote on the 2013 contract, that each pilot would receive the same amount in the equity distribution. Wholly without regard to the

2. The percentage allocation of equity to the various silos was arbitrary

a. Freezing the A Plan caused the most harm to pilots; the Pension Silo should have been weighted more heavily.

i. The allocation to the Pension Silo should have been based on actual damages to the pilots.

As previously noted, the amount of the APA allocation to the Pension Silo - $1.08 billion - was primarily based upon the Company's estimate of the cost savings to it of the freeze of the A Plan. The amount of the Pension Silo allocation was also predicated, albeit to a lesser extent, on the APA interest in minimizing disparities in payouts to the pilots.

APA's Pension Silo allocation was, however, unique in two respects. First, although the Company's cost savings estimates were calculated over the 6-year term of the 2013 CBA (as was true of all Company cost savings estimates), APA used a 12-year period – the average time to mandatory age 65 retirement for the eligible pilot population – in estimating the harm resulting from the freeze of the A Plan.[20] Second, APA reduced that estimate by the increased amounts that the Company was to contribute to the pilots' defined contribution plan (the B Plan) during the contract term.

A number of pilots, many of whom were represented by FO Brian Smith and/or CA Martin Dravis, argued that the amount assigned to the Pension Silo was too low and should be substantially increased. The crux of this argument was that the Union acted arbitrarily in using the Company's estimate of cost savings from the pension freeze to determine the allocation to the Pension Silo when it had access to data showing the actual pension loss to each pilot, as well as total pension loss to the entire pilot body. Towers Watson and Milliman, two consulting firms engaged by the Union, had estimated actual pension loss to the pilots to be approximately $1.5 billion over the course of their careers – the appropriate damage measurement period according to FO Smith and CA Dravis. It is at least this sum that should have been allocated to the Pension Silo, according to challengers, rather than the $1.08 billion assigned by APA.[21]

There is no doubt that APA could have used the Smith-Dravis approach of determining actual pension fund losses for all pilots and calculating the amount of the allocation to the Pension Silo based on those calculations. The question is not, however, whether APA could – or should – have used the Smith-Dravis approach, but whether its failure to do so was so far beyond the bounds of reasonableness as to constitute a breach of the duty of fair representation. FO Smith and CA Dravis say "yes" – that for the Pension Silo APA had access to actual damages,

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validity of such assertions, on which I express no opinion, they fall outside the Lump Sum Distribution Procedure, which is limited to disputes about the allocation of the equity, and does not apply to APA conduct that preceded that allocation. *See* Lump Sum Dispute Resolution Procedure, quoted at p. 6, *supra.*

[20] To calculate this figure, APA simply doubled AA's 6-year cost savings estimate.

[21] I say "at least" this sum because FO Smith and CA Dravis estimate total pilot pension losses at $2.6 billion. That estimation, however, is predicated on the wholly unwarranted assumption that APA would have received all the wage increases ultimately provided for in the 2013 CBA and the MOU even without having conceded the A Plan pension freeze.

and it was wholly unreasonable, even irrational, for APA not to use actual damages in determining the amount of the allocation to the Pension Silo.

I do not agree. APA had developed a method of determining silo allocations that it used for all silos – relying primarily on Company estimates of cost savings – in determining the estimated harm to pilots resulting from those concessions. It was not required, under penalty of being found to have breached its duty of fair representation, to vary from that approach in calculating the amount of the allocation to the Pension Silo solely because for that silo – and no other silo – it was possible to calculate actual damages.[22]

ii. Regardless of whether the allocation to the Pension Silo was drawn from Company cost savings calculations, it should have been weighted more heavily.

The first Smith-Dravis argument on this aspect of their challenge is that the allocation to the Pension Silo should be dramatically increased because wage increases under the 2013 CBA and the MOU were sufficient to compensate for the financial harm of all contractual concessions other than the A Plan freeze and the reductions in medical benefits. Hence, the Equity Fund should be used almost entirely to compensate for the A Plan freeze and, to a lesser extent, for reductions in medical benefits. FO Smith and CA Dravis would allocate 89% of the Equity Fund to the Pension Silo, with the remainder going to compensate pilots for the reduction in active and retiree medical benefits.

The argument that wage increases were sufficient to compensate for all contractual concessions other than the pension freeze and reductions in medical benefits, and that the amount of the Equity Fund allocated to the Pension Silo should be dramatically increased – from 30% to nearly 90% – is predicated on the assumption that none of the wage increases in the 2013 CBA and the MOU were attributable to the APA's concessionary acceptance of the freezing of the A Plan. That assumption is wholly unwarranted. The Company's estimate of its cost savings resulting from the freezing of the A Plan was approximately $550 million over the 6-year contract term. There is no reason to suppose that cost savings of this magnitude were of no significance to the Company in agreeing to substantial wage increases. To the contrary, a substantial portion of those wage increases is attributable to the pension freeze.

iii. The allocation of equity to the Pension Silo was discriminatory to junior pilots.

Some challengers assert that the effect of APA allocating equity share to the Pension Silo on the basis of the Company's estimated cost savings from the harm sought to be mitigated by that silo - the same approach it had used in allocating equity share to the other silos - was to favor older pilots at the expense of younger pilots. That may well be, but it does not, absent evidence that the Union's decision was wholly outside the bounds of reasonableness, which has not been shown here, render the Union's actions a breach of its duty of fair representation.[23]

[22] Indeed, had it been possible to calculate actual damages for the other silos, the amount of those damages may have equaled, or even exceeded, the damages attributable to the Pension Silo.
[23] *See Bondurant*, cited and discussed at pp. 9-10.

Nor may challengers succeed by arguing that the asserted negative effect on younger pilots constituted forbidden discrimination. Union conduct that has a negative effect on one group of employees compared to another does not constitute the type of discrimination that violates the duty of fair representation unless it is "intentional, severe, and unrelated to legitimate union objectives" (*Merritt*, *supra*, p. 8). In addition to its legitimate interest in using the same approach in allocating equity shares to all silos,[24] the APA Board of Directors discovered, in trying to decide on silo allocation, that increasing the amount of the allocation to the Pension Silo – certainly in the amounts sought by FO Smith and CA Dravis – would significantly increase the disparity in equity distributions among the pilots. Reducing such disparity is a legitimate union interest, and thus provides further support for the conclusion that the APA decision to use the same allocation method for the Pension Silo that is used for determining the allocation for all other silos did not violate its duty of fair representation.

iv. Other challenges to the Pension Silo allocation.

CA Peter Oborski also claims that the Pension Silo is underweighted. According to CA Oborski, APA documents show estimated cost-savings to the Company approximating $122 million per year from freezing the A Plan, representing 39% of the Company's total annual savings of $315 million per year. However, the figures on which CA Oborski relies consist of mere "placeholders," for final estimates. There is no support in the record for CA Oborski's claim that the freeze of the A Plan resulted in $122 million annual savings to the Company, and his challenge is therefore rejected.

CA Larry Scerba, on behalf of himself and numerous other pilots, claims that the Pension Silo was underweighted at 30% because pension claims constituted 36% of the Proof of Claim that APA filed in American's bankruptcy proceedings. Although the proportion of the pension claims is lower in the equity distribution (30%) than in APA's bankruptcy claim (36%), the measuring stick was not the same in both proceedings. The harm measured in the equity distribution is based on cost savings to American, whereas APA's claim in the bankruptcy was predicated on financial harm to pilots.

A different challenge to the weighting of the Pension Silo was filed by FO Andrew Weingram. As FO Weingram notes, subsequent to the ratification of the 2013 CBA, APA negotiated a Memorandum of Understanding (the MOU) with American, US Airways and US Airways Pilots Association. The MOU provided that in the event American and US Airways were to merge, there would be certain modifications to the 2013 CBA, most significantly for present purposes certain wage increases and increases in American's contribution to the pilots' defined contribution pension plan (the B Plan). APA took those increases into account in calculating the amount of the pension losses sustained by the pilots, and FO Weingram challenges its decision to do so. He states that the calculation of loss "must be done off of the actual contract that awarded the equity" and that "speculative or future enhancements" to be brought about by the MOU should not form part of the calculation. By including those

[24] *See* discussion in Section I.B.5.

"speculative enhancements", FO Weingram concludes, APA has underweighted the amount of the pension loss in the Pension Silo.[25]

APA's counter-argument is that the merger was almost certain to take effect at the time the EDC decided to consider the MOU modifications in calculating pilot losses. The Boards of Directors of both American and US Airways had approved the merger and no step remained but approval by American's creditors and the bankruptcy court as part of American's bankruptcy plan of organization.

I cannot sustain FO Weingram's challenge. While he is correct in pointing out that the increased contributions to the defined contribution pension plan were not definite at the time the EDC decided to consider them in calculating the pilots' pension plan losses, the likelihood that they would take place was sufficiently great that I cannot find that APA acted arbitrarily in taking account of them. To be sure, what APA had not considered in March 2013, at the time it finalized the Equity Distribution Plan, was the possibility that the United States Department of Justice might bring suit to block the American – US Airways merger. Nonetheless, the fact that it has done so does not lead me to sustain FO Weingram's challenge. First, there is no telling at this time what the outcome of that litigation will be. Second and more fundamentally, it is my role to determine whether the decisions of the EDC and the APA Board of Directors were arbitrary, discriminatory, or in bad faith at the time they were made, not with the benefit of subsequent developments which were not and could not reasonably have been known by the EDC and the APA Board of Directors at that time. *See Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (*O'Neill I*) ("[A] union's actions are arbitrary only if, in light of the factual and legal landscape *at the time of the union's actions*, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational.") (emphasis supplied, internal citation omitted).

b. The Years of Service (YOS) Silo should be eliminated or weighted less heavily.

The APA allocated 20% of the equity distribution, or $555 million, to the YOS Silo. This silo was designed to compensate pilots for the loss of the lump sum option in the frozen A Plan, elimination of the Company contribution to retiree medical insurance premiums, and "Compensation Concessions," including loss of profit-sharing, changes to the international premium and training pay, and a reduction in vacation days.

Some challengers, including FO Smith and CA Dravis, would eliminate or reduce significantly the allocation to the YOS Silo. They assert that, apart from the loss of the Company contribution to retiree medical insurance, pilots sustained no harm warranting financial compensation under the YOS Silo. Initially, they claim that the loss of the lump sum option for pensions is not a compensable loss because the actuarial values of an annuity's current and future values are equivalent. Further, they assert that the "Compensation Concessions" sought to be compensated under the YOS Silo have been fully offset by the 2013 CBA and MOU wage increases, hence that pilots do not suffer any harm from those concessions.

[25] FO Weingram's challenge also alleged that consideration of the MOU impacted inappropriately on the Years of Service Silo, but the theory of his argument on that score was unclear.

It is undoubtedly true that from certain perspectives, a lump sum option has no greater financial value than does the annuity on which the lump sum option is based. However, that is not to say that the pilot who loses the lump sum option has not been harmed. There is any number of reasons why a pilot might prefer a lump sum to an annuity. He may, for example, believe that he will do better financially by investing the amount of the lump sum than he would by accepting the annuity; alternatively, he may fear that if he accepts the annuity, he will be unable to pass it onto his heirs without sacrificing a significant portion of the annuity payments during his lifetime. Admittedly, the loss of the freedom to choose one option over another is not quantifiable, but APA was nonetheless entitled to treat it as harm to the pilots.[26]

I also reject the argument that the remaining harms which APA sought to mitigate in the YOS Silo had been fully offset by the wage increases in the 2013 CBA and the MOU. As pointed out previously, the wage increases were not negotiated in exchange for particular contractual concessions, but rather were part of an overall bargain by which the Company received workrule, compensation, and benefits concessions, and the Union received wage increases and increased contributions to the B Plan. Hence, the value of the wage increases is appropriately spread among all silos, and cannot be used to offset the contractual concessions that APA sought to mitigate in the YOS Silo.

c. The Inverse Seniority Silo is weighted too heavily.

The Inverse Seniority Silo was intended to mitigate financial harm from contractual changes that affected all pilots, but more particularly junior pilots. In this category the EDC placed increased work hours and changes in the contractual Scope clause, which allowed the Company to contract out flying previously restricted to American pilots. Both of these changes disproportionately harmed junior pilots because they reduced the amount of flying by AA pilots (Scope) and required AA pilots to work more days and longer hours, thus reducing the need for manpower, in either event delaying junior pilots from advancing into more lucrative flying positions.

The appropriate amount to allocate to this silo was particularly difficult to determine. Generally, after determining the type of harms to pilots that should be grouped together for silo purposes, APA decided the amount to allocate to each silo primarily on the basis of the Company's estimate of its cost savings from the contractual changes generating the harm that silo was intended to mitigate. It treated those cost savings as a rough estimate of the amount of harm to the affected pilots (modified by the interest in avoiding excessive disparity in payouts). It did so, as previously noted (Statement of Facts, pp. 4-5), both because of the great difficulty in estimating damages and because Company cost savings data were available and had been studied by APA in both the bankruptcy proceedings and the negotiations for the 2013 CBA.

The Company, however, consistent with its long-term practice, attributed no cost savings to the Scope concessions. This presented the Union with the choice of either treating the Scope

[26] Some pilots assert that loss of the lump sum option was treated in the Pension Silo, hence it ought not be included in the YOS Silo. The Pension Silo, however, considered only the financial harm flowing from the A Plan freeze. The loss of choice resulting from the absence of the lump sum option was not treated in the Pension Silo.

concessions as having no harmful effect on the pilots or of attempting to measure that harm itself. According to APA's Post-Hearing Brief (at 6-7):[27]

> . . . [T]he APA recognized that the valuation of Scope concessions is extremely uncertain because it depends largely on the Company's future business decisions. Although American has never acknowledged the cost-savings impact of Scope concessions, the APA has long maintained that Scope flexibility has tremendous value, not just in increased Company revenue but both in savings to the Company and potential harm to pilots. APA Director of Industry Analysis Allison Clark generated a variety of valuations for Scope concessions and concluded that the Scope figure used by the [EDC, $766 million,] was aggressive but reasonable.

Several challengers contend that the weighting of the Inverse Seniority Silo was arbitrary or made in bad faith, primarily because it does not correspond to actual damages in Scope concessions. For example, CA Larry Scerba (joined by others) challenged the 30% weighting of this silo as inflated because it exceeds the 14% that APA attributed to Scope concessions in the Proof of Claim it submitted in the bankruptcy proceedings. The amount of Scope damages asserted by APA in its bankruptcy claim ($759 million) was, however, almost identical to the EDC valuation of $766 million in the equity distribution. To be sure, as CA Scerba notes, the proportion of the Scope claim to the total bankruptcy claim was lower than the proportion of the harm to pilots flowing from Scope changes as valued in the equity distribution proceeding, but in the bankruptcy proceedings the APA claim was predicated entirely on financial harm to pilots, whereas in the equity distribution the allocations were primarily predicated on cost savings to the Company, even for Scope valuation, as to which the Company put forward no cost savings estimate.

FO Brian Smith and CA Martin Dravis raised here the same objections that they had in contesting other silo allocations – that APA acted arbitrarily in taking into account the interest in reducing disparities and that the wage increases more than made up for all the contractual concessions, other than the pension freeze and the reduction in retiree medical benefits. I have previously responded to those arguments, and will say no more here than that in my judgment those arguments have no more force as applied to the amount of the allocation to the Inverse Seniority Silo than they do as applied to the Pension Silo previously discussed.

CA Markus Bras and FO Eric Dean contended that 30% was a "huge" allocation for this silo because the Scope concessions are worth less than the freeze of the A Plan. The Inverse Seniority Silo, however, also accounts for the cost savings to the Company resulting from increased work hours, which was substantial. Indeed, the projected cost savings resulting from the freeze of the A Plan was $1.08 billion (net of increases to the B Plan), and projected cost savings for Scope and work rule changes, which combined to comprise the Inverse Seniority Silo, was $1.127 billion.[28]

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[27] (internal citations omitted).

[28] CA Steven Salmirs asserts that the Inverse Seniority Silo should be eliminated because it is impossible to predict a pilot's career progression. The contract changes addressed by this silo will, however, have a negative effect on

The challenges to the weighting of the Inverse Seniority Silo are denied.

3. The silo structure discriminates against senior pilots

On November 1, 1983, APA and American entered into an agreement ("Supplement B") that provided, so far as relevant here, that pilots hired after that date would receive less pay and benefits than pilots hired previously. This separate pay and benefit schedule was gradually phased out, ending in August 2001, but the disfavored pilots (known as the "B Scale pilots") who were harmed by Supplement B – all of whom have considerable seniority - claim that they should be compensated for that harm by an allocation from the Equity Fund.

APA raised two defenses to these challenges. Initially, it argued (APA Statement of Position at 28):

> It would have been impossible for the APA to consider all past harms incurred by American Airlines pilots. Measuring ten years of harm, going back to the 2003 CBA, would have been an extraordinarily difficult task. Moreover, if the APA had decided to consider past harm, there would be no logical stopping point. For example, prior to the 2003 CBA, many pilots were furloughed after the terrorist attacks of September 11, 2001. . . . Was APA required to consider . . . these harms in the equity distribution?

APA also argued that the equity stake was received by it in exchange for its agreeing in the 2013 CBA to work practices and conditions that were inferior to those in the 2003 CBA; hence, it was reasonable for it to reserve the equity stake to compensate those pilots who would work under those less favorable working conditions of the 2013 contract. To be sure, as previously noted, the ultimate amount of the APA equity stake was predicated in large part on the size of the equity stakes received by other airline unions, but the principle of the equity stake—that it was a form of compensation for the concessions made by APA in the 2013 contract—was not altered by these negotiations.

Inasmuch as the equity stake was based upon future harm to the pilots, it was neither arbitrary, discriminatory, nor in bad faith for APA to conclude that the equity stake should be used only to compensate for such harm, not for harm occurring before the effective date of the 2013 CBA. *See Bondurant*, 679 F.3d at 392-93.

Another argument raised by the senior pilots is that, without regard to any particular harm sustained by them as a result of the 2013 CBA, their long service as AA pilots is entitled to recognition and they did not receive adequate recognition in the Equity Fund distribution. The argument is understandable, but the core principle in the equity distribution was that allocations from the Equity Fund would be predicated on the estimated harm sustained by pilots

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career progression (and income) for many pilots, and it was rational for APA to create a silo to compensate pilots for those harms even though it could only estimate the amount of those harms.

as a result of the concessions in the 2013 CBA. Indeed, applying that principle, seniority – years of service as a pilot for American Airlines – was explicitly recognized and compensated in the YOS Silo. I have approved the forward-looking principle of recovery as well within the Union's allowable range of discretion, and its application to the senior pilots was equally so.

Three First Officers contend that the Pension Silo model discriminates against older FOs because, unlike the A Plan formula, it calculates pilots' assumed A Plan payout on the basis of the projected final average pay (FAP) of the pilots with seniority numbers closest to theirs, not on the basis of their actual final average pay. The Pension Silo model thus takes no account of the possibility that these FOs may achieve CA status and pay during their last five years of employment, a development that would substantially increase their pensions.

The challengers' description of the difference between the A Plan formula and the Pension Silo formula for estimating harms from freezing the A Plan is accurate. The EDC, however, was unable to use the A Plan formula because under the A Plan, which pays out a pension at the time a pilot retires, AA could wait until retirement and then determine the pension amount based upon the individual pilot's FAP. The EDC could not do that. It had to estimate what a pilot's likely FAP would be at the time it developed its allocation formula for Pension Silo distributions, and concluded that the best means of doing that was to estimate an individual pilot's FAP based on the projected pay for pilots with similar seniority numbers at the date of the individual pilot's retirement. Admittedly, that approach does not take account of the possibility that the challengers will achieve FAPs much greater than other pilots with similar seniority numbers, but EDC was unaware of any means of taking into account that possibility in a manner that would be fair to all pilots. Nor do the challengers suggest any practical and fair means of doing so. Under the circumstances, the Pension Silo model as applied to older FOs was neither arbitrary, discriminatory, nor in bad faith.[29]

4. The silo structure fails to account for the special harm to Supplement B pilots

Supplement B, which, as noted above, established separate wage scales for pilots hired before and after its effective date of November 1, 1983, also contained a promise by American that it would "take no action, at any time, by way of notice, negotiations or otherwise, to diminish the pay or the retirement benefit programs in effect on [November 1, 1983]."

Although the separate pay and benefit scale for pilots hired after November 1, 1983, was ultimately phased out, that portion of Supplement B which protected the pay and retirement benefits of pre-November 1983 pilots remained in effect until the 2012 bankruptcy proceedings when American, with the approval of the Bankruptcy Court, abrogated both the labor contract and Supplement B. The pilots covered by Supplement B protested American's action, both by motions to the Bankruptcy Court and by objecting to the Court's extinction of contractual grievances which they had filed against American. These protests were to no avail; the Court

[29] CA Peter H. Remington argues that the Equity Plan discriminates against senior pilots because they will have less time to realize the benefits of the pay increases that were granted in partial exchange for the concessions addressed in the Equity Plan. While this may be true, the Equity Plan is designed solely to cover damages incurred during the term of the 2013 CBA. Within that 6-year period, junior pilots will not have more time to realize any such benefits.

denied their motions and held that their grievances were not subject to the grievance and arbitration provisions of the new contract.

Here, the Supplement B pilots complain that APA breached its duty of fair representation by not creating a special category of damages that would recognize the greater harm sustained by them than by other pilots as a result of the freeze of the defined benefit retirement plan (the A Plan) and the elimination of the lump sum retirement option. The core of their complaint is that other pilots' retirement benefits were protected solely by the labor contract, but their retirement benefits were protected *both* by the labor contract *and* by American's Supplement B promise that it would take no action to diminish their pay or retirement benefits. The abrogation of the latter promise, they argue, created unique and greater harm over and above the harm sustained by those pilots who lost only the labor contract promise. The Supplement B pilots contend they are entitled to special compensation from the Equity Fund for this "greater" harm.

I reject that argument. The Supplement B pilots sustained no greater loss from the freeze of the A Plan and the termination of the lump sum retirement option than did other pilots. Nor is there any evidence in the record of this proceeding of animus, prejudice or hostility to these pilots. Hence it was neither arbitrary, discriminatory, nor in bad faith for APA to treat their claims for compensation the same as the claims of other pilots.[30]

B. Silo Methodology Challenges

1. Invalid Methodology in the Inverse Seniority Silo

According to APA, the Inverse Seniority Silo is designed to mitigate harms resulting from work rule and Scope changes. These changes include an increase in the maximum number of hours pilots are allowed to fly per month and changes to the Scope clause that permit an increase in permissible outsourcing of flying that had been reserved to AA pilots.

Each of these changes, APA concluded, was likely to reduce the size of the pilot workforce, thereby making it more difficult for junior pilots to advance to more lucrative positions, causing a career stagnation effect. Although these adverse effects tend to harm junior pilots more than senior pilots, APA concluded that even senior pilots could be harmed by these changes. For example, according to APA, increased outsourcing is likely to eliminate trips and perhaps routes, forcing even senior pilots onto less desirable trips. Work rule changes may

[30] The Supplement B pilots also assert that APA breached its duty of fair representation by failing to defend Supplement B with sufficient vigor in the bankruptcy proceedings. Whatever the merit of this assertion—a matter on which I express no opinion—the Equity Fund is not available to redress all harm sustained by APA pilots, but only that harm flowing from the less favorable terms of the 2013 contract compared to the 2003 contract. To be sure, the 2013 contract does not contain Supplement B and the 2003 contract did, but whether APA could have prevented the abrogation of Supplement B is not a matter properly before the Arbitrator in these proceedings, in which his jurisdiction is limited to resolving disputes over APA's methodology for allocating funds and the amount allocated to each pilot. The question of whether APA has breached its duty of fair representation to the Supplement B pilots by failing to defend Supplement B sufficiently is, however, pending in the U.S. District Court for the Southern District of New York (Case No. 13-03694), in which the Supplement B pilots have filed suit against APA, alleging that APA breached its duty of fair representation towards them in the Section 1113 negotiations and litigation.

eliminate some trips and routes on all equipment types, limiting the pool of trip options for captains on even the largest aircraft, *i.e.*, the most senior pilots. Furthermore, the new work rules may limit senior pilots' ability to maximize their pay. Even pilots who have substantial system seniority may be junior within a highly sought after bid status, such as 777 CA, and thus may be vulnerable to the harmful effects of greater pilot productivity and increased outsourcing.

a. APA's proposed distribution methodology: a 1:2 ratio.

In an effort to mitigate these harms, APA structured the Inverse Seniority Silo so that all eligible pilots would be allocated some portion of the silo, with junior pilots receiving a greater allocation. Pursuant to APA's proposed methodology, the most junior pilot would receive twice as much payout as the most senior pilot, with a linear distribution between these two pilots for all other pilots, depending on their seniority.[31] APA asserts that it is impossible to calculate pilots' damages flowing from work rule changes and Scope concessions with any sort of precision.[32] It chose a 1:2 distribution ratio because that is approximately the same ratio as the pay of a narrowbody FO, typically the most junior pilot, compared to the pay of a widebody CA, typically the most senior pilot. In choosing this ratio, APA also relied on the example of the pilots' unions involved in the Delta and Northwestern bankruptcies, both of which used a seniority silo with a 1:2 ratio between the payout for the most senior pilots to the most junior pilots, albeit with the senior pilots at the higher end of the scale.

FO Brian Smith and other challengers contend that while proportionate payouts are permissible, the 1:2 payout ratio is arbitrary because it does not attempt to calculate and reflect the anticipated harms pilots will suffer from the concessions addressed by this silo. The issue, therefore, is whether calculating the harm to the most senior pilot as 50% of the harm to the most junior pilot was rational, or so far beyond the wide range of reasonableness as to be irrational.

As I stated in an August 26, 2013, Notice and Order, my preliminary finding was that APA had not presented a rational basis for its conclusion that a 1:2 ratio was an appropriate formula for distributions from the Inverse Seniority Silo. I explained:

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[31] The Inverse Seniority Silo is prorated for pilots who will reach the mandatory retirement age of 65 during the 6-year term of the 2013 CBA.

[32] According to CA Mark Stephens: "We . . . realized very early in the process that as we looked at these particular damages and this silo that we didn't have that same kind of precision to that, in order to do that. We determined it was essentially an impossible feat to try to get down to what the harm was going to be to a particular individual." September 11, 2013 Hearing Tr. 13:18-14:3; *see id.*, 130:22-131:9 (CA Mellerski: "[W]e looked at various, you know, what I'll call y intercept and various slopes of the line as to which one was the most correct. Or which one gave us the greatest ability to address all of the issues that we had placed in that particular category. And as we've talked about here after addressing all of them we decided that the 1 to 2 ratio from senior to junior was as good a fit as we could come up with."); *id.*, 37:15-19 ("We looked at zero y axis solutions and we decided just as I told you that they understate damages or potential damages to the senior pilot. I believe they don't make sense."); *id.*, at 33:18-34:3 ("[W]e looked at trying to get, trying to say, okay, how does it impact this particular group, or how does it impact that group. But simply because of the indefiniteness both in productivity and scope we couldn't come up with something that we could say is a better formula."); *id.*, 105:12-17 (CA Mellerski also testified that EDC considered a 1:1 payout for this silo and determined it was not the "best fit").

> According to APA, the 2:1 scale[33] was appropriate for two reasons: (1) the most junior pilots (NB FOs) have pay rates that are approximately half of those of the most senior pilots (WB CAs); and (2) two other pilot unions that distributed money related to their carriers' bankruptcies used a 2:1 scale for seniority-based silo distributions, albeit with senior pilots at the higher end of the scale.
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> As for the first of these reasons, APA offers no explanation, and I am aware of none, why a 2:1 pay differential in favor of senior pilots should lead to junior pilots receiving twice as much under a distribution plan that is aimed at providing redress in proportion to harm where there is no basis for concluding that the relevant harms correspond to this pay ratio.
>
> APA also defends the 2:1 ratio on the ground that unions at Delta and Northwest each used a 2:1 ratio in one of their silos. Unlike here, however, those 2:1 ratios favored senior pilots and the harms included substantial pay cuts as well as pension cuts. It is not difficult to hypothesize why senior pilots, whose pay rates are twice those of junior pilots, should receive post-bankruptcy payouts twice those of junior pilots – either because they were disproportionately harmed, e.g. by pay cuts and pension cuts, or because all pilots were equally impacted, say by work rule changes, but the dollar impact of those changes was greater on senior pilots because their pay rate was greater. None of that, however, explains why it is appropriate or even rational to distribute a silo designed to mitigate the harm of work rule and Scope changes, which concededly harm junior pilots more than senior pilots, on a 2:1 ratio.
>
> If there is a legitimate basis for distributing the Inverse Seniority Silo on a 2:1 basis, it must be the assumption that, while precise measures are unavailable, junior pilots are harmed approximately twice as much as senior pilots by the contractual changes intended to be mitigated by the Inverse Seniority Silo. While that assumption may be valid, APA has provided neither analysis nor evidence to support it. . . .[34]

The August 26 Notice and Order directed that a Supplemental Hearing be held on September 11, at which APA and challengers would have the opportunity to introduce additional evidence and argument concerning the proper ratio to be applied when distributing sums from the Inverse Seniority Silo. At the September 11 hearing, APA introduced additional evidence to

[33] (Footnote added.) The 2:1 scale or ratio referred to in the August 26 Notice and Order is the same as the 1:2 ratio referred to in this Decision. No matter how expressed, the APA formula is intended to provide the most junior pilot with a payout double that provided to the most senior pilot.

[34] Notice and Order, at Attachment A, p. 3.

show that senior pilots are harmed by the concessions addressed by the Inverse Seniority Silo.[35] APA did not, however, submit evidence to quantify the relationship between the amount of harm to senior pilots and the harm to junior pilots. Instead, APA repeated its original assertion that 1:2 is a rational payout ratio because there is no way to calculate the damages addressed by this silo with accuracy, and the ratio between the pay of the most junior and most senior pilot (which historically has been 1:2) is a reasonable proxy for these harms.[36]

APA also asserts that the 1:2 ratio is preferable to a formula that would provide still greater payments to junior pilots because it serves the Union's institutional interest in minimizing disparities in payouts so as to reduce conflict among pilots: "[A]s is particularly pertinent here, while senior and junior members of a bargaining unit will always have perfectly rational bases on which to argue for a larger share of a given benefit, it is entirely rational for the dispenser of that benefit -- the union -- to seek and find ways in which to mediate between the groups and therefore reduce those inherent conflicts."[37]

b. FO Brian Smith's proposed distribution methodologies: a 0:1 or 1:5 ratio.

FO Brian Smith, who also appeared and presented evidence at the September 11 hearing, agrees that APA should look at pay loss as a model for Inverse Seniority Silo allocations, but contends that the pay slope should begin at zero because the most senior pilots are unlikely to suffer from the work rule and Scope changes addressed by this silo. According to Smith, the changes in the 2013 CBA allow senior pilots to fly more hours in the same amount of days, to make more money, and to bid on more efficient and favorable trips. Smith also argues that the new Individual Monthly Maximum enhances senior pilots' pay opportunities.

It is junior pilots, FO Smith asserts, who will bear the brunt of the harm from work rule and Scope changes. For example, Smith cites American's expressed intent to retire Group III aircraft, replacing them with some Group IV aircraft and many more Group II aircraft. As a result of this change, Smith contends that some Group III pilots will be able to bid up to Group IV jobs, but many more Group III pilots will be bumped down into Group II jobs. He also relies on American's proposed outsourcing of 76 seat jets to commuter carriers, a change that, if implemented, would result in the elimination of jobs primarily for junior pilots.

Moving from the general principle that junior pilots will be harmed substantially more than senior pilots by Scope and work rule changes, Smith attempts to quantify the harm to pilots in each bid status flowing from the career stagnation that these changes will produce. The means by which FO Smith measures the financial harm of career stagnation is to calculate the amount

[35] According to APA, for example, senior pilots may be unable to maximize their pay through the loss of the ability to bid lines that conflict with their training.

[36] APA Post Hearing Brief on Formula In Inverse Seniority Silo at 2; *see* September 11, 2013 Hearing Tr. 42:9-43:5 (CA Stephens explaining the justification for using pay scale as a proxy for harm in this silo); *id.*, 92:6-17 (CA Mellerski: "And what is that ratio? If you look at the pay that pilots get it's a little steep at the very top end, and the very top end I mean in the top 100-150 people. And then it's almost an exact 2 to 1 slope down until you get to people who are essentially new hires. That's the way we've been paid and that line, that curve has been consistent for many, many years, at least as long as the pay structure has been in place which has been the same thing since 1963.").

[37] APA Post Hearing Brief on Formula In Inverse Seniority Silo at 6.

that pilots in each bid status would lose by being unable to move up to the next higher bid status. Smith assumes that, under the preferential bidding system to take effect during the 2013 CBA, lineholders in all seniority ranges will have the opportunity to earn 90 hours of pay per month, 15% of pilots will be on reserve, reserve pilots will fly 81 hours per month (10% less than lineholders), the highest bid status will be Group IV CA Lineholders and the lowest bid status will be Group II FO Reserve.[38] Because the highest bid status is Group IV CA Lineholders, Smith calculated the career stagnation for each bid status, in part, as the difference in pay between pilots in that bid status and the corresponding pay of Group IV CA Lineholders. This necessarily results in Group IV CA Lineholders being attributed $0 career stagnation. Using 2013 CBA rates, the career stagnation losses for pilots in each bid status would be as follows:[39]

Pilot Bid Status	**Hours Pay Per Month**	**Pay Based on Current 2013 Pay Rates**	**Immediate Career Stagnation: % Immediate Cost of Not Moving Up to Next Bid Status**	**Career Stagnation in Proportion to Highest Bid Status, Group IV CA Lineholder**
Group II FO Reserve	81	$110,800	11%	108%
Group II FO Lineholder	90	$123,100	0	87%
Group III FO Reserve	81	$119,600	11%	92%
Group III FO Lineholder	90	$132,800	6%	73%
Group IV FO Reserve	81	$140,900	11%	63%
Group IV FO Lineholder	90	$156,600	4%	47%
Group II CA Reserve	81	$163,300	11%	41%
Group II CA Lineholder	90	$181,400	0	27%
Group III CA Reserve	81	$175,900	31%	31%
Group III CA Lineholder	90	$195,500	18%	18%
Group IV CA Reserve	81	$207,000	11%	11%
Group IV CA Lineholder	90	$230,000		0%

There are a number of problems with FO Smith's analysis. Initially, it purports to measure career stagnation on the basis of two criteria: (1) the cost of delay in moving from one bid status to the next higher bid status; and (2) the cost of delay in moving from each bid status to that of Group IV CA Lineholder.[40] The first of these measures is entirely sound, but does not support Smith's proposed 0:1 distribution formula, pursuant to which junior pilots would receive substantially greater sums than would senior pilots. Smith's table shows that Group II FO Reserves, typically the most junior pilots, whose annual estimated pay is $110,800, would sustain a loss of $12,300 for each year in which they were delayed in moving up to Group II FO Lineholder, whose annual estimated pay is $123,100. Smith's table also shows, however, that Group IV CA Reserves, typically possessing high seniority numbers, whose annual estimated pay is $207,000, would sustain a $23,000 loss for each year in which they were delayed in moving up to Group IV CA Lineholder. Yet, under Smith's 0:1 formula, the junior Group II FO, who has been less financially harmed by the delay than has the senior Group IV CA Reserve, would receive a far greater payout than would the Group IV CA Reserve.

[38] In selecting the range of bid statuses, FO Smith used the bid statuses that American has used to date.

[39] This chart has been created from the data and calculations set forth in Smith's Summary Brief to Supplemental Hearing On the Inverse Seniority Silo.

[40] The latter is expressed in percentage terms in Smith's chart, but those percentages translate into financial loss.

The only basis in Smith's chart for awarding substantially greater payouts to the most junior pilots – Group II FOs – is that career stagnation will cause the progression to Group IV CA Lineholder to be much slower for the most junior pilots than it will be for more senior pilots – such as Group II CA Lineholders or Group IV FO Reserves. Not only would the same be true even without the career stagnation effects of work rule and Scope changes, but measuring the effect of those changes on the most junior pilots over the 6-year term of the 2013 CBA by their increased delay in becoming a Group IV CA Lineholder is wholly unrealistic since the most junior pilots have no realistic possibility of becoming a Group IV CA Lineholder during the term of the 2013 CBA under any circumstances.[41]

Also problematic in the Smith analysis is his assumption that the most senior pilot will suffer no harm whatsoever from work rule and Scope changes and that other senior pilots will suffer negligible, if any, harm from these changes. While it may be true that the most senior pilot would suffer no such harm, it is difficult to accept that the junior Group IV CA Lineholders would suffer no harm. Though their system-wide seniority is great, these pilots would be vulnerable to the harmful effects of greater pilot productivity and increased outsourcing because they are the junior most pilots within their bid status.

In the alternative, FO Smith proposes a 1:5 ratio based on the assumption that a Group IV CA Lineholder will be harmed by the concessions addressed by this silo in the amount of 5% of his or her 2013 salary. While this ratio may reach what appears to be a reasonable result, I reject it because no data has been presented to show that the Group IV CA Lineholder will suffer this specific amount of harm.

c. Proposed 1:1 ratio

CA Ann Singer, FO Kathy Emery, and CA Steven Fulmer also appeared at the September 11 hearing. They contend that the funds in the Inverse Seniority Silo should be distributed equally among all eligible pilots. In the alternative, FO Emery asserts that this silo should be distributed on a 2:1 or 1.5:1 ratio in favor of senior pilots. Alternatively, she proposed different ratios for senior, midrange, and junior pilots, also favoring senior pilots. These ratios are, however, inconsistent with the evidence that junior pilots will suffer a disproportionate amount of the harm addressed by the Inverse Seniority Silo. Accordingly, I reject these ratios.[42]

d. Conclusion

I stated in the August 26 Notice and Order of Hearing that APA's justifications for its proposed 1:2 distribution ratio - that the most junior pilots (Group II FOs) have pay rates that are approximately half of those of the most senior pilots (Group IV CAs) and that two other pilot unions that distributed money related to their carriers' bankruptcies used a 1:2 scale for seniority-

[41] While Smith states that the effect of stagnation on junior pilots will ripple for decades throughout their careers because of the time value of money, the Equity Distribution is limited to harm suffered during the 6-year term of the 2013 CBA.

[42] FO Kenneth G. Wuttke argued that the Inverse Seniority Silo should be eliminated, and its portion of the distribution moved to the Pension Silo. I address this argument in Section III.A.2.c.

based silo distributions, albeit with senior pilots at the higher end of the scale – were so unpersuasive as to lack rationality.[43] I further stated:

> If there is a legitimate basis for distributing the Inverse Seniority Silo on a 2:1 basis, it must be the assumption that, while precise measures are unavailable, junior pilots are harmed approximately twice as much as senior pilots by the contractual changes to be mitigated by the Inverse Seniority Silo. While that assumption may be valid, APA has provided neither analysis nor evidence to support it.

APA has not, subsequent to the August 26 Order, presented evidence to support its assertion that junior pilots are harmed approximately twice as much as are senior pilots by the contractual changes sought to be mitigated by the Inverse Seniority Silo. On the other hand, precisely the same observation can be made of FO Smith's position that junior pilots are harmed substantially more than APA suggests, and that Inverse Seniority Silo funds should be distributed on a 0:1 ratio, with the most junior pilot receiving considerably more and the most senior pilot considerably less than under the 1:2 ratio.[44] FO Smith attempts to support his position on the basis of empirical data, but is not successful in doing so.

Ultimately, I accept APA's argument that it is impossible to calculate the damages flowing from work rule changes and Scope concessions with any sort of precision. Not only is it difficult to predict the effect of changed work rules on pilots in different bid and seniority statuses, but it is equally difficult to predict what use the Company will make of its increased Scope clause freedom to outsource flying, and the effect that will have on pilots in different bid and seniority statuses.

Under these circumstances, I cannot conclude, despite the unpersuasive nature of the APA justifications for the 1:2 ratio, that the 1:2 ratio itself is arbitrary. It was chosen by the experienced pilots who made up the EDC after their efforts to find a data-based distribution formula had failed.[45] As EDC Chairman Mellerski testified, the 1:2 ratio reflected the view of a majority of the EDC, based upon their experience, that a 1:2 distribution in favor of junior pilots

[43] The Group II FOs were referred to in the August 26 Order as "NB FOs" (Narrow Body FOs); the Group IV CAs were referred to as "WB CAs" (Wide Body CAs).

[44] Under the 1:2 APA formula, assuming a $1 billion total equity distribution, $300 million of which would be allocated to the Inverse Seniority Silo, and 8,678 pilots eligible for this silo, the most senior pilot would receive approximately $23,000 from the Inverse Seniority Silo and the most junior pilot would receive approximately $46,000, a difference of $23,000. Assuming the same factors under the 0:1 formula, the most senior pilot would receive nothing and the most junior pilot would receive approximately $69,000. These disparities would, of course, exist only at the extremes; all other pilots would receive payments somewhere between these extremes. (The estimated payouts in this footnote do not take account of the effect of prorating.)

[45] CA Stephens testified that EDC considered the same factors and analysis that FO Smith considered before it determined that 1:2 was the best fit. September 11, 2013 Hearing Tr. 40:21-41:2; 78:20-79:4; 204:19 – 205:3 (CA Stephens: "I appreciate First Officer Smith's efforts, I mean, and I really can relate to them, because we spent months doing, you know, a similar analysis, trying to figure out how to do this. So I know the type of thought and the type of effort that goes into it.").

was as close as they could come to estimating the harm to junior pilots compared to those more senior flowing from work rule and Scope changes.[46]

Furthermore, the 1:2 ratio is unquestionably more consistent with the APA interest in minimizing disparity than is FO Smith's approach, which would result in a payoff disparity of approximately $69,000 between the most junior and the most senior pilot, compared with the approximately $23,000 disparity under the APA 1:2 ratio. If there were data that supported a $69,000 payout disparity on the basis of greater harm in the amount of $69,000 to the most junior pilot, I might well approve a formula resulting in that disparity on the ground that it would be warranted by the core Equity Distribution Plan principle of basing recovery on harm. In considering allocation formulas for the Inverse Seniority Silo, however, under which determinations of harm cannot be made with any degree of precision, I am unwilling to strike down the APA 1:2 formula and approve a formula that would lead to the substantial disparities of the 0:1 formula on the basis of no more than FO Smith's estimations of harm, however well-intentioned those estimates may be.

The challenges to the APA formula for the distribution of funds allocated to the Inverse Seniority Silo are denied.

2. Invalid methodology in the Pension Silo

a. The Pension Silo's methodology is arbitrary because APA could have used more precise methods to calculate pension damages.

The Pension Silo was intended to address the significant financial loss caused to pilots as a result of American freezing the A Plan, which prevented pilots from continuing to accrue credit towards their plan benefit. While the actual calculations used to determine this loss were complex, the basic concept is not.

Each pilot's payout from the Pension Silo is based on the pension loss suffered by a generic pilot who shares his or her demographics, rather than an estimate of his or her actual damages. APA first calculated the pension payout at the mandatory retirement age of 65 that a generic pilot whose seniority was approximately the same as that of the pilot in question would have received at retirement if the A Plan had not been frozen. It did this, in part, by calculating the Final Average Pay ("FAP") for each seniority number. This calculation took into account future pay raises and increases in payments to the defined contribution pension plan (B Plan) that were provided in the 2013 CBA and the MOU. From this estimated payout, APA subtracted the amount the pilot was estimated to receive from the frozen A Plan. The result, subject to various technical modifications not relevant here, and reduced to present value, was the pilot's estimated loss as a result of the A Plan freeze. Each pilot's payout under the Pension Silo was distributed in proportion to all Pension Silo payouts for the total amount of

[46] "[W]e looked at various, you know, what I'll call y intercept and various slopes of the line as to which one was the most correct. Or which one gave us the greatest ability to address all of the issues that we had placed in that particular category. And as we've talked about here after addressing all of them we decided that the 1 to 2 ratio from senior to junior was as good a fit we could come up with." *See* September 11, 2013 Hearing Tr. 130:22-131:9.

money allocated to the Pension Silo. APA explained that it did not attempt to determine each pilot's actual loss for a number of reasons (APA Statement of Position at 38-39):

> The model generally does not attempt to account for the individual circumstances of pilots . . . . This is consistent with the APA's overall approach of declining to take on the impossible task of predicting the specific harms to be incurred by specific pilots. . . . The goal of the Pension Silo is to predict the size of the benefit that pilots would have received under the A Plan if the A Plan had not been frozen. That benefit would have been determined based on pilots' earnings during their last five years of work at American. But of the many factors that could influence a pilot's future earnings, only seniority can be predicted with any reasonable level of confidence. Other factors are based largely on pilot preferences and behavior, e.g. whether a pilot will choose to upgrade to a more lucrative aircraft or seat, even if it means flying out of a different base or sacrificing quality of life.

Some challengers argued that APA should have determined A Plan losses for each individual pilot rather than determining those losses based on a generic pilot model. Given the complexities and uncertainties APA has articulated regarding projecting precise results for each individual pilot, it is difficult to find that the APA approach is irrational. The amount a pilot will earn in his last five years of employment is dependent on factors within the pilot's choice that cannot be known by APA (such as whether and when to upgrade to a certain aircraft or seat, and whether to retire before the mandatory retirement age). Thus, it is impossible for APA to predict any pilot's actual FAP with any confidence.[47]

The challenges to APA's use of damages based on expected harm to a generic pilot are therefore rejected.[48]

b. The Pension Silo arbitrarily failed to give length of service credit to pilots who were furloughed after 2001.

The APA model for calculating A Plan losses multiplies length of credited service ("Credited Service") by FAP. With limited exceptions for pilots who joined American by

[47] Courts have not required distribution plans to be predicated on actual damages when such damages are extraordinarily difficult to determine, as they are here. *See, e.g., Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999)) (finding that a plan need not adopt an approach of distribution in proportion to the harms suffered by class members because "equity in such a simple sense" may be "unattainable in complex cases"); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1402-3, 9-10 (E.D.N.Y. 1985) (holding that damages were "far too speculative to serve as the primary basis for a distribution plan").

[48] The challenge of FO Al J. Austgen is based on facts specific to him. He asserts that the "calculation of [his] loss of pension should have been done based on what [he] would have received had [his] shares not been divided in half due to divorce." Because these facts, in the absence of further explanation not provided by FO Austgen, provide no support for applying a different formula to calculate his distribution from the Pension Silo, I reject this challenge.

merger, the model defines Credited Service as a pilot's years of service as an American pilot, minus one year.

FO Brian Smith, as well as several other pilots, contends that the Pension Silo arbitrarily denies length of service credit for time spent on furlough after 2001, thus unfairly reducing the Pension Silo allocations of pilots furloughed since 2001. The CBA in effect at that time of the furloughs did not, however, provide pilots with the right to accrue credited service while on furlough. Nor did these pilots have such a right under the A Plan itself. FO Smith relies, in support of his contention, on the fact that in 2001. APA successfully negotiated with American to provide credited service for furlough time to all pilots who had been on furlough before 2001 He argues that this negotiation success in 2001 for pilots furloughed prior to that date makes it likely that APA will be similarly successful in future negotiations with respect to pilots furloughed after 2001. Accordingly, he asserts that pilots furloughed after 2001 should be given credit for their furlough time or, at least, for a portion of that time.

APA, in response, points out that its success in 2001 marked the first time in decades that it had persuaded the Company to award credited service time to pilots who had been on furlough. APA also points out two factual differences between furloughs before and after 2001 that are not insignificant. First, the number of pilots who have been furloughed since 2001 is far greater than the number of pre-2001 furloughees. Second, the post-2001 furloughees have been on furlough longer than the pre-2001 furloughees. According to CA Mark Stephens, a member of the EDC:

> [T]he other important factor between those is the 600 furloughed pilots that were in the '90s, they were furloughed for two to three years. And the almost 3,000 pilots that have been furloughed [since then], some of them have been furloughed for . . . almost 12 years.[49]

Because crediting furlough time for post-2001 furloughed pilots would substantially increase their pensions, APA concludes that it is unlikely that the Company would be willing to credit time spent on furlough post-2001 as Credited Service time. Thus, APA could not reasonably expect to succeed in those negotiations.

APA's arguments are persuasive. It did not act arbitrarily, discriminatorily, or in bad faith in declining to award credited service for time spent on furlough after 2001 on the basis of the highly speculative assumption that it could have persuaded American to do so.[50]

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[49] Tr. 1313:2-7.

[50] FO Smith also argues that post-2001 furloughees should receive at least 5 years credited service time because American Eagle pilots who had been improperly denied the right to flow up to American were awarded 5 years of credited service time by Arbitrator George Nicolau. That argument is without merit. In the first place, the Nicolau Award did not grow out of a furlough, but was a remedy for a violation of Supplement W; the request for credited service time here is not based on a CBA violation. Second, Arbitrator Nicolau did not award any years of credited service to the American Eagle pilots. Rather, he held that the time between when they should have flowed up to American and the time they actually flowed up should be credited solely for complying with the 5-year vesting requirements of the A Plan. *See* Section III.C.3.a. of this Decision (pp. 45-46) at which this issue is discussed.

c. The Pension Silo should have excluded pilots not vested in the A Plan at the time it was frozen.

FO James Dodson argues that pilots who were not vested in the A Plan at the time it was frozen cannot incur damages as a result of the freeze, hence those pilots should not have been included in the Pension Silo.

APA acted rationally in including unvested pilots in the Pension Silo distribution. Inasmuch as only five years of service is needed for a pilot's A Plan rights to vest, all pilots on active duty on January 1, 2013, the eligibility date for Equity Fund participation, will become vested prior to the December 31, 2018, expiration of the 2013 CBA. Accordingly, such pilots will sustain harm from the freeze of the A Plan during the relevant period for determining damages under the Equity Distribution Plan.

d. The Pension Silo arbitrarily or discriminatorily favors certain categories of pilots based on age or seniority.

In order to deal with these challenges, it is necessary to go into more detail concerning the APA treatment of the harm sustained by pilots as a result of the A Plan freeze. Initially, for purposes of determining the amount of the allocation to the Pension Silo, APA, as set out on pp. 4-5, used the Company's estimate of the savings to it of the A Plan freeze over the 6-year term of the 2013 CBA. Because, however, the average time to age 65 retirement for eligible pilots was 12 years, APA doubled the amount of the Company's 6-year cost savings calculation (net of the increased Company contribution to the B Plan) in determining the amount it would allocate to the Pension Silo.

In determining allocations to individual pilots under the Pension Silo, however, APA calculated the loss that a pilot would suffer as a result of the A Plan freeze as the amount a generic pilot, who shared the actual pilot's demographic characteristics, would sustain if he or she continued in the Company's employ until the mandatory retirement age of 65.

Some challengers argue that because the amount of damages a pilot will receive under the Pension Silo accounts for harms beyond the 6-year term of the 2013 CBA, the Pension Silo awards to pilots arbitrarily favor younger pilots who have more years to retirement than do older pilots. These challenges fail to recognize, however, that although the 2013 CBA has only a 6-year term, the harm resulting from the A Plan freeze extends far beyond those six years, encompassing, for pension purposes, all years until that pilot's retirement. The challengers' approach of cutting off the accumulation of damages after six years would assign the same damages to a pilot scheduled to retire in 2040, whose anticipated pension has been dramatically cut by the freeze, as to a pilot scheduled to retire in 2019, whose pension loss due to the freeze is far less.

The result sought by these challengers would eliminate the effect of age – more precisely of years to retirement – from the Pension Silo calculation, but in doing so would transgress a fundamental principle of the Equity Distribution Plan – that each pilot's recovery should be proportional to the harm that pilot sustained as a result of the concessions in the 2013 CBA.

Finally, contrary to the challengers' contention, it is not forbidden age discrimination to provide greater compensation to pilots who sustained greater harm, even if the latter tend to be younger. *See Bondurant,* cited and discussed at pp. 9-10.

Other challengers assert that the Pension Silo's priority on seniority penalizes older workers who do not have seniority commensurate with their age. These challenges incorrectly assert that it is the Pension Silo that prioritizes seniority. In fact, the Pension Silo model does no more than follow the A Plan formula for determining pension payouts, which is, in essence, to multiply final average pay by credited service (seniority). The Pension Silo model must follow the A Plan formula in order to calculate the difference between what a pilot would have received if the A Plan had not been frozen and the amount the pilot will receive as a result of the freeze (albeit with final average pay based upon a generic pilot). What this challenge really seeks is for APA to reduce the impact of seniority in the Pension Silo formula to benefit older pilots whose seniority is not commensurate with their age. Were APA to do so, however, it would be using the Equity Fund to aid one group of pilots at the expense of others for the purpose of permitting the former group to receive a Pension Silo allocation greater than that to which it otherwise would be entitled. Such a result would contradict the basic Equity Fund principle of allocating damages as a function of the harm sustained by the concessions in the 2013 CBA. APA cannot be faulted for declining to allocate Equity Fund resources in the manner sought by the challengers.

e. The discount rate used to calculate the net present value of pilots' losses was too conservative.

The final step in the complex formula for calculating each pilot's payout from the Pension Silo was to reduce his or her estimated loss to present value in consideration of the fact that the pilot will receive the money earlier than he or she would have absent the freeze. The discount for present value depends on the length of time until each pilot reaches the assumed retirement age of 65, as well as an estimated rate of return on the money from the pension.

EDC member Michael MacMurdy testified concerning the means by which the EDC determined the present value for each pilot's payout. First, it looked at data from Morningstar, Inc., a leading investment research firm, to determine a reasonable asset allocation for pilots prior to retirement. Based on this data, EDC determined a 70% equity / 30% fixed-income asset allocation mix to be reasonable. EDC then asked its consultant, Towers Watson, which had long conducted actuarial work related to pilots' benefits for American, to provide an estimated rate of return for such a portfolio. Towers Watson informed the EDC that the estimated projected rate of return was 6.02%, and subtracted an estimated average expense ratio of 0.51% to arrive at 5.51%. The EDC used this 5.51% rate to discount what would have been the pension's value at a pilot's retirement to present value. The EDC had used the same assumptions, calculations and rate in the Pension Silo to calculate the return for the expected B Plan contributions for each pilot pre-retirement.

CA Martin Dravis claims that the 5.51% discount rate to calculate the net present value of pilots' pensions was too low (similarly, he claims the same rate used to calculate the return for the expected B Plan contributions is also too low). He asserts that both should be 6.86% based on

the historical rate of return since its inception in 1999 of the moderate mixed portfolio which is available to pilots in the B Plan. The APA's artificially low discount rate (and for the rate of return for the expected B Plan contributions), CA Dravis argues, overcompensates younger pilots because the net present value of that anticipated pension loss many years in the future will be overstated (and the net present value of the expected B Plan contributions will be understated) in comparison to that of older (more senior) pilots who will have fewer years to benefit from an overstated discount rate (and understated rate of return).

EDC's determination of reasonable portfolio allocations based on data generated by a leading investment research firm, and its reliance on an estimated discount rate and rate of return provided by its pension and investment consultants cannot be characterized as arbitrary, discriminatory or in bad faith. Accordingly, I reject the challenge to EDC's use of a 5.51% discount rate and rate of return.

f. The distributions for LTD Category 2 and Category 3 pilots from the Pension Silo are too low because (1) LTD Category 2/3 pilots do not receive the increased 401(k) contributions received by active pilots, and (2) unlike active pilots, they will be unable to recover their A Plan losses by working under the increased pay rates of the 2013 CBA.

Several LTD Category 2 and Category 3 pilots contend that their distributions from the Pension Silo are too low because, unlike active pilots, they do not receive 401(k) contributions.[51] Their concern is that even though Category 2 and Category 3 pilots do not participate in the 401(k) plan, they are being treated like active pilots, whose 401(k) contributions from the Company are used to offset their A Plan losses in calculating the amount due to them under the Pension Silo. In fact, however, the Equity Distribution Plan does not subtract from the Pension Silo payments of LTD Category 2 and Category 3 pilots the 401(k) contributions they are not receiving.[52]

LTD Category 2 and Category 3 pilots also contend that they suffer more harm from the A Plan freeze than active pilots because they will be unable to recover their A Plan losses over time through the increased compensation rates negotiated in exchange for the 2013 CBA concessions. Assuming that pilots working under the 2013 CBA will gain more from increased compensation than they will lose from the work rule and benefit concessions that APA made to obtain that increased compensation, the amount of that gain is impossible to calculate. Thus, APA did not act arbitrarily in declining to provide additional Pension Silo payouts to LTD Category 2 and Category 3 pilots who would not work under the 2013 CBA.

[51] In Section III.D.2, *infra*, I define LTD Category 2 and Category 3 pilots as LTD pilots who went on disability before January 1, 2008.

[52] Tr. 1158:6-12. At least one challenger asked APA to add LTD pilots to the 401(k) plan. As discussed during the Merits Hearing, this request does not involve a challenge to the Equity Distribution. It is thus beyond my jurisdiction.

3. Invalid methodology in the Per Capita Silo

The only challenge to the methodology in the Per Capita Silo was filed by FO Kenneth Wuttke, who argued that the equal distribution of equity for the harms encompassed by this silo, primarily scheduling changes impacting the pilots' quality of life, was unfair to junior pilots because such pilots typically suffer more from work schedule changes than do more senior pilots. APA does not dispute that scheduling changes may have a disproportionate impact on junior pilots, making it more difficult for them to claim favorable trips and advance to more lucrative positions, but points out that the disproportionate effects on junior pilots are mitigated by the Inverse Seniority Silo, which was designed for this purpose. APA also points out that some of the contractual concessions dealt with by the Per Capita Silo, particularly the increased cost of active medical insurance, has an equal impact on all seniority groups.

I cannot find, under all the circumstances, that APA acted arbitrarily in not taking seniority into account in the Per Capita Silo, particularly because it did so in the Inverse Seniority Silo.

4. Invalid methodology in the Years of Service (YOS) Silo

a. Inclusion of different harms in the Years of Service Silo and measuring those harms by years of service.

APA designed the YOS Silo to mitigate financial harm arising from various concessions in the 2013 CBA, including: (i) the loss of the lump sum option in the frozen A Plan; (ii) elimination of the Company contribution to retiree medical insurance; (iii) changes to benefits related to compensation, such as profit-sharing, the international premium, and pay for military leave; (iv) 35-day cap for vacation days; and (v) modified training opportunities. As APA acknowledges, the impact of some of these concessions depends on a pilot's age (loss of subsidized retiree medical insurance and the lump sum pension option); the impact of others depends on a pilot's pay rate (changes to profit-sharing, military leave and training opportunities); and still others depend on a pilot's seniority (limited international premium and 35-day vacation cap).

Despite the variance in the source of these harms, APA combined them in a single silo, allocating each eligible pilot's share as a function of the number of years he or she worked for American. It did so on the ground that each of the key factors in determining the impact of the concessions treated in this silo – age, pay rate, and seniority – is highly correlated with a pilot's years of service. It stated (APA Statement of Position at 36):

> The APA reasonably determined that the impact of many contractual concessions is closely linked to pay, age, or various measures of length of tenure at American. Rather than create separate silos for each of these factors, the APA recognized that all were correlated with years of service, *i.e.*, years since a pilot's Occupational Seniority Date. The APA therefore chose to create a single Years of Service Silo.

> In choosing this approach, the APA gave significant weight to two of its guiding principles: the value of simplicity and the impossibility of creating any exact measure of damages. In light of these principles, it was reasonable for the APA to create a silo that employed a straightforward methodology that generally, though imperfectly, correlated to a variety of contractual harms . . . .

Combining varied harms in a single silo necessarily makes the distribution imperfect. The compensation-related harms and age-related harms are measured by years of service rather than according to the most relevant benchmark, *i.e.*, compensation or age. Nonetheless, the decision to combine them was rational because the Union did so to further the legitimate Union interest in avoiding unnecessary complexity.[53] The primary question, therefore, becomes whether it was arbitrary for APA to use years of service as the yardstick by which to measure pilots' individual distributions from this silo.

Several pilots contended that it was improper to use years of service as the yardstick for this silo because some of the concessions in the YOS Silo, such as the loss of subsidized retiree medical benefits, stem from factors other than years of service. Others argued that years of service is improper because the compensation-type losses at issue in this silo are shared equally by all eligible pilots on a percentage basis (rather than linked to seniority), depending on the pilot's pay rate and bid status. Still others claimed that junior pilots suffer more harm from the compensation-related concessions.

APA responded, "[y]ears of service is directly linked to seniority and is correlated to age (and therefore proximity to retirement), pay rate, and accredited service for vacation purposes."[54] Moreover, APA asserted that the absolute impact of the compensation concessions in this silo would be greatest on senior pilots because their pay was greatest under the 2003 CBA.

Like age, pay rate and bid status generally increase with seniority, so senior pilots would – as APA suggests – have a larger share of the damages that are correlated to these factors. The distribution is designed to compensate pilots for losses covered by the 2013 CBA, which expires after six years; junior pilots do not suffer a larger percentage of harm arising from the compensation concessions simply because they will retire later.

FO Eric Kowalski argued that the YOS Silo inaccurately allocates significantly more to a senior pilot who does not fly internationally than to a junior pilot who does, even though the senior pilot is not harmed by the loss of international premiums. He also contended that loss of night and international pay is unrelated to years of service, and instead hinges on bid status. These arguments show the imperfections of using years of service, but do nothing to show that it was an unreasonable measuring tool.

Understandably, some pilots are dissatisfied with this silo. Indeed, APA recognizes its flaws. But imperfection does not rise to the level of arbitrariness, discrimination or bad faith.

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[53] APA Post-Hearing Brief at 30.
[54] APA Statement of Position at 11.

APA designed the YOS Silo to accomplish legitimate objectives that were clearly set forth in the Equity Distribution Plan. Such a decision was not so far outside a wide range of reasonableness as to be irrational. *See Vaughn v. Air Line Pilots Ass'n Intern.*, 604 F.3d 703, 709 (2d Cir. 2010). Although the use of years of service is imperfect, an alternative yardstick for all concessions in the YOS Silo might produce comparable imperfections. Further, dividing the YOS Silo into several sub-silos based on different yardsticks would increase the complexity of the distribution scheme, without any guarantee of a corresponding benefit. Because each pilot's years of service are reasonably correlated to the harm he or she will suffer from each of the concessions in the YOS Silo, it was not arbitrary for APA to rely on years of service.

As evidence of discrimination, the challengers cite the fact that the YOS Silo favors senior pilots and imperfectly allocates damages. The law is clear that a union's actions are not discriminatory simply because they are unfavorable to some pilots. *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202-03 (1944); *Bondurant v. Air Line Pilots Ass'n Int'l*, 679 F.3d 386, 393 (6th Cir. 2012); *see Turner v. Air Transport Dispatchers' Ass'n*, 468 F.2d 297, 300 (5th Cir. 1972) ("The fact that a union adopts a position which favors one group of employees over another does not amount to a breach of the duty of fair representation."). Although the YOS Silo favors senior pilots, the Inverse Seniority Silo favors junior pilots. When examined as a whole, the Equity Distribution Plan does not favor either group.

FO Brian Smith proposed that the YOS Silo should be renamed the "Age 65/Retiree Medical Silo," limited to the loss of subsidized retiree medical care, and allocated according to age on the ground that the other concessions in this silo have been mitigated due to wage increases. This argument has been responded to elsewhere (p. 14), and that response will not be repeated here.

b. Allocations from the Years of Service Silo should be prorated for those pilots who will reach mandatory retirement during the 2013 CBA.

APA chose not to prorate the YOS Silo because many of the concessions allocated to it (*e.g.*, loss of the lump sum option and subsidized retiree medical benefits) occur post-retirement. Because, however, other concessions in the YOS Silo do not affect pilots post-retirement, senior pilots who retire before the 2013 CBA expires will receive some compensation for damages they will not incur, thus reducing the pool of money available for junior pilots. As a result, some junior pilots have challenged the APA decision to not prorate the YOS Silo as arbitrary and discriminatory. As explained above, however, it is not discriminatory for a union to make a decision that favors one group over another unless there is evidence – lacking in this case – that the Union's decision was based upon invidious considerations. *See, e.g.*, *Bondurant*, 679 F.3d at 393 (accepting union's allocation even though it gave an unearned benefit to certain pilots). Evidence of Company cost savings, from which estimates of pilot harm were primarily drawn, showed that the cost savings attributable to cuts in retiree medical insurance accounted for nearly half of the cost savings in the YOS Silo. Furthermore, even those pilots who must retire during the term of the 2013 CBA will suffer some degree of harm from the concessions that affect active employees. Under these circumstances, it was not arbitrary or discriminatory for APA not to prorate the YOS Silo.

5. Silo structure unfairly prorates the Inverse Seniority and Per Capita Silos

As described above, APA chose to prorate the award from two silos—Inverse Seniority and Per Capita—for pilots who would reach the mandatory retirement age of 65 before the end of the 2013 CBA's six-year term. The EDC stated that this decision was made because the financial harm associated with those two silos accrued only to active pilots.

Several pilots have filed challenges to this proration decision. The arguments by these pilots fall into two categories: (i) the proration decision is discriminatory because it unfairly reduces the award to older pilots; and (ii) the proration decision is arbitrary and/or discriminatory because it reduces the award to pilots facing *mandatory* retirement but does nothing to reduce the award to pilots who *voluntarily* retire during the 2013 CBA. These pilots have also noted that none of the EDC members will be affected by proration.

As to the challengers' first argument, APA responds that there is a legitimate basis for reducing the award to "older" pilots (*i.e.*, those who must retire during the contract term) in the Inverse Seniority and Per Capita Silos. Pilots who must retire during the term of the 2013 CBA, APA points out, will suffer less from the harm mitigated by those silos because that harm (*e.g.*, increased work hours and reduced medical benefits for active pilots) falls on active pilots and those pilots who must retire during the contract term will be active for fewer years than those pilots who will work during the entire contract term. Hence, prorating their recovery as a function of the time they will work under the 2013 CBA is entirely reasonable.

With respect to the challengers' second argument, APA explains that the differential treatment between pilots facing mandatory versus voluntary retirement is based on the unpredictability of the latter. APA argues that it cannot reduce the initial distribution to pilots who may voluntarily retire during the term of the 2013 CBA because, in almost all cases, it does not know who those pilots will be. Mandatory retirement, in contrast, is certain to occur during the term of the 2013 CBA for pilots aged 59 or older as of January 1, 2013.

Nor would it serve pilot interests for APA to seek to recover a portion of the initial equity distribution from those pilots who voluntarily retire during the term of the 2013 CBA. APA asserts that voluntary retirements are beneficial to the pilot group as a whole because they create opportunities for advancement for the remaining pilots. APA thus has an interest in not discouraging voluntary retirements by requiring pilots who voluntarily retire during the 2013 CBA to return some portion of their equity award.

I conclude, in light of these arguments, that the APA decision to prorate distributions from the Per Capita and Inverse Seniority Silos for those pilots who would be required to retire during the term of the 2013 CBA, but not for those who voluntarily retire, served legitimate Union interests, and was neither arbitrary, discriminatory, nor in bad faith.[55]

[55] This conclusion is not affected by the challengers' observation that no member of the EDC will suffer as a result of proration. The fact that the EDC decision on this issue was consistent with the personal interests of its members does not render that decision a breach of the duty of fair representation in the absence of evidence that EDC members acted for the purpose of furthering their personal interests rather than the interests of all pilots represented

C. Challenges to APA's Treatment of the Effect of Prior Service at Another Airline

1. Challenges by former TWA pilots

a. Background

In April 2001, American acquired the assets of Trans World Airlines, Inc. ("TWA"), and hired 2,337 former TWA pilots. Those pilots were initially assigned to TWA LLC, a wholly-owned subsidiary of American. They were subsequently integrated into the American workforce and, by virtue of Supplement CC, an agreement between American and APA, were assigned places on the AA-APA system seniority list.[56] The 1,095 most senior former TWA pilots were "feathered" into the existing seniority list on a 1:8.1762556 ratio, beginning at AA seniority number 2596, a pilot who had an American date of hire of October 8, 1985. The 1,242 remaining former TWA pilots were "stapled" to the end of the seniority list immediately below the last AA pilot hired before the April 10, 2001, purchase by American of the TWA assets. For the 1,095 pilots feathered into the list on a ratio basis, American and APA assigned each TWA pilot an Occupational Date between the American pilot immediately above and below him. For the 1,242 stapled TWA pilots, American and APA assigned them all the same Occupational Date—June 10, 2001—as the last American pilot hired before April 10, 2001. Other dates that American had assigned to the former TWA pilots, as to all other pilots, were Classification Date (for pay purposes), Company Date (for vacation accrual), and Date of Hire (for pension accrual). For former TWA pilots, these dates corresponded with their initial hire at TWA, not the date on which they arrived at American. As a result of the American-APA seniority integration formula, the seniority dates assigned to the former TWA pilots were considerably later than were their TWA dates of hire.

b. The EDC use of Occupational Date in the Years of Service Silo

When the former TWA pilots started work at American, they were assigned an Occupational Date based on their placement on the APA system seniority list, and that was the date used by the EDC to determine their years of service in calculating their allocations from the Years of Service Silo. The EDC also used the Occupational Date in calculating years of service for other pilots.

Several former TWA pilots argue that the EDC's decision to use Occupational Date for them in the Years of Service Silo was arbitrary because, in their case, that date has no relation to the financial harms the Years of Service Silo seeks to remedy. The Occupational Date for them,

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by APA. There is not a scintilla of such evidence in this case. *Cf. Mansfield v. Air Line Pilots Association International*, No. 1:06-cv-06869, 2009 WL 2386281 (N.D. Ill. July 29, 2009), cited and discussed at pp. 10-11, *supra*.

[56] Supplement CC, which also established St. Louis as a protected base for the former TWA pilots, providing protective fences and preferred bidding rights for them at that base, was abrogated by American in the 2012 bankruptcy, but the seniority list was not disturbed. The effect of the Supplement CC abrogation and the projected closing of the St. Louis base upon the Equity Fund allocations to the former TWA pilots is discussed subsequently at pp. 40-44.

they assert, does not correspond to their age, pay, or length of tenure at American. Rather, their Occupational Date was "manufactured" after they had been assigned places on the system seniority list through the feathering and stapling process. They assert that any of the other relevant dates assigned to them by the Company would have been a more satisfactory measure of the harms sustained by them as a result of the contractual concessions treated by the YOS Silo, since each of those dates corresponds to their TWA date of hire. The best date, they state, would have been Date of Hire.

APA does not dispute that Date of Hire, Classification Date or Company Date could have been used to measure years of service for former TWA pilots in the YOS Silo. It argues, however, that had it used any of those dates across the two silos in which awards are a function of seniority—YOS and Inverse Seniority—former TWA pilots would have fared less well because doing so would have decreased their payout from the Inverse Seniority Silo by a greater amount than it increased their payout from the YOS Silo. For, contrary to the YOS Silo methodology, pursuant to which more senior pilots receive a higher allocation, the Inverse Seniority Silo methodology provides greater awards to more junior pilots. And, since the Inverse Seniority Silo contains 30% of the assets in the Equity Fund, while the Years of Service Silo contains 20% of those assets, it stands to reason, APA asserts, that the former TWA pilots benefited as a result of the EDC decision to use Occupational Date, rather than any other date, as a measure of seniority in both the YOS and Inverse Seniority Silos.[57] Finally, APA points out that 85% of former TWA pilots received total awards from the YOS, Inverse Seniority, and Per Capita Silos that were in excess of $80,000, while 88% of "legacy" American pilots received such awards from those three silos. This, APA asserts, clearly shows that there has been no discrimination against former TWA pilots.[58]

The former TWA pilots argue that APA's contention that they profited by the APA decision to use Occupational Date in both the YOS Silo and the Inverse Seniority Silo is unsupported because the EDC made no effort to determine what the impact would have been if it had used a more compensation-related date in its YOS calculations. They assert that there is no evidence to support the EDC's determination that its use of Occupational Date in the Years of Service Silo was balanced out by its use of Occupational Date in the Inverse Seniority Silo.

This argument is not persuasive. Albeit not mathematically tested, the EDC calculation that the former TWA pilots were not harmed, but helped, by the use of Occupational Date in both the YOS and Inverse Seniority Silos is entirely reasonable. The former TWA pilots

[57] Actually, APA used a pilot's seniority date, not his Occupational Date, as the measure of seniority in the Inverse Seniority Silo. Inasmuch, however, as Occupational Date is drawn from seniority date, the two are closely related. To simplify the analysis, the date used by APA in the Inverse Seniority Silo will be referred to as the Occupational Date.

[58] APA also notes that in the Pension Silo former TWA pilots benefit from the EDC decision to use the past pay of former TWA pilots, rather than the past pay of all pilots with similar seniority numbers, to project future pay for former TWA pilots. That treatment, based on the St. Louis flying advantages provided to former TWA pilots by Supplement CC, provided greater Pension Silo payouts to the former TWA pilots than they would have had if they had been treated like legacy AA pilots with similar seniority numbers. APA further notes that TWA pilots, because of their comparatively low system seniority, benefited from the Inverse Seniority Silo, which rewards junior pilots more than senior pilots.

comprise approximately 10% of the total American pilot work force. It does not require mathematical testing to accept the proposition that 10% of 30% (the former TWA pilots' share of the proportion of the Equity Fund allotted to the Inverse Seniority Silo) is greater than 10% of 20% (their proportion of the Equity Fund allotted to the YOS Silo). Nor, despite their suggestion that the EDC calculation may not stand up to more rigorous analysis, do the former TWA pilots put forward any analysis that would undercut the EDC calculations.

Finally, while the former TWA pilots contest the APA assertion that they are better off with the use of Occupational Date in both the YOS and Inverse Seniority Silos, and prefer that, in light of their special circumstances, Date of Hire be used in the YOS Silo, they do not propose that their seniority also be determined by Date of Hire in the Inverse Seniority Silo. Instead, in the YOS Silo they want Date of Hire, which would maximize their seniority, and in the Inverse Seniority Silo, they want their "manufactured" seniority date, which would minimize their seniority, thus maximizing their payout from both silos. They put forward no justification for such special treatment, and I am aware of none.

In sum, because of the special circumstances under which seniority dates had been assigned to the former TWA pilots, the EDC was required to determine whether their Occupational Date was an appropriate measure for determining their years of service for the YOS Silo, as it had been for all other pilots. In doing so the EDC determined that to use any of the other potentially relevant measures of seniority—Date of Hire, Classification Date, or Company Date—that would serve to increase the former TWA pilots' seniority and allocations from the YOS Silo would reduce their allocations from the Inverse Seniority Silo by a greater amount than the potential gain in the YOS Silo. Hence, the EDC decided to use Occupational Date to determine years of service in the YOS Silo for former TWA pilots, as it had done for all other pilots. I conclude that in doing so, APA acted neither arbitrarily, discriminatorily, nor in bad faith.

c. Harm from the abrogation of Supplement CC, the closing of the St. Louis base, and the decision of the LOA 12-05 Arbitration Panel.

Supplement CC to the 2003 CBA guaranteed that 346 CA seats in American's St. Louis base ("STL") would be held by former TWA pilots and provided former TWA pilots with preference for FO seats in STL. Supplement CC also established a protected "bubble" for former TWA pilots in STL. Within that bubble, despite the comparatively low system-wide seniority former TWA pilots had as a result of the Supplement CC seniority integration formula, they bid only among themselves for STL flying, with the result that the more senior among them had their choice in monthly bidding for lines of flying, days off, vacations, and other seniority-based preferences.

When Supplement CC was abrogated in September 2012, along with the remainder of the 2003 CBA, and American announced its plan to close STL as a pilot base, American and APA entered into a Letter of Agreement ("LOA 12-05"), which provided in relevant part:

This letter confirms our agreement concerning the termination of Supplement CC, the planned closure of the STL base, interest arbitration related to that action, and the schedule of any other base closures.

Supplement CC established seniority placement on the Pilots' System Seniority List for TWA pilots, as defined under Section I.D of Supplement CC, and certain preferential flying rights to specific aircraft based at STL associated with those seniority placements. The Company and APA agree that the TWA Pilots' existing seniority placements on the Pilots' System Seniority List are final and shall continue pursuant to Section 13 of the CBA notwithstanding the termination of Supplement CC and any preferential flying rights associated with those seniority placements. The Company and APA agree that a dispute resolution procedure is necessary to determine what alternative contractual rights should be provided to TWA Pilots as a result of the loss of flying opportunities due to termination of Supplement CC and the closing of the STL base.

The Company will have the right, in its sole discretion, to decide whether to close the existing STL pilot base, and such closure and consequences thereof shall not constitute a breach of the CBA. In preparation for closure of the STL pilot base, the Company and APA will engage in final and binding interest arbitration pursuant to Section 7 of the RLA to establish certain terms of the CBA as a substitute for the loss of Supplement CC preferential flying opportunities in order to resolve all issues related to the impact on TWA Pilots of termination of Supplement CC. The interest arbitration will commence within 30 days of the effective date of this agreement and the hearing shall be completed and a final award issued within 90 days of commencement. Within 30 days of issuance of the final award, the Company and APA shall submit to the Panel contract language implementing the award and the Panel shall within 15 days thereafter issue final approval of such contract language. The Company shall defer closure of the STL base until issuance of a final award and the Company shall have the contractual and legal right to close the STL base upon issuance of and compliance with the award, from which there shall be no reconsideration motions considered and notwithstanding any legal challenges to the award.[59]

[59] (Footnote added.) While the timetable set out in LOA 12-05 contemplated a final award on or about May 1, 2013, and final contractual language on or about May 15, 2013, the final award was issued on July 22, 2013, and final contract language was approved by the Arbitration Panel on September 12, 2013.

> The interest arbitration panel shall consist of three neutral arbitrators who are members of the National Academy of Arbitrators with Richard Bloch as the principal neutral if he is available and will to serve. The arbitrators shall decide what non-economic conditions should be provided to TWA Pilots as a result of the loss of flying opportunities due to the termination of Supplement CC and the closing of the STL base, provided that training costs associated with the closure of the base shall be considered non-economic. In no event shall the arbitrators have authority to modify the Pilots' System Seniority List, require the establishment or continuation of any flight operation at any location, or impose material costs beyond training costs on the Company, and any preferential flying rights under the award shall not modify or be deemed a modification of the TWA Pilots' seniority placements on the Pilots' System Seniority List.

The estimated cost savings to American of closing STL as a pilot base was $83 million over the term of the 2013 CBA. These savings resulted partly from system efficiencies due to American's freedom to begin and end flights so as to maximize profits, rather than being constrained to utilize pilots based in STL for certain flights in order to comply with the Supplement CC guarantees. Cost savings to American would also be achieved by not being required to deadhead STL pilots to other locations to begin trips not originating in STL, as well as from not having to pay hotel bills for deadheaded STL pilots.

The EDC decided that the $83 million in estimated cost savings to American resulting from the closing of STL and the abrogation of Supplement CC should not be placed in a separate silo to be distributed solely among former TWA pilots. Instead, the $83 million was placed in the Per Capita Silo, where it would be shared by all pilots. Initially, the EDC decided that the $83 million in cost savings to American, because it resulted from system efficiencies and the elimination of deadheading costs, did not impose concomitant harm to the former TWA pilots. Furthermore, the EDC believed that any harms to former TWA pilots that were not mitigated by an Equity Fund allocation would be dealt with by LOA 12-05, which provided for:

> . . . final and binding interest arbitration . . . to establish certain terms of the CBA as a substitute for the loss of Supplement CC preferential flying opportunities in order to resolve <u>all issues</u> related to the impact on TWA Pilots of termination of Supplement CC. (Emphasis added.)

The former TWA pilots, for their part, argue that whatever the general principles of the Equity Distribution Plan may have been, they constitute a unique group that sustained clearly identifiable harm resulting from the closing of the STL base, the abrogation of Supplement CC, and the decision of the LOA 12-05 Arbitration Panel. They introduced evidence showing that as a result of the LOA 12-05 arbitration award, which requires them, when they are transferred from STL to other bases, to use their comparatively low system seniority when bidding against American pilots at those bases, most of whom have greater system seniority than they do, most

of them will not have sufficient seniority to hold a line at those bases. Instead they will be forced to fly as reserves. They also introduced evidence showing that lineholders' income is significantly greater than that of reserves, with the result that the loss in income to them will be approximately $37 million over the term of the 2013 CBA. To this loss the TWA pilots added the loss in their quality of life resulting from their inability to choose, as they had at STL, their schedules, days off, and vacations. The monetary value of this loss they estimated at $18.8 million.[60] They also added the increased costs to those STL pilots who live within commuting distance of STL of having to commute the greater distance to the new bases to which they would be assigned upon the closure of STL, a cost they estimated at $12 million. In total, they claimed $95.6 million in losses as a result of the STL base closing, the abrogation of Supplement CC, and the LOA 12-07 arbitration decision.

APA's initial response to the damage claims of the former TWA pilots is that they are both highly speculative and overstated. According to APA, the claimed commuting losses are predicated on a flawed analysis of the number of pilots who live within commuting distance of STL. Furthermore, the claimed commuting losses take no account of the likelihood that some STL pilots will move to their new bases to avoid commuting costs, a likelihood made greater by American's agreement to pay moving costs for pilots who are transferred out of STL. APA also attacks the alleged quality of life losses being predicated on the assumption that being unable to take a summer vacation with the pilot's family renders that vacation essentially worthless. APA introduced evidence that 60% of all pilots system-wide cash in as much vacation as they can, suggesting that for most pilots, the time when they would otherwise take their vacation is of little importance. Finally, APA asserted that the claimed financial losses due to the former TWA pilots being forced onto reserve ignored the effects of preferential bidding, soon to be implemented, and the limitation in the 2013 CBA on the maximum number of hours that can be flown by lineholders, both of which APA asserts will markedly reduce the number of reserves and shrink the income gap between lineholders and reserves.

More fundamentally, APA argues that the former TWA pilots seek to have the Arbitrator overturn an EDC allocation decision made in March 2013 on the basis of facts that were not, and could not have been known to the EDC at that time – more precisely the Decision and Award of the LOA 12-05 Arbitration Panel, which was not issued until July 2013 and not reduced to contract language until September 2013. Were the Arbitrator to do as the former TWA pilots request, APA asserts, he would exceed his jurisdiction, which is limited to reviewing allocation decisions *at the time they are made*, not months afterward on the basis of newly-acquired evidence.[61]

The former TWA pilots do not contest the APA assertion regarding the scope of the Arbitrator's jurisdiction, but instead assert that even viewed as of March 2013, the EDC acted arbitrarily in assuming that the LOA 12-05 arbitration was capable of and would determine the

[60] The TWA pilots valued the loss in their quality of life by assuming that being unable to choose summer vacations with their families rendered those vacations essentially worthless because the dates on which they may be able to take vacation time (generally winter months) will be times when their children and families are generally not available to travel. Hence, they treated the dollar value of those vacations as a loss.

[61] *See Air Line Pilots Ass'n, Intern. v. O'Neill*, 499 U.S. 65, 67 (1991) (holding that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational") (internal citation omitted).

harms sustained by the former TWA pilots and provide an appropriate remedy for those harms. They state:

> It is impossible to see how a rational labor organization could honestly believe that the arbitration process it devised—with the *limitations* it imposed—could fully replicate the protections the prior agreement gave to a minority so as to avoid the need to compensate that loss through the Equity Distribution available to redress concessions it made.[62]

This assertion is without merit. The former TWA pilots argued to the LOA 12-05 Arbitration Panel that the Panel had the authority to – and should – provide fences for the former TWA pilots at the bases to which they were transferred, with bidding behind the TWA fence limited to former TWA pilots, thus recreating at several bases the protected bubble that had existed at STL. Had the LOA 12-05 Arbitration Panel accepted this argument, the former TWA pilots would have bid for lines only among themselves, thus avoiding their automatic relegation to reserve status, and would also have bid among themselves on quality of life issues (flying schedules, days off, vacations) just as they had at STL. Inasmuch as the former TWA pilots argued for this outcome in the LOA 12-05 arbitration, it was hardly arbitrary or irrational for the EDC to believe that they might attain it, hence that the LOA 12-05 arbitration could have redressed any harm resulting from the closing of STL and the abrogation of Supplement CC.

In sum, I reject the former TWA pilots' argument that the EDC should have known that substantial harm to the TWA pilots was inevitable as a result of the LOA 12-05 arbitration and that the EDC acted arbitrarily in not providing a separate silo to compensate former TWA pilots for the harm they allegedly sustained as a result of the closing of the STL base, the abrogation of Supplement CC, and the foreseeable inability of the LOA 12-05 arbitration to remedy those harms.[63]

2. Challenges by former Reno Air pilots

Former Reno Air pilots, who also joined American as the result of a merger with their former employer, and who also received Occupational Dates that did not correspond to their dates of hire at Reno Air, complain of that treatment on the same grounds as did the former TWA pilots. Those arguments have been rejected as to the former TWA pilots and are similarly rejected here.

[62] Supplemental Post-Hearing Brief at 4-5 (internal footnote omitted). (Emphasis in original.)
[63] As a result of this holding I need not and do not express an opinion on the competing arguments of APA and the former TWA pilots regarding the amount, if any, of the harm sustained by the latter as a result of the STL base closing, the abrogation of Supplement CC, and the Decision and Award of the LOA 12-05 Arbitration Panel.

3. Challenges by former American Eagle pilots

a. Former American Eagle pilots did not receive the years of credited service in the A Plan to which they are entitled pursuant to the April 9, 2010, award of Arbitrator George Nicolau.

Pursuant to an agreement dated May 5, 1997, between American Airlines, American Eagle (hereafter "Eagle"), APA, and the Airline Pilots Association ("ALPA"), which was memorialized as Supplement W to the 1997 American/APA CBA, and which has since expired, Eagle pilots obtained certain rights to flow up to American when there were openings, and American pilots obtained certain rights to flow down to Eagle when there were layoffs at American.[64]

Supplement W was a source of many disputes in the following years, some of which were decided by Arbitrator George Nicolau. In an award dated April 9, 2010 (hereafter the "Nicolau Award"), Arbitrator Nicolau held that several Eagle pilots had been improperly denied the right to flow up to American between June 6, 2007 and March 18, 2009. As a remedy, Arbitrator Nicolau ordered American to offer those pilots the opportunity to flow up to American beginning in June 2010. Arbitrator Nicolau further held that:

> 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 American'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.[65]

The EDC, in determining former Eagle pilots' credited service in the A Plan, did not give them credit for the period between the time they should have been transferred to American and the date on which they were actually transferred, interpreting the Nicolau Award as ordering that they be given credit for that time solely for vesting purposes.[66]

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[64] ALPA is the collective bargaining representative of the Eagle pilots.

[65] (Footnote added.) Some former Eagle pilots asserted that they had not received the benefit of the waiver of the one-year waiting period for commencing credited pension service to which they were entitled under the Nicolau Award. APA confirmed the merit of this claim with American and all former Eagle pilots have now had the one-year waiting period waived.

[66] An AA pilot was required to have been employed by American for 5 years before his A Plan rights became vested.

Several former Eagle pilots challenge the EDC decision, arguing that the EDC erred in its interpretation of the Nicolau Award, and that they were entitled to A Plan credit for the period between the date on which they should have been transferred to American and the date on which they were actually transferred, interpreting the Nicolau Award as ordering that they be given A Plan credit for that period.

The challengers' argument is without merit. Arbitrator Nicolau was (and is) an able and experienced arbitrator who has had extensive experience arbitrating disputes in the airline industry, including disputes involving the interpretation of the American-APA CBA. It is not credible, in light of Arbitrator Nicolau's experience and the familiarity he demonstrates with the provisions of the American-APA CBA in the above-quoted portion of his decision, that he does not know the difference between (1) the 5-year vesting requirement for securing a pilot's rights under the A Plan and (2) credited service time, which plays a major role in determining the amount of a pilot's pension. Hence the EDC did not act arbitrarily, discriminatorily or in bad faith in determining that Arbitrator Nicolau meant exactly what he wrote -- that the time between when the former Eagle pilots should have been allowed to flow through to American and the time when they actually did so should be "credited, but solely for vesting purposes."[67]

b. Former Eagle pilots have been discriminated against compared to former TWA pilots in the calculation of their dates of service for purposes of determining their allocations under the Years of Service and Pension Silos.

In calculating years of service for former Eagle pilots in the Years of Service Silo, the EDC followed Supplement W in assigning them an Occupational Date corresponding to the date they could have flowed up to American.[68] In calculating former Eagle pilots' years of service for purposes of the Pension Silo, the EDC used the date on which they actually began working at American.

A group of former Eagle pilots challenge the EDC computation of their years of service in both the Pension and Years of Service Silos. Their first argument is that to the extent that former TWA pilots prevail in obtaining Date of Hire at TWA as the beginning point for their years of service at American under the Years of Service Silo, they want their Date of Hire at American to be when they began working at Eagle. Inasmuch as the former TWA pilots were not successful in obtaining their Date of Hire at TWA as the beginning point of their years of service at American for purposes of the YOS Silo, the Eagle pilots' argument that their Date of Hire should be the date they began flying for Eagle falls of its own weight.

The Eagle pilots' second argument is that they are being discriminated against because they are not being treated equally in comparison to the former TWA pilots for purposes of pension credit. They point out that under Supplement CC, the former TWA pilots' pension accrual began as early as January 1, 2002, even though many of those pilots did not actually begin working at American until years later due to furloughs. In comparison, they state that

[67] The challenge of FO Eric Sapp raises essentially the same issues discussed above and is denied for the same reasons.
[68] *See* Suppl. W § III.B.

many former Eagle pilots became eligible to flow through to American but were delayed in doing so due to Eagle exercising its right under the Nicolau Award to hold them back. They further state that their A Plan pension accrual did not begin until they actually began working at American. The former Eagle pilots want credit in the Pension Silo from the date they could have flowed through to American but for the Eagle hold back.[69] They believe this is consistent with the treatment of the former TWA pilots.

APA pointed out, however, that there is a difference between Supplement W (governing the former Eagle pilots) and Supplement CC (governing former TWA pilots). Under Supplement CC, former TWA pilots became eligible to accrue and did accrue pension credit as early as January 1, 2002 (less time on furlough or leave). Under Supplement W, the former Eagle pilots did not become eligible to participate in the A Plan until they actually flowed through to American. EDC Chair Michael Mellerski testified that every pilot was credited in the Pension Silo with the years of service established by the A Plan, along with the applicable supplement to the CBA -- Supplement CC for the former TWA pilots and Supplement W for the former Eagle pilots. This uncontradicted testimony provides a rational basis for the EDC calculation of years of service in the Pension Silo for former Eagle pilots.

The former Eagle pilots also argue that APA breached its duty of fair representation in negotiating more favorable terms for former TWA pilots in Supplement CC than for former Eagle pilots in Supplement W. Whatever the merit of that contention, on which I express no opinion, it is not relevant in these proceedings which are limited to an examination of APA's distribution of the Equity Fund, not what it did or did not do in the years preceding that distribution.[70]

c. AA pilots who were forced to remain on furlough because Eagle pilots were allowed to flow through to American should receive pension credit for that furlough time.

In calculating each pilot's credited years of service for pension purposes, the EDC did not count the years during which a pilot was on furlough, as neither the 2003 CBA nor the A Plan itself provides pension credit for time on furlough. For example, a pilot who was trained and hired by American on January 1, 2001 but was immediately placed on furlough not to return until January 1, 2012, would receive only one year's credited service for pension purposes (i.e.,

[69] This argument is similar to that raised by the former Eagle pilots who challenged their pension credit based on the Nicolau Award. This argument, however, is based not on the Nicolau Award but on the theory that it is discriminatory to treat former Eagle pilots differently than former TWA pilots.

[70] Some former Eagle pilots' also argued they should be given an Occupational Date that corresponds with the date on which they *could have* flowed through to American but for the holdbacks. EDC Chairman Mellerski testified that this was in fact the date that was used for them in the Years of Service Silo. The former Eagle pilots accepted this explanation at the hearing, but later complained in a post-hearing brief that they could not verify whether their YOS calculations are correct because the information was not available to them. APA has since confirmed that the Occupational Date and seniority number of all pilots is available on the APA website. Other Eagle pilots complained that APA did not furnish them with the amount of pension credited service of former TWA pilots who eventually flowed up to Eagle. Inasmuch as pension credited service dates of former TWA pilots were established by Supplement CC and those of Eagle pilots going to American were established by Supplement W, the pension credited data of former TWA pilots is not relevant for former Eagle pilots.

the difference between January 1, 2012 and January 1, 2013) even though his or her Occupational Date was January 1, 2001.

FO Glenn Dominy challenges the application of this rule as applied to him and other legacy American pilots. FO Dominy alleges that as a result of the Nicolau Award, Eagle pilots were permitted to flow through from Eagle to American ahead of legacy American pilots who were then on furlough, including himself. This preference in favor of Eagle pilots, he argues, has caused harm to legacy American pilots that should be compensated through an adjustment to the Pension and Years of Service Silos for the furloughed legacy American pilots.

The harm of which FO Dominy complains occurred many years prior to the 2013 CBA. Hence, it is not subject to redress under the Equity Fund, which is limited to providing compensation for those harms arising from concessions in the 2013 CBA compared to the 2003 CBA.[71]

D. Challenges to Eligibility Criteria

1. Challenges related to pilots on furlough

a. The distribution unfairly penalizes furloughed pilots who exercise their contractual right to defer recall.

Approximately 2,900 pilots were on furlough from American on January 1, 2013, the effective date of the 2013 CBA. Each of the furloughees was offered recall before May 6, 2013. Approximately 1,200 elected to defer recall pursuant to Letter T of the CBA.[72]

The APA Equity Plan of Distribution provides that pilots on furlough as of January 1, 2013 are only eligible for the distribution if they satisfy the following criteria between January 1, 2013 and August 1, 2013, the Supplementary Eligibility Qualification Period ("SQP"): (1) accept recall to active service; (2) register for a training class set to begin by October 30, 2013; and (3) sign an enforcement letter and promissory note agreeing to remain on active status for 12 months. A furloughed pilot who satisfies these conditions but does not complete 12 months on active status will be required to repay all or some portion of his/her Equity Fund distribution.[73]

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[71] FO Dominy, who was on furlough from 2001 to 2013, also asserts that he should receive pension credit for that furlough time because APA was successful in 2001 in negotiating pension credit for pilots who had previously been furloughed. That contention has been rejected (*see* p. 30), and will not be addressed again here.

[72] Letter T provides, in relevant part:

> A furloughed pilot may defer recall to American Airlines for three (3) years after the last pilot with recall rights is notified of recall. Pilots should keep their current contact information on file with the Company. For planning purposes, a pilot electing to defer recall shall notify the Company of the length of deferral desired. The pilot can notify the Company if the pilot's situation changes such that the pilot desires to end the recall deferral. In such case, the Company will recall the pilot in seniority order to the next available class date.

[73] The original version of the Plan of Distribution did not contain the August 1, 2013 ending date of the SQP. That date was added, and communicated to all pilots, on May 20, 2013.

APA explained the rationale underlying the Equity Fund eligibility standards for furloughed pilots as follows (APA Statement of Position at 45-46):[74]

> Furloughed pilots are not currently affected by the concessions in the 2013 CBA for the simple reason that they are not working at American Airlines. And furloughed pilots may never be affected by those concessions because they may never return to American. Indeed, many furloughed pilots do not return. Many of these pilots have established careers at other airlines or in other fields of work. The APA was not obligated to reduce the equity payout to working American pilots in order to provide equity to pilots who might never return to American, many of whom now work for competitors.
>
> The APA's decision was particularly reasonable because all pilots on furlough have now been offered an opportunity to return to American – meaning that any pilot who remains on furlough made a voluntary choice not to return. Every furloughed pilot at American was offered recall by May 6, 2013, and every pilot who accepted recall by that date has been scheduled for a training class. Pilots who have chosen not to accept recall are particularly unlikely to return in the future.

Many furloughees challenged APA's decision to exclude them from the Equity Fund distribution if they elected to defer recall past August 1, 2013. Their initial argument is that by excluding them from the Equity Fund distribution, APA is infringing upon their contractual right, pursuant to Letter T, to defer recall for three years after the last furloughed pilot is offered recall.

That argument is without merit. APA did nothing to interfere with furloughed pilots' contractual right to defer recall pursuant to Letter T. To be sure, APA denies participation in the Equity Fund to those furloughed pilots who do not terminate their deferral within the SQP, but there is nothing in the text or spirit of Letter T that requires APA to allocate Equity Fund resources to pilots who choose to remain on furlough.

The challengers next argue that APA discriminated against furloughed pilots who deferred their opportunity to return by requiring them to return before August 1, 2013, and to satisfy the other elements of the Plan of Distribution applicable to furloughees. According to the challengers, this is discriminatory because other pilots not on active duty – those on LTD less than five years, those on TAG status, those on military leave, and those on personal leave – are not required to meet the obligations imposed on furloughees, but are eligible to receive a full share of the Equity Fund.

[74] (internal citations omitted).

Although the challengers accurately state the facts, I do not accept their conclusion that these facts demonstrate invidious discrimination against furloughees. The key factor in distinguishing among the pilots in the different categories described by the challengers is whether those pilots have given any indication that they will not return to American when they are able to do so. Pilots on LTD for less than five years have given no indication that they will not return to work when they are able to do so. Those in TAG status are fighting (metaphorically) for their return to American. As for pilots on military leave and those on personal leave, there is no reason to suppose that they will not return to American at the conclusion of their leaves.[75]

In contrast, there was every reason for APA to suppose that the pilots who declined recall to American in the circumstances of this case, preferring to "defer" their return, would never return. Not only had they opted not to return when they could have done so, but they did so at a time when they knew that they would be guaranteed a full share in the Equity Fund if they accepted that offer. Under these circumstances, it was hardly arbitrary for APA to conclude, as it did, that such furloughed pilots were unlikely to return to American on a permanent basis. Nor was it discriminatory for APA to limit Equity Fund resources to those pilots who would work under the 2013 CBA and sustain the harms associated with that contract. The furloughed pilots who declined offers to return to American and share in the Equity Fund were unlikely candidates to return to American and work under the 2013 CBA.[76]

To overcome the doubts concerning their return to American, the challengers suggest that APA could establish a reserve account and make distributions to furloughed pilots on deferral if and when they return to active service at American (presumably signing the enforcement letter and promissory note at that time, although challengers are silent on this point). Any amount not distributed from this reserve account after the deferral period could then be redistributed *pro rata* to all eligible pilots.[77]

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[75] Admittedly, the likelihood that a pilot on personal leave will not return to flying for American is greater than is that likelihood for a pilot on military leave. APA has recognized the difference between those two categories of leaves by requiring pilots who return from a personal leave of absence to sign the same letter and promissory note as furloughed pilots, thus deterring them from returning solely to collect a share of the Equity Fund, then leaving American (and APA). One pilot challenged the Equity Distribution Plan on the ground that pilots on personal leave who return to work after the SQP will not receive a full share of the equity allocation. As noted in the preceding sentence, however, such pilots are eligible for a full distribution as long as they satisfy the APA requirements for doing so.

[76] FO Lloyd Hamlin asserts that APA may not require the enforcement letter and promissory note because doing so puts pressure on pilots to remain employed by American even if they would prefer to leave the Company's employ. He characterizes the enforcement letter and promissory note as "punitive damages on active pilots who decide to leave the Company." In fact, however, the enforcement letter and promissory note are required only of those pilots who were not active on January 1, 2013 and either deferred their recall from furlough during the SQP, were on a personal leave of absence or were management pilots. As noted above, APA had a legitimate interest in ensuring that these pilots did not collect a distribution from the Equity Fund by returning to active duty for a brief period, only to leave the Company a short time later without having sustained to any significant degree the harms imposed on pilots by the 2013 CBA that the Equity Fund distribution was designed to address. The enforcement letter and promissory note were intended to further that legitimate APA interest, and whatever pressure they may exert on pilots who have returned to active duty and obtained a share of the Equity Fund to remain with the Company for the term of the enforcement letter or surrender their Equity Fund allocation is entirely warranted.

[77] Challengers proposed several permutations of this basic proposal. *See*, *e.g.*, FO Andrew Weingram Challenge 1132: "[W]e now can figure out the exact potential costs of any combination of returns or resignations that will

APA asserts that establishing a reserve fund for furloughed pilots would have been legally and logistically unworkable. According to Captain Mark Stephens, the EDC concluded "that it was impractical, if not virtually impossible, to delay or withhold part of the distribution until the status of each and every pilot could be determined for the entire duration of the new CBA."[78] That position was affirmed by the testimony of APA's tax counsel, Gregory Kidder of the law firm Steptoe & Johnson LLP, who testified that due to logistical and tax complications he "advised the APA to make the allocations in the distribution immediately" and not provide for a holdback.[79] It was further affirmed by APA's financial advisor, Andrew Yearley, Managing Director of Lazard Frères & Co. LLC, who testified:

> [W]hat concerns me about having a class sort of opt in later over time is we may not have a lot of shares on the back end left to sort of reallocate to everybody, which I think would force the APA to distribute less or somehow -- I don't know what they'd do. Maybe they'd take that 50 percent and set some aside and not distribute them yet, which would hurt, obviously, pilots who would want them earlier.[80]

Upon confirmation of the Plan of Reorganization and the beginning of public trading in American stock, American will determine the value of the 13.5% of its equity that has been assigned to APA. It will then distribute shares to eligible pilots identified by APA in two or more tranches. The first tranche will be distributed on the effective date of the bankruptcy reorganization plan or as soon thereafter as is practicable. It is anticipated that a second tranche will be distributed 120 days later.[81] Pilots who receive stock in the first tranche may elect to hold or sell it.[82] Mr. Yearley, APA's financial advisor, described the distribution mechanics in detail at the Merits Hearing. According to him, after 120 days, on the basis of the market price of its shares at that time, American will distribute sufficient shares to bring the total value of the distribution equal to the value of APA's 13.5% share as of the Plan confirmation date.[83] If the stock price increases between Tranche 1 and Tranche 2, then eligible pilots will receive fewer shares in Tranche 2 because the shares that they previously received will be worth more.[84] For example, if the stock price doubles over those 120 days, the pilots and APA could receive few if any shares in the second tranche.[85] APA asserts that, if this were to happen, it would not have

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occur in 3 years' time. We should escrow the worst case scenario. If they return they get their prorated share. If they don't return that money stays in Escrow. Once the last pilot is back on the property or resigned 3 years from now, we then distribute the remaining escrow balance to all pilots who received a check from the equity settlement using the exact same multiplier."

[78] Stephens Declaration ¶ 45.

[79] Tr. 171:21-24.

[80] Tr. 295:13-20.

[81] *See* APA's Supplemental Brief (Aug. 19, 2013) (attached letter agreement from American Airlines dated July 30, 2013 ¶ 2).

[82] *See* Tr. 293:17-23; Yearley Declaration ¶ 10.D; Allied Pilots' Association's Supplemental Brief at 2 (Aug. 19, 2013).

[83] Tr. 293:8 - 294:9.

[84] *Id.*

[85] *Id.*

enough shares remaining to establish a reserve fund; alternatively, it would have to establish such a large reserve fund up front that it would significantly dilute the distribution to active pilots.[86] Out of concern that the Arbitrator's final decision might come after confirmation of the bankruptcy plan, American and APA have signed a letter agreement dated July 30, 2013 providing that the first tranche could be put in trust if APA is unable to provide a definitive list of eligible pilots as of confirmation.[87] APA has stated that "the backup trust arrangement, while it may be necessary, imposes enormous market risk on APA and the pilots."[88]

APA also cites logistical and tax reasons why it could not establish a reserve.[89] According to Mr. Kidder, American instructed APA that it was important for shares to be distributed to individual pilots soon after emergence from bankruptcy so that those shareholders could be factored into the calculations relevant to the tax implications of a change in control of the company.[90] For the new American to take advantage of the old American's net operating losses for tax purposes, there cannot be a change in control of the company. Mr. Kidder represented that American has determined that the stock must be received by the pilots in order for their shares to not count toward this tax threshold.[91] A reserve, therefore, could have negative tax consequences to the new American.

Moreover, according to Mr. Kidder, individual pilots could owe significant tax obligations but not have funds from the distribution with which to pay those obligations if APA were to establish a reserve.[92] Mr. Kidder testified that American is required to serve as the withholding agent for any proceeds that have been allocated to individual pilots. To the extent that individual pilots are not identified for distribution, APA would have to take on the withholding responsibility. According to Mr. Kidder, if American is not the withholding agent, then no portion of the amounts paid to the pilots will be eligible for contribution into an eligible

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[86] APA Post-Hearing Brief at 17 ("As a result of the complicated structure of the distribution of equity to AMR creditors and labor groups, along with the significant risks of fluctuations in the stock price, the APA has been advised [by tax counsel Greg Kidder and financial advisor Andrew Yearley] that it is impractical, and potentially impossible, to adjust the pool of eligible pilots after the first tranche of stock has been distributed."); *see also* Tr. 312:6 - 313:13, 313:23 - 314:20.

[87] APA's Supplemental Brief at 1(Aug. 19, 2013) (attached letter agreement from American Airlines dated July 30, 2013 ¶ 7).

[88] *Id*. at 2.

[89] *See* APA Statement of Position at 7 ("The equity distribution scheme is also the product of the Association's recognition that it cannot reserve any significant portion of the Equity Stake for any significant period following its receipt. The reasons for this flow from tax law and from other logistical considerations."); Kidder Decl. ¶¶ 6-33 (describing tax consequences of reserve fund); Tr. 311:9-13 (CA Mellerski: "So who assumes the risk here of the change in stock price? In the scenario that we are in, the pilot has to assume the risk. He also assumes the reward, as Mr. Yearley pointed out, but we don't know what's going to happen.").

[90] Tr. 166:14-15 ("We did ask American to hold on to the equity for a period of time, and they refused.").

[91] Kidder Decl. ¶¶ 14-25; *see* Tr. 295:21 - 296:7 (Yearley: "I won't get into the tax issues, but what American says is we need those shares on day one distributed to individual pilot accounts for NOL [net operating loss] purposes because the NOL is based on a change of control concept. Every share distributed to a pilot is a good guy share. It's to a holder of less than five percent of the overall shares, so it goes in the good guy camp. If we can't distribute shares in the individual pilot accounts, if we have to set some aside, you know, to be distributed later, that hurts in the overall NOL calculation because we have -- there aren't as many good guys is what they would say.").

[92] Kidder Decl. ¶¶ 6-12, 26-33.

tax deferral retirement plan because such contributions must be made by the "employer."[93] The IRS may deem the distributions to be constructively received by the pilots at the time they are provided to APA and thus taxable income at that time.[94]

In sum, I find that in declining to establish a reserve fund to take account of the possible return of pilots who had deferred their return from furlough, APA relied on the advice of qualified outside lawyers, tax counsel, and financial advisors. The conclusions APA drew from that advice – that establishing such a reserve fund would create significant logistical, legal, and tax problems – can under no stretch of the imagination be described as arbitrary. Accordingly, I find it was well within the range of APA's discretion to decline to establish a reserve for furloughed pilots who deferred their possible return.[95]

b. The distribution unfairly penalizes furloughed pilots who have deferred recall and are currently employed by US Airways.

APA treated current US Airways pilots who deferred recall the same as all other furloughees, advising them that they would be eligible for Equity Fund distributions if they met the conditions established by APA – notably that they accept recall to active duty by August 1, 2013.

US Airways furloughees contend that they should be eligible for distributions from the Equity Fund without satisfying any conditions because they will return to American by operation of the anticipated merger between the airlines, and thus will be governed by the 2013 CBA. They also argue that it would be illogical for them to leave US Airways to return to American only to be merged with US Airways, and that it was arbitrary, discriminatory, and in bad faith for APA to make their Equity Fund eligibility contingent upon such return.

It is unclear, however, if and when the US Airways pilots will be covered by the 2013 CBA, the concessionary terms of which provide the basis for Equity Fund distributions. Several procedural hurdles must be overcome before the companies merge.[96] Even if the merger does

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[93] Kidder Decl. ¶ 29.

[94] Kidder Decl. ¶ 30 ("If the APA were to receive the proceeds and hold them on behalf of the pilots, there is significant risk that the amounts would be deemed to be constructively received by the pilots when received by the APA.").

[95] This conclusion is supported by the district court's decision in *Hudson v. Air Line Pilots Ass'n Int'l*, 415 B.R. 653 (N.D. Ill. 2009), in which the court addressed the same issue under comparable facts involving the United Airlines pilots' union. The court held that the union's decision to exclude pilots who deferred recall from furlough from participating in an equity distribution when United emerged from bankruptcy was not arbitrary, discriminatory, or made in bad faith. The union there presented evidence of the same types of logistical and tax concerns here raised by APA, and the court found that the furloughed pilots "failed to provide any evidence or cite any authority from which a jury reasonably could find that the [union's] decision was wholly irrational." *Id.* at 661. The court further stated that "[r]egardless of whether [the union's] concerns ultimately proved correct, no jury reasonably could find that they were anything other than legitimate reasons for the [union] to decide against setting aside funds to distribute to later returning furloughees." *Id.* (quoting *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1529-30 (7th Cir. 1992) ("[A] mistake in judgment does not violate the duty of fair representation."). This analysis applies equally here.

[96] The U.S. Department of Justice has brought suit to prevent the merger of AA and US Airways; if that suit is successful, there will be no merger.

take place, it is not certain that current US Airways pilots will ever be covered by the 2013 CBA. As APA points out, American and US Airways will not be considered a single bargaining unit until the National Mediation Board determines the two carriers to be a single transportation system. Even then, the US Airways pilots and the American pilots will continue under separate collective bargaining agreements until the union representing them – presumably APA – has negotiated a single collective bargaining agreement covering the employees of both carriers. There is no certainty that agreement will incorporate the terms of the 2013 CBA. Even if it does, APA witness Mark Stephens testified, and there is no record evidence to the contrary, that for US Airways pilots, the 2013 CBA would be an improvement on their current terms and conditions of employment, rather than a concessionary agreement, as it is for the American pilots.

For all of these reasons, I reject the contention that APA acted arbitrarily, discriminatorily or in bad faith in determining that US Airways pilots were not eligible for distributions from the Equity Fund unless they satisfied the conditions placed upon all furloughees.

c. The distribution irrationally assumes that furloughed pilots who return will not ultimately get credit for their time on furlough.

Several pilots argue that they should get credit for their time on furlough or leave of absence in determining their equity distribution share. In Section III.B.2.b, above, I explained why it was reasonable for APA not to credit pilots' time on furlough when calculating distributions from the Pension Silo, and thus need not address that silo here. Because distributions from the Per Capita Silo are the same for each eligible pilot (before prorating is taken into account), the only silos left to address are YOS and Inverse Seniority.

FO Richard Elder stated in his challenge that furloughees have been "doubly harmed by the YOS Silo, and other silos to a lesser degree, due to the impact of the lower years of service on longevity pay increases, benefit accrual, bid status and pay rates and overall compensation."

Payouts from the YOS Silo are calculated based on the difference between each eligible pilot's Occupational Date and January 1, 2013.[97] Similarly, Occupational Date is used to determine pilots' seniority number, upon which payouts from the Inverse Seniority Silo are based.[98] The Equity Distribution Plan expressly provides that "Occupational Seniority Date does not change as the result of furlough."[99]

Because furloughed pilots will in fact get credit in the Years of Service and Inverse Seniority Silos for their time on furlough, these challenges are denied.

[97] As explained above, "Occupational Date" is the approximate date a pilot actually begins to perform work for American, with certain exceptions.
[98] Tr. 816:23 -818:12 (seniority number is used to determine distributions from Inverse Seniority Silo); *see* Tr. 137:8-13 ("The occupational date, in essence, defines your seniority number. It is what is used to place pilots in seniority order. So any pilot with an occupational seniority date of, say, July 16th will be senior to a pilot with an occupational seniority date of July 17th or any date after that.").
[99] Equity Distribution Plan: APA Board of Directors-Approved Eligibility and Allocation at Appendix E(3) n. 11.

2. Challenges related to pilots on Long Term Disability (LTD)

a. It was arbitrary for APA to treat some LTD pilots as if they would not return to active duty.

The Equity Distribution Plan does not treat all LTD pilots equally. Rather, it provides three tiers of eligibility for those pilots, varying by length of disability leave. LTD pilots whose disability benefits commenced on or after January 1, 2008, *i.e.*, less than five years before the January 1, 2013 date for determining Plan eligibility, are eligible to receive a distribution from each of the four silos ("Category 1 pilots"). Pilots whose LTD benefits commenced between February 1, 2004 and December 31, 2007 ("Category 2 pilots") are eligible to receive distributions only from the Pension and Per Capita Silos. Pilots who began receiving LTD benefits before February 1, 2004 ("Category 3 pilots") are eligible only to receive a distribution from the Pension Silo.

APA justifies this differential treatment of LTD pilots on the ground that Category 1 pilots are more likely than other LTD pilots to return to active duty. After five years, an LTD pilot is removed from the seniority list and can only return to active status by agreement of the Company and APA. Such agreements are rare. EDC Member Rusty McDaniels, who was in charge of the seniority list from May 2003 until May 2010 and still helps maintain that list, testified that only 1-2 LTD pilots were reinstated to the seniority list each year, pre-bankruptcy. He also testified, "Well, rate of return, anybody who has been out over five years, the odds are very, very low at that point that they get their medical back and return. I mean, very -- only, normally, one or two a year."[100] Similarly, EDC Member Mark Stephens testified: "Our experience is that the less time a pilot has spent on LTD, the more likely that pilot is to return. And pilots that have been on for five years or more return at very -- a very low rate, one or two, a couple a year."[101]

As pilots with a contractual right to return to active duty, Category 1 pilots are likely to suffer the harms addressed by all silos. In contrast, Category 2/3 pilots are unlikely to return to active duty, hence unlikely to suffer the negative effects of work rule changes and the increased freedom of the Company under the Scope clause to outsource flying. According to APA (Statement of Position at 48-49):

> The eligibility criteria created by the APA are a reasonable attempt to match these pilots' payouts to the actual harm they may experience as a result of the 2013 CBA. Pilots who began receiving disability benefits prior to February 1, 2004, receive their medical coverage from the retiree medical coverage provided under the A Plan; pilots who began receiving disability benefits after that date receive the same medical coverage as active pilots. Because this second group of pilots was harmed by changes to the active medical plan, but the first group was not, the APA made the second group eligible for a payout from the Per Capita Silo. APA

[100] Tr. 180:20-23.
[101] Tr. 95:16-20.

> is making both groups eligible for a distribution from the Pension Silo because, under the A Plan, all pilots on disability continued to accrue credited service for pension benefits until age 60.

According to several challengers, it was arbitrary for APA to treat all Category 2 and 3 pilots as if they would not return to active duty. None of the challengers, however, denied that five years of LTD status operated as a cut-off date after which pilots lose their contractual right to return to active service. Nor did they dispute the testimony of EDC Members McDaniels and Stephens that pilots with over five years on LTD were less likely to return to active service than pilots who had been on LTD leave for under five years. Although some Category 2 and 3 pilots stated that they hoped to return to active duty, none presented any evidence that he or she would be able to do so.

Inasmuch as pilots lose their contractual right to return to active duty after five years on LTD and are rarely successful in returning to active duty and the seniority list, it was rational for APA to treat Category 2 and 3 pilots as unlikely to return to active duty.

b. LTD Category 2 and Category 3 pilots should be eligible for recovery from the Years of Service Silo.

As previously noted, Category 2 pilots are eligible for recovery from the Pension Silo. They are also eligible for recovery from the Per Capita Silo because among the harms mitigated by that silo are changes in the active pilots medical plan, which covers Category 2 pilots. Category 3 pilots are eligible for recovery only from the Pension Silo because, while on LTD status, they are covered by the retiree medical plan rather than the active pilots medical plan.

Category 2 and Category 3 pilots assert that they should also be eligible for recovery from the Years of Service Silo because they will sustain harms covered by that silo. Both will lose the benefit of the lump sum option in the pension plan as well as the Company subsidy for retiree medical care upon their retirement. Even if, as APA suggests,[102] the right of Category 3 pilots to receive retiree medical benefits while on LTD status were to be addressed in the Section 1114 proceeding now pending in the Bankruptcy Court (an issue on which I express no opinion), the harm these pilots will suffer from elimination of the Company subsidy for retiree medical care upon retirement is no different from the impact that loss will have on Category 1 pilots who are eligible to receive compensation for this harm through the Years of Service Silo. The impact also is the same on Category 2 pilots.

Inasmuch as APA included Category 2 pilots in the Per Capita Silo because they were affected by changes in the active employee medical plan, which was but one of the harms covered by the Per Capita Silo, it was arbitrary for APA to exclude Category 2 and 3 pilots from the Years of Service Silo, under which they have two compensable harms – loss of the lump sum option and loss of Company contributions to their retiree medical care.

[102] APA Statement of Position at 49, n. 25.

The challenge of the Category 2 and Category 3 pilots to their exclusion from the Years of Service Silo is sustained. APA will be directed to treat all such pilots as eligible for distribution from the Years of Service Silo.[103]

c. Pilots in LTD Category 2, whose disability benefits began between February 1, 2004, and December 31, 2007 should be eligible for the same four silos as LTD Category 1 pilots whose disability benefits began on January 1, 2008.

Some challengers contend that it was arbitrary, discriminatory, and in bad faith for APA to limit the distribution for Category 2 pilots to two silos while pilots who began LTD on January 1, 2008, only one day after the cutoff for the Category 2 pilots, may participate in all four silos.

APA's use of the January 1, 2008 cutoff date to determine eligibility for Category 1 status and its concomitant distribution from all silos was rational. Pilots who were placed on LTD before January 1, 2008, even as late as December 31, 2007, would have been on LTD for more than five years as of January 1, 2013. Consequently they would have been removed from the seniority list and have no contractual right to return to active service on January 1, 2013 -- the date for determining pilot eligibility for distributions from the Equity Fund. In contrast, pilots placed on LTD status on January 1, 2008, albeit only a day later, would be on the seniority list as of January 1, 2013, hence eligible for distribution from all silos. It was thus neither arbitrary, discriminatory, nor in bad faith for APA to treat pilots who began receiving LTD benefits on January 1, 2008, differently from those whose benefits began before that date.[104]

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[103] Some Category 3 pilots assert that they should also be eligible for recovery from the Per Capita Silo and the Inverse Seniority Silo. Inasmuch, however, as these pilots are unlikely to return to active duty, they are equally unlikely to sustain the harms associated with these silos.

[104] Three of the challenges state individualized grievances. FO Melanie Jarvi criticizes APA for "bending over backwards to help people who willfully violate American policies and procedures or show up to the Flight Deck and report to work intoxicated." She seems to take issue with the fact that Category 2 and 3 pilots are not eligible for all four silos while TAG pilots whose grievance process had not been completed as of January 1, 2013 are treated as active pilots for purposes of the distribution. TAG pilots, however, are viewed by APA as having a greater likelihood of returning to active duty than pilots with more than five years on LTD, who have been contractually removed from the seniority list. While I note subsequently (page 61) the lack of evidentiary support for APA's assertion that it has been "substantially successful" in returning discharged pilots to active duty, I cannot conclude, in light of the evidence that very few pilots who are removed from the seniority list after five years ever return to active duty (*see* pp. 55-56) that it was irrational to treat Category 2 and 3 pilots, who have been removed from the seniority list, as less likely to return to active duty than TAG pilots.

CA Stephen Davidson is a Category 3 pilot who is eligible to receive a payout from the Pension Silo. He asserts that his disability is the result of having been attacked in 1999 by an AA check airman. He further asserts that he was wrongfully terminated by American in December 1999, and reinstated as the result of an arbitration award in September 2004. On the basis of these facts, as well as approximately 25 years of what he describes as "dedicated pilot service" for American, he asserts that equity requires him to be eligible for a payout from all silos. Assuming the facts to be as CA Davidson states, he falls, nonetheless, within the Category 3 group of pilots – those who have been on LTD since before February 4, 2004. Accordingly, he is eligible only to receive a distribution from the Pension Silo, as well as, pursuant to this Decision, the Years of Service Silo.

CA Sammy Lynn Sevier and FO B.D. Lomax each contend that they are LTD pilots whom APA erroneously left out of the Pension Silo. According to APA, it treated CA Sevier and FO Lomax as eligible for the Pension Silo, but

3. Pilots not receiving LTD benefits and not on the Seniority List

As a general rule, APA required a pilot to be on active duty on January 1, 2013, to be eligible for a full share of the Equity Fund. Among the exceptions to that rule were pilots who had been on LTD status for less than five years as of January 1, 2013 (their LTD benefits having commenced on or after January 1, 2008), and TAG (Terminated Awaiting Grievance) pilots who, as of January 1, 2013, had been terminated by American but had not yet completed the grievance process. Pilots in each of these categories are eligible to participate in the equity distribution because, according to APA, they are reasonably likely to return to active duty during the term of the 2013 CBA, and thus will suffer economic harm as a result of the concessions in the 2013 CBA.

With respect to pilots on TAG status, APA stated that they should be eligible for full participation in the Equity Fund because eligibility would be "consistent with APA's advocacy for these pilots' reinstatement to active status and with the fact that a substantial portion of pilots on TAG have been reinstated."[105]

Partial shares in the Equity Fund are available to pilots who, as of the date for determining eligibility for the equity distribution (January 1, 2013) had been on LTD for more than five years. These pilots have been dropped from the seniority list and are only eligible to return to active duty upon the agreement of both AA and APA. Inasmuch as such agreements are rare,[106] APA assumes that these pilots will not return to active duty and limits their participation in the Equity Distribution to those silos that APA deemed to address concessions that affect inactive pilots on LTD.

Finally, APA excluded from participation in the Equity Fund "former pilots who are no longer on the seniority list, are not on leave, and are not receiving LTD benefits," because it concluded that these pilots would not suffer any harm from the concessions in the 2013 CBA. Three pilots who were denied Equity Fund participation on these grounds – FO Lawrence Meadows, FO Kathy Emery, and FO Wallace Preitz –have filed challenges protesting these eligibility criteria.

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their proposed distributions from that silo are $0 because they are over 60 years old and, as LTD pilots, they stopped accruing pension credited service under the A Plan at age 60. The question, therefore, is whether APA's calculations of a $0 payout from the Pension Silo were correct. Because American will pay pilots the value of the pension as it stood before the freeze, payouts from the Pension Silo are based on the difference between that payment and the amount a pilot would have been paid if the A Plan had not been frozen. (Equity Distribution: APA Board of Directors-Approved Eligibility and Allocation at 17). CA Sevier's and FO Lomax's pension benefits stopped accruing before the A Plan was frozen because they had already reached age 60, the cutoff for LTD pilots to accrue pension benefits. Thus, they will receive from American the full value of their pensions despite the freeze of the A Plan. Accordingly, APA was not arbitrary in concluding that their payouts from this silo should be $0.

The challenges of FO Melanie Jarvi, CA Stephen Davidson, CA Sammy Lynn Sevier, and FO B.D. Lomax are denied.

[105] APA Statement of Position at 18.
[106] *See* Section III.D.2.a (pp. 55-56).

a. FO Lawrence Meadows.

First Officer Lawrence Meadows began LTD status on April 19, 2004. In December 2007, AA terminated his disability benefits on the ground that he was no longer disabled. AA thus placed him on Sick Leave of Absence. FO Meadows filed an ERISA action in the U.S. District Court for the Southern District of Florida challenging the termination of his disability benefits. This action was dismissed on summary judgment in March 2011, and an appeal from that decision is pending before the U.S. Court of Appeals for the Eleventh Circuit.

On or about September 12, 2011, FO Meadows filed a complaint with OSHA, alleging that AA's termination of his disability benefits in 2007 had been part of a scheme to deny disability benefits to many pilots in order to reduce American's obligations under its defined benefit plan, thus violating the Sarbanes-Oxley Act. According to FO Meadows, he informally advised AA counsel of his intention to file this action and, on July 18, 2011, he reported the allegedly unlawful scheme to AA managers and counsel.[107]

On August 5, 2011, shortly after FO Meadows informed American of his pending Sarbanes-Oxley complaint, he was advised by American that because he had been on Sick Leave of Absence (SLOA) since April 19, 2004, he had exceeded the contractual and Company policy time limit of five years on SLOA, and his administrative separation from employment was required.[108] FO Meadows was administratively separated from the Company and removed from the seniority list on November 4, 2011.

On February 4, 2012, FO Meadows filed a grievance claiming that his November 4, 2011, removal from the AA seniority list and his discharge were in retaliation for his having filed a Sarbanes-Oxley complaint. By agreement of American and APA, that grievance, along with several others, was preserved in the AA bankruptcy proceedings. FO Meadows' grievance was denied by American on June 6, 2013. On June 28, 2013, APA submitted the grievance to the System Board for a Pre-Arbitration Conference, noting that the grievance "protest[ed] the Company's action in removing him from the seniority list and discharging him from American Airlines."

APA determined that for Equity Fund distribution purposes, FO Meadows was an LTD Category 2 pilot, no longer on the seniority list, hence eligible for distributions solely from the

[107] FO Meadows' Sarbanes-Oxley complaint was scheduled for hearing before a Department of Labor Administrative Law Judge on June 10, 2013. That hearing was stayed at American's request because of the pending bankruptcy proceedings.

[108] Article 11.D(1) of the 2003 CBA provides:

> When leaves are granted on account of sickness or injury, a pilot shall retain and continue to accrue his seniority irrespective of whether or not he is able to maintain his required certificates or ratings, until he is able to return to duty or is found to be unfit for such duty. A leave of absence for sickness or injury shall not commence until after a pilot has exhausted accrued sick leave credits provided under Section 10 of this Agreement. Such leave of absence for sickness or injury may not exceed a total continuous period of three (3) years *unless extended by mutual consent of the Company and the Association, in which case it may not exceed a total continuous period of five (5) years*. . . . (Emphasis added).

Pension and Per Capita Silos. FO Meadows asserts that he should be eligible for distributions from all four silos as a result of his February 4, 2012, grievance.

APA defends its determination on the grounds that:

> FO Meadows has been inactive for more than five years, starting when he began receiving disability benefits in 2004. He is no longer on the seniority list and APA reasonably determined that pilots in his condition were very unlikely to be affected by the concessions associated with the Inverse Seniority Silo and the Years of Service Silo.[109]

It is true that FO Meadows has been inactive and on sick leave for more than five years, and that in the normal situation the CBA would call for his administrative separation and removal from the seniority list. But those are not the only relevant facts. FO Meadows filed a grievance in February 2012 alleging that the reason why American removed him from the seniority list was not that he had been on sick leave for more than five years (which would have called for his removal in 2009), but because he had filed a 2011 Sarbanes-Oxley complaint against American. APA has submitted that grievance to a Pre-Arbitration Conference, noting that the grievance "protest[ed] the Company's action in removing him from the seniority list and discharging him from American Airlines." Hence, if his grievance is sustained, FO Meadows' administrative termination will be overturned, and he will be back on the seniority list, presumably retroactive to the date he was removed, *i.e.*, November 4, 2011. It is equally safe to assume that if his grievance is sustained, the arbitrator would not countenance his removal from the seniority list in the period between November 4, 2011, and the date of the arbitration award. In sum, then, it is reasonable to assume that if the grievance is sustained, FO Meadows would be treated by the arbitrator as a pilot who should have been on the seniority list on January 1, 2013, the date on which pilots on the seniority list are eligible for recovery from all four silos, even if they were on LTD status.

FO Meadows argues that he should be treated like a TAG pilot because of his pending grievance. Much like a TAG pilot who will be returned to active duty if his grievance is successful, Meadows will be returned to the seniority list if his grievance is successful. To be sure, the outcomes are different, but in each case the grieving pilot may obtain an advantageous change of status. And in each case APA supports the pilot's efforts at reinstatement, whether it is to active duty for a TAG pilot or to the seniority list for Meadows.

APA claims that Meadows cannot be treated as a TAG pilot because TAG is an internal APA code, which has always been used to describe pilots who have a pending grievance challenging their termination for cause, not an administrative termination such as the one underlying FO Meadows' grievance. APA states, "TAG is a code entirely internal to the APA; the arbitrator should defer to APA's interpretation of its own internal policy."[110]

[109] APA Post-Hearing Brief at 34-35.
[110] APA Post-Hearing Brief at 32.

I accept APA's position and do not require APA to deviate from its policy of using the TAG denomination solely to refer to pilots who have a grievance pending that challenges their termination for cause. I do, however, hold that it is arbitrary for APA to treat pilots who have a pending TAG grievance as sufficiently likely to be successful that they will be treated, for purposes of Equity Fund eligibility, as if they will be successful, while treating differently pilots who have a pending non-TAG grievance that challenges an administrative termination.

APA offers no explanation for this different treatment, other than to state, as previously noted, that its treatment of TAG pilots is "consistent with APA's advocacy for these pilots' reinstatement to active status and with the fact that a substantial portion of pilots on TAG have been reinstated." APA ignores the fact that it also is advocating for FO Meadows, albeit for reinstatement to the seniority list. Furthermore, while the assertion that "a substantial portion of pilots on TAG have been reinstated" may be true, it is wholly unsupported by evidence in the record. Nor is there record evidence that a grievance seeking reinstatement to active duty is more likely to be successful than a grievance seeking reinstatement to the seniority list.

FO Meadows' challenge is sustained and APA will be directed to make him eligible for a distribution from all silos.

b. FO Kathy Emery and FO Wallace Preitz.

Both FO Emery and FO Preitz have presented voluminous evidence regarding the termination of their LTD benefits, including their efforts to have those benefits reinstated. Not all of this evidence is ultimately relevant to the disposition of their challenges, but I summarize much of it here.

i. FO Kathy Emery: summary of the evidence.

FO Kathy Emery joined American Airlines in September 1992 and flew for more than 10 years before she was medically disqualified from flying. In April 2003, she applied for LTD benefits and her application was approved. Her benefits were terminated on January 25, 2007, due to a lack of substantiation of her medical disability. FO Emery appealed this denial to AA's Pension Benefits Administration Committee ("PBAC"), seeking reinstatement of her LTD benefits. As part of its consideration of FO Emery's appeal, PBAC purported to rely on evaluations made by Western Medical Evaluators ("WME"). No one from WME ever examined FO Emery and the record suggests that someone from PBAC may have influenced WME's opinion.[111] FO Emery's appeal to the PBAC was denied on October 22, 2007.

After FO Emery's appeal was denied, she received a letter from her supervisor advising her that she needed to return to work or be terminated. She asserts that a hearing was held with

[111] In addition, FO Emery and FO Preitz both suggest that fraud at WME contributed to the PBAC denial of their appeals. As outlined by FO Preitz in his Post-Hearing Brief, WME and its principals were indicted by the State of Texas and entered pleas of no contest on charges of securing execution of documents by deception. (FO Preitz Post-Hearing Br. at 6.) WME and its principals have also been accused of sending out forged or fraudulent doctors' reports and one of the two doctors who allegedly wrote a report in support of the termination of FO Preitz's benefits has sworn that the alleged report was forged. (FO Preitz Post-Hearing Br. at 7, 10.) While troubling, these allegations of fraud are not necessary to my decision on these challenges.

Miami Chief Pilot Brian Fields on November 20, 2006. The record does not reflect what happened at that hearing, but on December 10, 2007, FO Emery filed a grievance protesting the Company's actions in "improperly removing [her] from medical disability, improperly placing [her] on an 'unauthorized' leave of absence, failing to place [her] on proper pay status of [Pay Withheld], investigating [her], and the hearing conducted on November 20, 2006." On October 22, 2008, her grievance was denied. APA subsequently sought to present FO Emery's grievance to the System Board of Adjustment, requesting that the System Board of Adjustment "[m]ake First Officer Emery whole for losses sustained plus interest, and place her on a paid status." The record does not reflect any further action with respect to the 2007 grievance.

In September 2009, FO Emery, who by then had been on sick leave for more than five years, was dropped from the seniority list and administratively terminated, as called for by Article 11.D (1) of the CBA. Prior to that date, in December 2008, FO Emery had filed an ERISA action in the U.S. District Court for the Southern District of Florida seeking to have her benefits restored. The case had proceeded through discovery and FO Emery had filed a motion for summary judgment when, on November 29, 2011, American Airlines filed a voluntary petition for bankruptcy thus triggering an automatic stay. On March 30, 2012, the court dismissed the case without prejudice. In its order, the court said:

> This Court shall retain jurisdiction over this matter and the cause shall be restored to the Court's docket upon motion of a party if circumstances change this action, or if the bankruptcy stay is lifted, so that it may proceed to final disposition. This Order shall not prejudice the rights of the parties to this litigation.

U.S. District Court, Southern District of Florida, Case No. 1:08-cv-22590-WMH, dkt no. 185.

ii. FO Wallace Preitz: summary of the evidence.

FO Preitz joined American Airlines in June 1992, and flew for approximately twelve years before he was medically disqualified from flying. On July 3, 2005, he applied for LTD benefits and his application was approved on August 4, 2005. He continued to receive benefits until November 12, 2007, when his benefits were terminated. The record does not disclose the reason for the termination. FO Preitz appealed the termination to PBAC, requesting reinstatement of his LTD benefits. PBAC denied his appeal on June 23, 2008. As with FO Emery, the PBAC relied in part on the opinion of WME in denying FO Preitz's request for reinstatement of benefits.

In or around June 2010, FO Preitz was dropped from the seniority list. He subsequently filed an ERISA action in the U.S. District Court for the Eastern District of Pennsylvania seeking reinstatement of his LTD benefits and reinstatement to the seniority list. Following the filing of American Airlines' voluntary bankruptcy petition, the court entered an order staying the proceedings. Those proceedings have not been dismissed.

iii. Did APA act arbitrarily in declining to treat FO Emery and FO Preitz similarly to TAG pilots – assuming for Equity Fund purposes that their grievances and/or ERISA suits would result in a change of status that would make them eligible for Equity Fund participation?

FO Emery and FO Preitz, like FO Meadows, argue that they should be treated as TAG pilots because, in FO Emery's case, she has a grievance pending, and in FO Preitz' case, he has an ERISA suit pending. APA asserts that these pilots do not fall within its definition of TAG because neither has a pending grievance that challenges a termination for cause that, if sustained, would lead to a reinstatement to active duty.

I accept APA's argument, as I did in the case of FO Meadows, that neither FO Emery nor FO Preitz is a TAG pilot as that term is used by APA. That, however, does not end the inquiry, but raises the further question of whether it was arbitrary for APA not to treat FO Emery and FO Preitz in the same fashion as TAG pilots – assuming, for Equity Fund purposes, that they were sufficiently likely to be successful in their grievances and/or ERISA suits that they should be treated as if they would be successful in obtaining a change in their status, and thus make them eligible for Equity Fund distributions in accord with their changed status.

FO Kathy Emery's 2007 grievance claims that American improperly removed her from medical disability. APA does not claim that the 2007 grievance cannot result in the reinstatement of her LTD benefits. In the absence of any evidence, or even argument, to the contrary, I must conclude that it could. Moreover, FO Emery's 2007 grievance is one of approximately 40 grievances that APA and American agreed would not be extinguished by the bankruptcy. Thus, it remains as a procedural avenue by which FO Emery's LTD benefits may be restored.

Under these circumstances, I conclude that it was arbitrary for APA to treat FO Emery differently from TAG pilots. She, just as they, has a grievance pending that APA referred to the System Board. Hence, she, just as they, was entitled to the presumption, at least for Equity Fund purposes, that her grievance would be successful, resulting in her LTD benefits being restored and her no longer being excluded from Equity Fund eligibility. APA stated that the inactive pilots who were ineligible for Equity Fund distributions were those who were "no longer on the seniority list, are not on leave, *and are not receiving LTD benefits . . . .*"[112] FO Emery, if her grievance is sustained, would receive LTD benefits, hence she would no longer satisfy that definition, and she was entitled to the presumption that it would succeed.

Accordingly, I sustain FO Emery's challenge and treat her as if her disability benefits had never been terminated, the result she seeks through her grievance. Since she entered on sick leave in April 2003, I direct APA to treat her as a Category 3 pilot, eligible for recovery from the Pension and the Years of Service Silos.[113]

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[112] APA Post-Hearing Brief at 31 (emphasis supplied).

[113] Although LTD Category 2 and 3 pilots are not eligible for the Years of Service Silo under the proposed Equity Distribution Plan, for the reasons explained in Section III.D.2.b, *supra*, I shall direct APA to include these pilots in that silo.

The challenge of FO Wallace Preitz raises a slightly different issue in that he has not filed a grievance that, if successful, would result in the restoration of his LTD benefits, but rather an ERISA lawsuit seeking restoration of those benefits. Inasmuch as I have held that APA is required, for Equity Fund purposes, to treat a grievance seeking the restoration of LTD benefits as if it would be successful, the next question is whether a similar obligation is imposed on APA when the restoration of LTD benefits is sought, not through a grievance, but through a court which has the authority to grant such relief.

APA's sole response to this question is to state that it "is not obligated to assume that these pilots will return to LTD, regardless of pending grievances and lawsuits."[114] APA thus makes no effort to distinguish its obligation to assume the likelihood of success of a grievance seeking restoration of LTD benefits from a lawsuit seeking the same result. Had APA presented a reasoned argument for distinguishing the two situations, I would have been obliged to consider that argument. In the absence of such an argument, however, I, like APA, shall treat the lawsuit seeking restoration of LTD benefits no differently from a grievance seeking that result. And, having held that APA acted arbitrarily by not assuming the likely success of a grievance seeking restoration of LTD benefits, I reach the same conclusion with respect to APA's failure to assume the likely success of a lawsuit seeking restoration of LTD benefits in a case in which the power of the court to award that remedy is unquestioned.

The challenge of FO Wallace Preitz is sustained. As I did with Emery, I shall direct APA to treat FO Preitz as an LTD pilot whose benefits are ongoing -- consistent with the relief FO Preitz seeks in his grievance. Inasmuch as his LTD benefits commenced between February 1, 2004 and December 31, 2007, I direct APA to treat him as an LTD Category 2 pilot, eligible for distributions from the Pension, Per Capita, and Years of Service Silos.[115]

4. CA Ann Singer -- currently receiving LTD benefits and not on the seniority list

Captain Ann Singer went on LTD in 2007, and was administratively terminated some time between March and December 2012. (The record is silent on this issue.) Unlike FO Meadows, FO Emery, and FO Preitz, CA Singer's LTD benefits have not been terminated and she is already receiving a partial share of the Equity Distribution. Specifically, as a pilot whose LTD benefits began between February 1, 2004 and December 31, 2007, she is an LTD Category 2 pilot eligible for distributions from the Pension, Per Capita, and Years of Service Silos. She seeks a full distribution, however, on the basis that she is on TAG status and/or because it would be arbitrary to treat her differently than TAG pilots.

For the reasons explained above, I conclude that CA Singer was not on TAG status as of January 1, 2013. I must nevertheless consider whether she should have been treated as if she were. Unlike FO Meadows, FO Emery, and FO Preitz, there is no evidence that CA Singer has filed a grievance or an ERISA lawsuit. Instead, she relies exclusively on the pending Dallas-Fort Worth domicile grievance ("DFW Domicile Grievance"), arguing that, if sustained, that

[114] APA Statement of Position at 58 n.34.

[115] Both FO Emery and FO Preitz raised a host of arguments, not discussed here, why their challenges should be sustained. Having sustained their challenges on the grounds set out in this Decision, I see no reason to comment on their other arguments.

grievance would result in her reinstatement to the seniority list. Hence, she reasons, she should be treated similarly to a TAG pilot and benefit from the presumption that the DFW Domicile Grievance will be successful.

There is no basis to conclude that the DFW Domicile Grievance will result in CA Singer being reinstated to the seniority list. On its face, the DFW Domicile Grievance is unclear as to what relief will be available if the Union prevails. But according to APA's Director of Representation, J. Bennett Boggess, the purpose of the grievance was solely to improve procedures going forward, not to secure the reinstatement of any pilot. CA Singer has not presented any evidence to the contrary,[116] so I must accept Boggess's explanation of the DFW Domicile Grievance. Accordingly, APA did not act arbitrarily when it declined to treat CA Singer similarly to TAG pilots eligible to receive an Equity Fund distribution from all four silos.

5. Retired Pilots

Consistent with APA's forward-looking approach, pursuant to which allocations from the Equity Fund are based on harm sustained as a result of the concessions in the 2013 contract compared to the abrogated 2003 contract, APA limited Equity Fund distributions to those pilots who were in the AA bargaining unit on January 1, 2013, the effective date of the 2013 contract. Excluded from equity distributions were pilots who left the employment of the Company prior to January 1, 2013, whether through retirement, resignation or termination.[117] This exclusion was decided upon by the APA Board of Directors in July 2012, and was communicated to the pilots months before January 2013.

Pursuant to this policy, APA determined that CA Stephen Cox, who retired on November 1, 2012, shortly before his age 65 mandatory retirement date of December 16, 2012, was ineligible for participation in the Equity Fund. CA Cox challenges this exclusion on the grounds that (1) the selection of January 1, 2013 as the eligibility date for Equity Fund participation was arbitrary and capricious; (2) he has had difficulty securing the retiree medical benefits to which he is entitled since the 2013 contract went into effect; and (3) he has sustained harm under the 2013 contract in that he lost the lump sum option for pension benefits.

APA asserts that its selection of January 1, 2013 as the date for determining Equity Fund eligibility was based upon that being the effective date of the 2013 labor contract, pursuant to which it received the Equity Fund. Fixing the eligibility date for participation in the Equity Fund on the date that it received the Equity Fund can hardly be characterized as arbitrary. *Cf. Bondurant v. Air Line Pilots Ass'n*, 679 F.3d 386, 396 (6th Cir. 2012).

As for CA Cox's claim that he has suffered as a result of changes to his retiree medical benefits, it was established during the hearing that his difficulties in obtaining medical benefits were due to bureaucratic errors, not to a loss of those benefits. Indeed, Cox currently receives retiree medical benefits.

[116] Nor did FO Emery or FO Preitz, who also argued that the DFW Domicile Grievance entitled them to be treated as if they were on TAG status.

[117] APA Statement of Position at 44. The exclusion of terminated pilots was subject to certain exceptions. *See* p. 58, *supra*.

Finally, APA points out that pilots such as CA Cox who retired on or before December 31, 2012 did not lose the lump sum option as a result of the 2013 CBA. Rather, only pilots who retired after December 31, 2012 lost this benefit.[118] Although Cox and other pilots who retired between the bankruptcy filing and December 31, 2012 were not able to receive the lump sum option immediately upon retirement, this inability was due to federal law, which temporarily prohibited AA from distributing lump sum pension payments as a result of the bankruptcy, not because retired pilots lost their right to collect the lump sum.[119] CA Cox's complaint about his inability to obtain the lump sum payment, therefore, is beyond the purview of this arbitration, which is limited to complaints about the structure of the Equity Plan and payouts under that Plan.

For all these reasons, CA Cox's challenge to the APA determination that he was ineligible to participate in the Equity Fund is denied.

6. Management Pilots

One pilot, CA Roy Wall, argued that management pilots should not be permitted to participate in the Equity Fund distribution because, "management pilots have not endured the loss of quality of life incurred because of contractual changes nor the changes in compensation due to contractual losses." The Equity Distribution Plan provides that management pilots will not be eligible for the equity distribution unless they "return to line flying during the SQP, remain in active line pilot status throughout the remainder of the SQP, and . . . sign an enforcement letter and promissory note agreeing to remain at AA in active status as a non-management pilot for at least 12 months after the end of the SQP. . ."[120] Because management pilots who return to active status during the SQP will be affected by the concessions contained in the 2013 CBA, APA's decision to include them in the equity distribution is neither arbitrary, discriminatory nor in bad faith.

E. Challenges to APA's Administration of the Equity Distribution Process

FO Mark Hass asserted that APA should have provided greater transparency in the Equity Distribution process. He was particularly concerned that his inability to learn the amount of the proposed payouts to pilots similar to him in bid status or seniority would prevent him from discovering that they had received higher payouts than he had received in time to file a complaint. He testified:

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[118] *See* APA Exhibit 41 (bankruptcy order confirming elimination of lump sum benefit for pilots who retire after December 31, 2012).

[119] Tr. 277:24-278:10; 26 U.S.C. § 436(d)(2) ("A defined benefit plan which is a single-employer plan shall provide that, during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, the plan may not pay any prohibited payment. . . ."); *see In re AMR Corp.*, S.D.N.Y. Case No. 11-15463 (SHL), Dkt. No. 5414, Memorandum of Law in Support of Motion of Debtors for Entry of Order Pursuant to 11 U.S.C. Section 363(b) and Treas. Reg. Section 1.411(d)-3(g)(4)(C) Finding that Amendment of American Airlines, Inc. Pilot Retirement Benefit Program Fixed Income Plan to Eliminate Lump Sum and Installment Forms of Benefits is Necessary to Avoid a Termination of the Plan (explaining how 26 U.S.C. § 436(d)(2) prevented payment of the lump sum option during the pendency of AA's bankruptcy so long as the plan exceeded a designated amount).

[120] Equity Distribution: APA Board of Directors-Approved Eligibility and Allocation at 4.

> I'm average age at APA, and when I look at another pilot 23 years old with my airplane, I'd like to see his payout. I'd hate to find out a year from now I got this amount and he got a higher amount . . . .[121]

APA declined to provide to FO Hass (or any other pilot) the amount of the proposed payouts to other pilots. It explained that it had significant privacy concerns associated with the release of pilot pay data and that American had required it to sign a non-disclosure agreement to obtain access to pilot pay data.

Putting to one side the effect of the non-disclosure agreement with American (on which I express no opinion), this is a classic case of weighing two competing interests, *i.e.*, the interest in transparency as a means of ensuring fair process and outcomes and the interest in pilots' privacy relating to their financial information.

APA assigned greater weight to the interest in privacy than it did to the interest in transparency. Regardless of whether I agree with this decision, I cannot hold that the APA choice was arbitrary, discriminatory or in bad faith.[122]

F. Challenges Alleging Data and Calculation Errors

All challenges of this nature were resolved by APA and the challengers. APA worked with American to correct initial data and calculation errors, and communicated the corrected information to the affected pilots. Although certain challengers maintained their challenges even after receiving the corrected information, the remaining challenges actually concerned claims by former Eagle pilots that the proposed distribution discriminates against them as compared to former TWA pilots (*see* Section III.C.3.b, above), rather than data and calculation errors.

IV. AWARD

All challenges are denied, with the exception of the following:

- The challenge of LTD Category 2 and Category 3 pilots to their exclusion from the Years of Service Silo is SUSTAINED. APA is hereby directed to treat all LTD Category 2 pilots (those whose LTD benefits commenced between February 1, 2004 and December 31, 2007) and LTD Category 3 pilots (those who began receiving LTD benefits before February 1, 2004) as eligible for distributions from

[121] Tr. 1091:10-15.

[122] A few pilots contended that the EDC members designed the equity distribution to benefit themselves. There is, however, no evidence of any such impropriety. Furthermore, to the extent these pilots contend that the EDC sought to benefit junior pilots at the expense of those more senior, or younger pilots at the expense of older pilots, these charges are effectively contradicted by the composition of the EDC, whose members range in seniority from number 311 to number 6764 on the AA seniority list and whose age range is 49-59.

the Years of Service Silo (as well as those silos for which they are currently eligible).

- The challenge of FO Lawrence Meadows is SUSTAINED. APA is hereby directed to treat FO Meadows as eligible for distributions from all silos.

- The challenge of FO Kathy Emery is SUSTAINED. APA is hereby directed to treat FO Emery as an LTD Category 3 pilot, eligible for distributions from the Pension Silo and the Years of Service Silo.

- The challenge of FO Wallace Preitz is SUSTAINED. APA is hereby directed to treat FO Preitz as an LTD Category 2 pilot, eligible for distributions from the Pension, Per Capita, and Years of Service Silos.

V. ARBITRATOR'S RETENTION OF JURISDICTION

The Arbitrator shall retain jurisdiction over this matter to resolve any disputes about the interpretation or application of the Decision and Award that the parties are unable to resolve themselves. The Arbitrator will not exercise his retained jurisdiction until the parties have made a good faith effort to resolve the dispute without the Arbitrator's intervention.

Stephen B. Goldberg, Arbitrator

October 15, 2013