UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3176

LEROY "BUD" BENSEL, JAMES ARTHUR, PATRICK BRADY, THEODORE A. CASE, MATTHEW J. COMLISH, DARSHANPRIT DHILLON, LEMUEL A. DOUGHERTY, MICHAEL V. FINUCAN, JOHN S. HEFLEY, HOWARD B. HOLLANDER, ROBERT A. PASTORE and SALLY YOUNG

Plaintiffs-Appellants,

v.

ALLIED PILOTS ASSOCIATION, AIR LINE PILOTS ASSOCIATION, AMERICAN AIRLINES, INC., and TWA AIRLINES, LLC

Defendants-Appellees

On Appeal from the United States District Court for the District of New Jersey

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BRIEF OF APPELLEE ALLIED PILOTS ASSOCIATION

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Appellee Allied Pilots Association ("APA") respectfully submits the following brief in opposition to the Appellant Class' brief in this appeal. As will be demonstrated below, this Court should affirm the district court's dismissal of the Class' claims against the APA.

STATEMENT OF ISSUES

1. Whether the APA owed the Class a duty of fair representation prior to the date on which the APA was certified as the class members' collective bargaining representative by the National Mediation Board on April 3, 2002.
2. Whether the APA breached the duty of fair representation to the Class members after April 3, 2002, by not altering or reversing actions taken prior to April 3, 2002.
3. Whether the Class' claims of breach of duty by the APA for acts prior to certification are untimely.
4. Whether the Class' state law claims are pre-empted by the Railway Labor Act, 45 U.S.C.§§ 151, et seq.

COUNTERSTATEMENT OF THE CASE

This case arises out of the demise of Trans World Airlines, Inc. ("TWA"), and the purchase in early 2001 of substantially all TWA assets by American Airlines, Inc. ("American"). In order to preserve the jobs of TWA's pilots,

initially at an American subsidiary TWA Airlines, LLC ("TWA LLC"), the labor organization representing those pilots - - the Air Line Pilots Association ("ALPA"), through its TWA division, the TWA Master Executive Council ("TWA MEC") - - agreed to waive certain labor protective provisions in the ALPA/TWA collective bargaining agreement affecting the procedures for integrating the seniority of the TWA pilots with that of the American pilots. The TWA pilots also received from American a promise to facilitate negotiations over seniority integration between the TWA MEC and the APA, the labor union representing the American pilots.

Those negotiations went forward as promised and, although the two sides made significant progress toward an agreement, they were ultimately unable to come to full agreement. Accordingly, as was its right and duty under the Railway Labor Act, 45 U.S.C. § 151, et seq. ("RLA"), the APA negotiated and executed a modification of its collective bargaining agreement with American to provide for integration of the seniority of the two pilot groups. Without such modification, known as Supplement CC, the former TWA pilots would simply be "endtailed" on the American pilot seniority list; with Supplement CC, the former TWA pilots were substantially "dovetailed" on the list and accorded other significant job, status and promotion protections.

On November 9, 2001, the APA petitioned the National Mediation Board ("NMB") to declare TWA LLC and American a single transportation system for representational purposes and to designate the APA as the representative of the combined unit. Although ALPA and the TWA MEC opposed that petition, on March 5, 2002, the NMB declared the two entities a single transportation system and, when ALPA disclaimed interest in representing the combined unit, on April 3, 2002, extinguished ALPA's representational certificate and extended APA's to cover the combined unit. On that date, Supplement CC became applicable to TWA LLC pilots.

Even before Supplement CC was executed, a number of TWA LLC pilots made known their displeasure with the prospective seniority integration. In the face of numerous threats by TWA LLC pilots to sue over Supplement CC, on February 21, 2002, the APA instituted a lawsuit in the United States District Court for the Northern District of Texas against current class representative Leroy "Bud" Bensel. Appendix ("A") at 440-41 (Memorandum Opinion and Order in Allied Pilots Association v. Bensel (N.D. Tex. June 6, 2002)). The lawsuit sought a declaration that Supplement CC constituted an enforceable agreement, that APA breached no duty or obligation in negotiating and concluding it and that the APA would violate no duty or obligation in enforcing the Supplement. Id. Rather than

join issue on the merits, Defendant Bensel moved to dismiss on various jurisdictional grounds, and the district court dismissed for lack of personal jurisdiction on June 6, 2002. A440-48.

The APA then filed essentially the same suit in the District Court for the District of New Jersey on June 19, 2002. A0021 (decision below); A0944-0960 (APA Complaint). Defendant Bensel, on behalf of the Class subsequently certified by the district court, answered the APA's complaint on October 3, 2002, and at that time set forth a set of counterclaims and crossclaims against the APA, American, TWA LLC and ALPA. A0008 (docket sheet). At the district court's suggestion, the parties were realigned so that the Class became the plaintiff in the case and APA, ALPA, American and TWA LLC the defendants. A0936-38 (Order Realigning the Parties). The Class filed an omnibus Second Amended Restated Complaint ("Complaint") against the four defendants on January 27, 2003, incorporating the allegations of its counter and crossclaims. A048-94. The district court certified the plaintiff class on February 12, 2003, with 12 class representatives. A0939-43. Of the 12 class representatives, at least 7 had served as members of the TWA MEC or its various committees, including the Merger Committee that negotiated over seniority integration with the APA. A0449, 0452, 0463, 0541, 0545-46 (Declarations of Sally Young, John Hefley, Leroy "Bud"

Bensel, Robert Pastore; March 28, 2001, Letter to NMB from TWA MEC).

The Class' Complaint contained ten counts, seven of which raise allegations against the APA pertinent to this appeal.[1] Count II alleges that the APA breached a duty of fair representation to the former TWA pilots both before and after the APA was certified to represent those pilots. A0071-74. Prior to certification, the Class alleges, the APA had a duty to classmembers because it was generally known and intended that the APA would one day be their representative. A0071-72 (¶117). The Class alleges the APA breached that duty by negotiating Supplement CC with American and thereafter seeking from the NMB actual representation rights with respect to the classmembers; by "caus[ing], permitt[ing] and otherwise participat[ing]" in certain alleged misrepresentations that caused the TWA pilots to waive the labor protective provisions of the TWA/ALPA collective bargaining agreement; and by declining to arbitrate seniority integration issues although requested to do so. A0072-73 (¶¶120, 121, 124). As post-certification breaches of duty, the Class alleges the APA continued to fail to negotiate a "fair and equitable" seniority integration despite demands to do so and generally failed to treat the Class fairly. A0073 (¶¶ 125, 126). Although the Class does not

[1]The Class voluntarily moved to dismiss Count X of the Complaint regarding an arbitration of a TWA LLC base closing, and that Count is not pertinent to this appeal. A0041-42.

specifically denominate Count III as a duty of fair representation claim, it alleges that the "APA owed the Class a fiduciary duty of good faith and to treat the Class fairly" and that the APA breached that duty "[b]y reason of the acts and conduct . . . previously asserted" - - i.e., the conduct set forth in the fair representation claim - - and by allegedly "requir[ing] ALPA to negotiate the seniority integration with APA" instead of American or TWA LLC. A074-75 (¶¶ 133, 136, 137).

Finally, the Class lodges five state law claims against the APA: tortious interference with ALPA's duty to the Class by convincing the Class, through fraud and coercion, to waive its labor protective provisions (Count V); fraudulent misrepresentation (also alleged as part of Count II and Count V) (Count VI); tortious interference with American's agreement to use its best efforts in connection with the seniority integration negotiations between the APA and ALPA (Count VII); tortious interference with American's alleged duty of good faith and fair dealing in using its best efforts (Count VIII); and conspiracy with all of the other defendants to do all of the things previously alleged (Count IX). A0077-0086.

On May 5, 2003, the APA filed a motion to dismiss all of the claims against it, contending 1) that it owed no duty of fair representation to the Class prior to its certification as representative of the TWA LLC pilots and took no action that

could be deemed a breach thereafter; 2) that even if it did owe a pre-certification duty, the Class' claim was untimely and 3) that the Class' state law claims were essentially duty of fair representation claims and therefore completely preempted and extinguished by federal labor law. A0013.

On July 15, 2003, the district court heard extensive argument on the APA's motion and the other defendants' dispositive motions. A0095-0255. On July 18, 2003, the district court granted the APA's motion to dismiss and those of the other defendants. A0016-47. Because the various parties had relied on documents beyond the pleadings, the court treated the various dispositive motions as motions for summary judgment. A0022. With respect to the APA's motion, the court relied on well settled principles of federal labor law to hold that 1) because the APA had no duty of fair representation to the class members prior to the APA's certification as the exclusive bargaining representative of the TWA LLC pilots, the APA could not be deemed to have breached any such duty; 2) the Class had not alleged any particular breach of duty after certification - - only a continuing failure to negotiate a seniority integration pleasing to the Class; and 3) the Class' state law claims were all pre-empted by federal labor law. A0030-32,0039-41. With respect to Count III, the court concluded that the alleged breach of a "fiduciary duty of good faith and to treat the Class fairly" was nothing other than a

restatement of the Class' breach of duty of fair representation claim and therefore dismissed the Count. A0033-34. The court did not address the APA's statute of limitations argument.

On July 23, 2003, the Class timely noticed an appeal from the district court's Opinion and Order. A0000.

COUNTERSTATEMENT OF FACTS

By January 2001, the once proud TWA was in dire financial straits. A0273-74 (Memorandum in In re Trans World Airlines, Inc. (Bankr. D. Del. Apr. 2, 2001)). Having not earned a profit for over a decade and facing steadily mounting losses, the carrier had decided the previous spring that it could no longer survive as a standalone entity. Id. Although TWA approached numerous potential buyers or merger partners, only American expressed any interest in acquiring a broad enough base of TWA assets to preserve those assets as a going concern. A0262-64.

After negotiation, American agreed to purchase TWA assets in the context of a bankruptcy proceeding, and TWA filed for bankruptcy on or about January 10, 2001. A0055(Complaint). At the time of the filing, TWA had significantly less cash than necessary to fund its operations the very next day. A0267 (Bankruptcy Court's April 2, 2001 Memorandum). But for the American

purchase, the Bankruptcy Court concluded, TWA was doomed to a "free fall large Chapter 11 case" and liquidation of its assets. A0285, 0289. In that event, the jobs of TWA's 20,000 employees, including its airline pilots, would be lost. A0290.

As a condition to its purchase and its promise to hire virtually all TWA employees, American insisted that TWA's pilots waive certain labor protective provisions in their collective bargaining agreement with TWA, requiring, inter alia, that the integration of the seniority lists of TWA and an acquiring airline be subject to binding arbitration. A0054 (Complaint). Section 13 of the American/APA agreement, commonly known as the "Green Book," provided that pilots coming to the airline through an acquisition or as new hires received and began to accrue seniority only as of the dates the pilots actually began to perform their duties at American. A0058 (Complaint); 0292-0294 (Green Book Section 13). At all relevant times, that aspect of the Green Book was known to the TWA pilots, and so was the notion that many American pilots opposed any "integration" of the seniority lists of the two carriers, other than as provided by the Green Book. A0054 (Complaint).

The TWA MEC, the ALPA division that "directly represented the TWA pilots and was charged with the decision making on behalf of the pilots," A0548

(Declaration of Robert Pastore), initially resisted the requested waiver of the labor protective provisions. A0055 (Complaint). Consequently, TWA filed a motion under Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113, to set aside the entire TWA-ALPA collective bargaining agreement, and American indicated its intention to withdraw from the purchase unless the waiver could be procured. Id.; A0056.

Ultimately, the TWA MEC agreed to the waiver; in return, it received two promises: 1) that the TWA pilots, who were initially to be employed by an American subsidiary known as TWA LLC pending their integration into American's operation, would continue to have ALPA as their representative at TWA LLC and would during the transitional period have a negotiated collective bargaining agreement at TWA LLC, A0057 (Complaint), 0560 (April 2, 2001, TWA MEC Meeting Minutes); and 2) that American would use its "reasonable best efforts with its labor organization representing the airline pilots craft or class to secure a fair and equitable process for the integration of seniority" and, to that end, would engage a facilitator to assist in the negotiations between the two unions. A0057 (Complaint), 0394 (April 2, 2001, TWA MEC Resolution).

On those conditions, the TWA-MEC effected the waiver, and the purchase closed on April 10, 2002. A0058 (Complaint). The former TWA pilots then

became employees of TWA LLC under an April 9, 2001, collective bargaining agreement between TWA-LLC and ALPA (the "TWA LLC/ALPA Transition Agreement"), which, apart from the waived labor protective provisions, maintained substantially all of the terms of the TWA/ALPA collective bargaining agreement pending the transition to American. A0057-58. Among those terms was the TWA seniority system, which would continue to define and govern the seniority of former TWA pilots at TWA LLC. A1031-32 (TWA LLC/ALPA Transition Agreement).

At the time of the purchase, all concerned, including the TWA pilots, knew that their employment at TWA LLC was to be temporary, pending the integration of the former TWA operations into American's operations. A0053-54, 58 (Complaint). Accordingly, the TWA LLC/ALPA Transition Agreement expressly provided that it would remain in effect only "until integration of the TWA-LLC and American Airline pilot crafts or classes, specifically, action by the National Mediation Board ("NMB") pursuant to Section 2 Ninth of the Railway Labor Act recognizing the inclusion of the TWA-LLC pilots under the American Airlines, Inc. NMB certification for the pilot craft or class." A1040. At that point, the Transition Agreement would "terminate in all respects" - - including, necessarily, the seniority system carried over from TWA. Id. Until that time, ALPA would

and did remain the certified collective bargaining representative of the TWA LLC pilots, and the APA would and did remain the representative of only the American pilots. A0019-20 (decision below), 0051, 0054 (Complaint). The TWA LLC/ALPA Transition Agreement did not in any way address the seniority the TWA LLC pilots would have when they were included under American's NMB Certification for the pilot craft or class. A0550 (Declaration of Robert Pastore).

Consistent with its formal resolution on the subject, the TWA MEC's Merger Committee was authorized to commence negotiations with the APA over seniority integration. A0394 (April 2, 2001 TWA MEC Resolution). In order to launch those negotiations, ALPA, including the TWA-MEC and its Merger Committee, entered into a formal Agreement for Engagement of Facilitator ("Facilitation Agreement") with the APA, American and TWA LLC, which expressly recited that it was entered into pursuant to American's "best efforts" commitment to the TWA MEC. A0319-323. Pursuant to that Agreement, American formally retained Rolf Valtin, an experienced airline labor arbitrator, to facilitate the negotiations. Id. Any agreement reached would then be presented to American as a proposed modification of Section 13 of the Green Book, which, if not modified, would govern the seniority of TWA LLC pilots when they became

American employees. A0320.[2]

All told, ALPA and the APA held 25 days of negotiations through September 17, 2001, 15 of which were overseen by the facilitator, and an additional three days in October of that year. A0325 (Supplement CC). Although the negotiators reached common ground on significant methodological issues, they were ultimately unable to come to agreement on the precise terms of an integrated seniority list. Id.; A0059 (Complaint). However, rather than leave Section 13 of the Green Book unchanged and thereby require the simple "end-tailing" of all TWA-LLC pilots when they became American pilots, the APA negotiated a modification of Section 13 that "dovetailed" large numbers of TWA LLC pilots throughout the pre-existing American seniority list and also included conditions and restrictions that protected TWA LLC pilot jobs, captain and first officer seats and opportunities for promotion to captain at the sole remaining TWA LLC pilot base in St. Louis. A0058-60 (Complaint), 0324-0340 (Supplement CC). The

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[2]In July 2001, APA and American had entered into their own Transition Agreement to govern the terms on which American could operate TWA LLC as a separate subsidiary consistent with the "scope" provisions of the Green Book. A0564-78. In that Transition Agreement, APA and American agreed that the seniority of TWA LLC pilots at the time they were integrated into American's system would be governed by Section 13 of the Green Book, but contemplated that American and APA might "decide to modify the application of Section 13." A0571. The subsequently negotiated Supplement CC became that modification.

modification, known as Supplement CC to the Green Book, was executed by the APA and American on November 8, 2001. A0059-60 (Complaint). By its express terms, Supplement CC was to go into effect and apply to the American and TWA-LLC pilots on "the date on which the National Mediation Board issues a decision finding that American and TWA LLC are or have become a single carrier." A0326, 328 (Supplement CC).

On September 24, 2001, well before the execution of Supplement CC, ALPA filed a grievance on behalf of the TWA-LLC pilots alleging that American had breached its "reasonable best efforts" obligation and seeking the nullification of Supplement CC. A0021 (decision below), 0453 (Declaration of John Hefley). After holding two days of hearings on the matter, on April 18, 2002, the arbitrator ruled that American had not breached that commitment. A0454-0461 (Arbitration Decision). No challenge to that decision has ever been pursued.

On November 9, 2001, the APA petitioned the NMB, contending that American and TWA/LLC would, as of December 2, 2001, constitute a single employer for representational purposes. A0060. ALPA opposed the petition, contending that American and TWA LLC were not sufficiently integrated to be considered a single employer. Id.; A0517 (ALPA Opposition). The TWA MEC made its own separate filing with the NMB, also contending that TWA LLC had

not been sufficiently integrated into American to constitute a single employer and declaring that TWA LLC would remain "for the foreseeable future, a separately operated . . . subsidiary." A0540 (March 28, 2002, TWA MEC filing). In another filing with the NMB, the TWA MEC argued that American's entry into Supplement CC constituted improper interference with the selection of a collective bargaining representative for the combined TWA LLC/American bargaining unit. A0536 (March 20, 2002, TWA MEC NMB filing).

On March 5, 2002, the NMB found that American and TWA LLC were a single transportation system and opened an investigation into the appropriate representative for the combined pilot bargaining unit. A0522-534 (Am. Airlines, Inc., 29 NMB 201 (2002)). The NMB gave ALPA 30 days to present a sufficient showing of interest among unit members that ALPA be certified as the representative. A0533-34. Pending that showing, the NMB expressly ruled that the pre-existing representational statuses - - ALPA for the TWA LLC pilots and APA for the American pilots - - were to be maintained. A0526, 0534.

ALPA formally disclaimed interest in representing the combined unit on March 18, 2002. A0060 (Complaint), 0539 (March 20, 2002, TWA MEC filing). On April 3, 2002, the NMB extended the APA's certification to represent all pilots in the combined unit, including the TWA LCC pilots, and extinguished ALPA's

certification. A710-14 (Am. Airlines, Inc., 29 NMB 260 (2002)). As expressly provided in the TWA LLC/ALPA Transition Agreement (A1040), that Agreement terminated on that date, and Supplement CC took effect. A0020-21 (decision below).

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no pending related cases or proceedings. The APA's initial suit against Class Representative Bensel, Allied Pilots Association v. Bensel (N.D.Tex. June 6, 2002), was dismissed and not appealed, A440-48, as was the Class' initial lawsuit against ALPA, Bensel v. ALPA, Civ. Action No. 02cv4284 (D.N.J.).

SUMMARY OF ARGUMENT

The Class' breach of duty of fair representation claim against the APA was properly dismissed as that claim relates both to conduct prior to the APA's certification as the representative of the combined TWA LLC/American bargaining unit and to conduct after certification. As authoritatively recognized by the NMB, prior to APA's certification, ALPA and the TWA MEC were the "exclusive" representative of the Class. The APA, on the other hand, exclusively represented the American pilots and could not have owed a duty to the Class, whose members were in any case members of a different bargaining unit. Settled

law as well as the practical difficulty of allocating among two unions the same representational duties to the same group of employees at the same time preclude any argument that a pre-certification duty to the Class may be imposed on the APA.

As the district court properly found, the Class alleged no post-certification APA act that could be deemed a breach of the duty. Accordingly, the Class failed to meet its burden under Fed. R. Civ. P. 56 to resist summary judgment on this issue. The Class' newly minted "status quo" contention may not be considered on this appeal. Even if it were, Supplement CC, not any prior agreement, provided the terms to define any such "status quo," and the APA had no obligation to modify Supplement CC after certification.

Because the Class' state law claims against the APA arise out of the same conduct that forms the basis for the Class' duty of fair representation claim, the former are preempted and extinguished under the rule of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). There can be no valid argument that the RLA did not regulate the APA's representational conduct in this case. On the contrary, the RLA dictated that the APA seek to advance the interests of the American pilots rather those of the Class. Permitting the Class to pursue state law claims to impose liability on the APA for conduct protected or arguably protected

by the RLRA would create precisely the conflict between the federal and state regimes that the preemption doctrine was designed to prevent.

Finally, although the district court did not consider the contention, the untimeliness of the Class pre-certification breach of duty claim is an alternative ground on which to affirm the dismissal of that claim. All of the Class' claims of injury in this case, however couched, arise from the APA's entry into Supplement CC and petition to the NMB for a single employer determination and representation rights. Both acts occurred by November 9, 2001, and the Class did not enunciate any claims against the APA until well after the six month limitations period had run. Although many of the consequences of Supplement CC may have been felt in April 2002, under settled law the Class' claim with respect to the Agreement accrued when the Agreement was concluded. By the same token, no continuing violation theory is available to extend the limitations period because the Complaint is devoid of any allegation that the APA committed any act within the limitations period on which to base a breach of duty claim.

ARGUMENT

I. Standard of Review

This Court exercises plenary review over a grant of summary judgment.

FDIC v. Bathgate, 27 F.3d 850, 860 (3d Cir. 1994).[3] In so doing, the Court applies the same standard of review as that applicable in the district court: namely, a movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (quoting Fed. R. Civ. P. 56(c)). According to the Supreme Court, "Summary judgment . . . is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The role of a reviewing court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Havens v. E.I. DuPont De Nemours & Co., No. 02-2286, 2003 WL 245732, at *1 (3d Cir. Feb. 4, 2003).

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[3]To the extent the Class takes issue with the district court's decision to treat the dispositive motions below as motions for summary judgment, Appellants' Brief ("Ap. Br.") at 22, that argument must fail. Because the parties presented matters outside of the pleadings to support their dispositive motions and defenses, the district court was fully justified in treating the motions before it as summary judgment motions. Fed. R. Civ. P. 12(b).

To establish that such "genuine issue" exists, the "party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" Anderson, 477 U.S. at 248 (citing Fed. R. Civ. P. 56(e)). To preclude summary judgment, a factual issue must be "genuine," not "metaphysical," Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), and also "material" - - i.e., concern facts "that might affect the outcome of the suit." Anderson, 477 U.S. at 248. The evidence to support each element of the non-movant's claim, moreover, must be more than a "mere scintilla." Hernandez v. Borough of Palisades Park Police Dep't., No. 02-2210, 2003 WL 202441, at *1 (3d Cir. Jan. 29, 2003), cert. denied, 124 S. Ct. 465 (2003) (quoting Anderson, 477 U.S. at 249, 252).

As will be demonstrated below, the Class failed to make the requisite showing to avoid summary judgment.

When a party contends, as the Class evidently does here, see Ap. Br. at 23, that a grant of summary judgment is premature because a request under Fed. R. Civ. P. 56(f) for discovery has been filed, this Court reviews "a district court's refusal to delay action for an abuse of discretion." St. Surin v. Virgin Islands Daily News, Inc., 21 F.3d 1309, 1313 (3d Cir. 1994) (citation omitted). A Rule

56(f) request "must identify with specificity 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.'" Lunderstadt v. Colafella, 885 F.2d 66, 71 (3d Cir. 1989) (quoting Dowling v. City of Philadelphia, 855 F.2d 136, 140 (3d Cir. 1988)) (emphasis added).

Any suggestion that the district court prematurely rendered judgment in this case must fail under an abuse of discretion or any other standard because the Class' Rule 56(f) affidavit, see A0418-0420, is devoid of the requisite specificity. The affidavit says nothing about how discovery would uncover evidence that would preclude summary judgment and nothing about any efforts the Class made on its own to develop such evidence. The "amorphous allegation[s]" contained in the affidavit cannot satisfy Rule 56(f). Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994).[4]

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[4]The Class claims to need discovery, inter alia, to establish that American and TWA LLC were "joint employers." A0419 (Rule 56(f) Declaration). In March 2001, however, the TWA MEC, most of whose members are Class representatives, argued the diametrically opposite position to the NMB that American and TWA LLC were not sufficiently conjoined to constitute a single employer and would not be for the foreseeable future. See supra at 4-5, 14-15. As this Court has previously held, a litigant may not seek advantage at various points in a dispute by taking contradictory positions on a given issue. See, e.g., Anjelino v. N.Y. Times Co., 200 F.3d 73, 100 (3d Cir. 1999). When a discovery request is at issue, the doctrine of judicial estoppel entirely justifies a refusal to permit such discovery. Id.

II. The District Court Correctly Dismissed The Class' Fair Representation Claim Against the APA

The district court dismissed the Class' duty of fair representation claim against the APA arising out of conduct both prior to and subsequent to the APA's certification as the Class' actual collective bargaining representative. A0030-0032. The court based its decision concerning pre-certification conduct on two central RLA principles: 1) that the duty is inextricably linked to a union's position as the exclusive representative of employees in a given bargaining unit; and 2) that the NMB has the exclusive authority to designate a representative of a given employee bargaining unit. A0031-2, citing, respectively, Vaca v. Sipes, 386 U.S. 171, 177 (1967), and Switchmen's Union v. NMB, 320 U.S. 297, 303 (1943). The court found the Class' post-certification claims too general to specify a breach of duty (viz, Complaint ¶ 126: "At all times after becoming the certified collective bargaining agent for the Class, APA has and continues to fail to treat the Class fairly, impartially and in good faith; has taken actions adverse to the interests of the Class and has failed to represent the interests of the Class," A0073) and wholly lacking in a triggering obligation: namely, any duty on the APA's part to re-negotiate Supplement CC. A0030-31.

Although the Class attempts to avoid the ruling on the post-certification

period with a brand new theory not advanced below, it offers nothing on this appeal to undermine the district court's judgment on either issue.

A. Because the APA Had No Fair Representation Duty to the Class Prior to Certification, It Could Not Have Breached Any Such Duty During that Period

As the Class correctly observes, the duty of fair representation is a direct function of a labor union's role as the exclusive bargaining representative of the employees in a given bargaining unit. Ap. Br. at 45, citing Vaca, 386 U.S. at 177; Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). The Class also concedes that the courts implied the duty from the federal labor statutes in order to ensure that bargaining unit members, deprived of the right to bargain individually or to select a minority union to represent them, are not deprived of all effective means of protecting their interests. See Ap. Br. at 51, 69, citing Felice v. Sever, 985 F.2d 1221, 1227-28 (3d Cir. 1993) (citing DelCostello v. IBT, 462 U.S. 151, 164 n.14 (1983)); Masy v. N.J. Transit Rail Operations, Inc., 790 F.2d 322, 327-28 (3d Cir. 1986).

Given these well-settled principles, the APA could not possibly have owed the duty to the Class prior to certification because during that entire period, ALPA and the TWA MEC - - not the APA - - were the exclusive representative of the Class. Ap. Br. at 3, 15-16. Indeed, the Class contends, in order to fulfill its duty

to TWA LLC pilots during the period before the APA was certified, ALPA should have 1) forced American and/or TWA LLC to negotiate with ALPA over seniority integration; 2) challenged Supplement CC as negotiated by American and the APA; and 3) sought to represent the combined pilot group after the NMB declared TWA-LLC and American a single carrier. Ap. Br. at 20, 25, 40, 42. The Class also contends that ALPA's unsuccessful efforts to arbitrate American's alleged breach of its "best efforts" commitment did not meet the level of care required under the duty of fair representation. Id.

In light of those contentions, the Class cannot possibly establish that the APA had the "exclusive" - - or any - - representational status during the pre-certification period. The Class' entire theory, therefore, rests on the misguided notion that its members were entitled to two "exclusive" representatives. As a matter of logic as well as law, that simply cannot be. See McCormick v. AMFA, 225 F. Supp. 2d 1131, 1135 (D. Minn. 2002), aff'd 340 F.3d 642 (8th Cir. 2003), citing Spenlau v. CSX Transp., Inc., 279 F.3d 1313, 1316 (11th Cir. 2002).

As a matter of labor policy, moreover, that notion simply should not be. The Class also concedes that throughout the pre-certification period, the APA was the "exclusive" representative of an entirely different group of pilots, the American pilots. A0054 (Complaint ¶ 37). As such, the APA indisputably owed

those pilots a duty of fair representation. As the Ninth Circuit declared in a substantively indistinguishable case, had the APA acted in the interests of the Class during that time period and "not sought to preserve the seniority of its bargaining unit members to the detriment of those outside the bargaining unit, it would have been remiss in its statutory duty" to the incumbent American pilots. See McNamara-Blad v. Ass'n of Prof'l Flight Attendants, 275 F.3d 1165, 1173 (9th Cir. 2002).[5]

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[5]McNamara-Blad concerned American's 1998 purchase of Reno Air, Inc. As in this case, subsequent to the purchase, but before the NMB declared the two carriers a single carrier, the Association of Professional Flight Attendants ("APFA"), the certified representative of the American flight attendants, negotiated a seniority agreement with American that arguably disadvantaged the Reno flight attendants, who were represented by the Teamsters Union. The NMB subsequently declared the two carriers a single carrier and certified the APFA as the representative of both groups (and extinguished the Teamsters' certificate to represent the Reno flight attendants).

The Reno flight attendants sued the APFA on the theory that APFA owed them a duty prior to the operational merger date (coincident with the single carrier finding) and breached that duty. Beginning with the notion that the scope of the duty is "coextensive with the scope of the union's statutory authority as the exclusive bargaining agent" and did not extend to persons for whom the union was not the exclusive representative, 275 F.3d at 1169-70, the court held that the APFA could not have been the Reno flight attendants' representative at the time the integration agreement was concluded, had no duty to them, and therefore could not have breached any duty. Id. at 1170, 1172. To the extent that the challenged agreement disadvantaged the Reno flight attendants, the court held, it was a "bona fide economic decision made to protect the interests of the American flight attendants, for whom the APFA did have the statutory duty to fairly represent." Id. at 1172. That the agreement was not actually implemented until after the APFA was certified to represent the Reno flight attendants was of no moment

Any notion that the APA could have had some duty to the Class prior to certification is also inconsistent with the Facilitation Agreement, which the TWA MEC chose to enter. In return for waiving the labor protective provisions of the TWA/ALPA collective bargaining agreement, the Class' actual representative, ALPA and the TWA MEC, received a promise by American to sponsor and facilitate negotiations on seniority integration between the TWA MEC and the APA. See supra at 10. Both unions entered into the Facilitation Agreement in order to make those negotiations possible. See supra at 12.[6] Like any labor

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because the agreement had been "finalized before the APFA had the statutory duty to represent them." Id. at 1172. The Reno pilots brought a virtually identical breach of duty claim against the APA on virtually identical facts; for the reasons set forth in McNamara-Blad, the U.S. District Court for the District of Nevada dismissed the pilot claims on summary judgment. See Allen v. American Airlines, Inc., No. CV-N-99-539-DWH(RAM), slip op. (D. Nev. Sept. 14, 2001). A0354-0361.

[6]Although the Class contends it had a right to bargain directly with American over seniority integration, Ap. Br. at 25-32, the law provides otherwise. As an employer, American has a duty to "treat," or bargain, with the certified representative of its employees - - the APA - - and no other. RLA Section, 2 First, Ninth, 45 U.S.C. §152 First, Ninth; Virginian Ry. v. Sys. Fed'n No. 40, 300 U.S. 515, 548 (1937). A carrier is under no obligation to engage in multi-employer bargaining over terms generally applicable to the similar employees of other carriers. See, e.g., UTU v. Grand Trunk W. R.R., 901 F.2d 489 (6th Cir. 1990). Neither does a carrier have any duty to bargain over issues that would impact only future employees who are not yet members of the bargaining unit - - precisely the situation of the TWA LLC pilots at the time of their negotiations with the APA. Japan Air Lines Co. v. IAM, 538 F.2d 46, 51-52 (2d Cir. 1976). C.f., e.g., IFFA v. Trans World Airlines, 819 F.2d 839, 845-47 (8th Cir. 1987), rev'd on other

negotiation, the one that ensued was a process whereby "two adversarial parties" dealt at "arm's length to further their own economic interests." A.T. Kearney, Inc., v. IBM, 73 F.3d 238, 242 (9th Cir. 1995) (citation omitted). Neither side was required to agree to a given proposal or to make a concession. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952); NLRB v. Tomco Communications, Inc., 567 F.2d 871, 884 (9th Cir. 1978); Erie Lackawanna Ry. v. Lighter Captains Union, Local 996, 338 F. Supp. 955, 964-65 (D.N.J. 1972).

Although its own TWA MEC, chaired by Class Representative Pastore, agreed to negotiate over seniority with the APA, the Class would now attempt to alter the very definition of "negotiation" ex post by suggesting that both parties at that negotiation table had a duty to advance the Class' interests. In that case, of course, the incumbent American pilots would have had no representative at all to advance their interests. As a matter of law, that notion is simply impossible because the American pilots were as entitled to the best efforts of the APA at the integration negotiations as was the Class to the best efforts of ALPA and the TWA MEC.

The Class attempts to escape this conundrum by asserting that a labor union

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grounds, 489 U.S. 426 (1989) (trainees who have not commenced service with employer are not "employees" under the RLA); ALPA v. United Air Lines, Inc., 802 F.2d 886, 910-13 (7th Cir. 1986) (same).

has a duty to represent all members of a given bargaining unit, not just members of the particular union at issue. Ap. Br. at 51-54. While that proposition is certainly accurate, it gains the Class nothing because it applies only within a particular bargaining unit. And it is well established that a labor union owes no duty to persons not members of the bargaining unit the union represents. E.g., Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 n.20 (1971); Felice, 985 F.2d at 1228-29; Merk v. Jewel Cos., 848 F.2d 761, 766 (7th Cir. 1988); Karo v. San Diego Symphony Orchestra Ass'n, 762 F.2d 819, 821 (9th Cir. 1985); Anderson v. Alpha Portland Indus., Inc., 727 F.2d 177, 181 (8th Cir. 1984); Riser Foods, 309 NLRB 635, 636 (1992).

The ineluctable fact of this matter is that before the NMB consolidated the TWA LLC pilots into the American bargaining unit, the pilots at American and the pilots at TWA-LLC belonged to different bargaining units, each with its own separate exclusive bargaining representative. A345 (March 5, 2002 NMB decision). Moreover, although the bargaining units were deemed conjoined as of March 5, 2002, the NMB expressly ordered that the representational statuses remain as they were (i.e., ALPA for the TWA-LLC pilots and APA for the incumbent American pilots) until such time as the NMB decided which union would represent the combined pilot group, a decision the NMB made only as of

April 3, 2002. A353; see NMB Representation Manual §19.602 ("Existing certificates remain in effect until the NMB issues a new certificate or dismissal"). The NMB's determinations preclude any argument that the APA represented the Class, or owed it any duty, prior to April 3, 2002.

Indeed, Congress invested the NMB with the exclusive authority to make such determinations, including whether carriers will be treated separately or as a single unit for representational purposes and the identity of the bargaining representative(s) at the various stages of a merger, acquisition or change in corporate structure. Switchmen's Union, 320 U.S. at 301; AFA v. Delta Air Lines, Inc., 879 F.2d 906, 912 (D.C. Cir. 1989); ALEA v. Republic Airlines, Inc., 798 F.2d 967-68 (7th Cir. 1986); Int'l Bhd. Of Teamsters v. Tex. Int'l Airlines, 717 F.2d 157, 161 (5th Cir. 1983); ALPA v. Tex. Int'l Airlines, Inc., 656 F.2d 16, 22-23 (2d Cir. 1981); IAM v. Northeast Airlines, Inc., 536 F.2d 975, 977 (1st Cir. 1976); Bhd. of Ry. & S.S. Clerks v. United Air Lines Inc., 325 F.2d 576, 579-80 (6th Cir. 1963).[7]

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[7]In an effort to avoid a single carrier finding - - the trigger for the implementation of Supplement CC - - both ALPA and the TWA MEC argued to the NMB that American and TWA LLC were not sufficiently integrated to constitute a single carrier as of March 2002. See supra at 14-15. Because no class member challenged the NMB's contrary determination, the Class may not attack that determination collaterally here. See, e.g., Callanon Road Improvement Co. v. United States, 345 U.S. 507, 512 (1953) (whether administrative decision was

The Class' argument that a union's duty to a group of employees may attach before those employees enter the pertinent bargaining unit must also fail, as must its attempt to find support for that proposition in Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952), Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974), Gvozdenovic v. United Airlines, Inc., 933 F.2d 1100 (2d Cir. 1991), and Bernard v. ALPA, 873 F.2d 213 (9th Cir. 1989). Ap. Br. at 52-56. None of these cases stands for the proposition that a union owes a duty of fair representation to people who are not bargaining unit members. Howard, for instance, is not even a fair representation case. Rather, as a dissenting Justice accurately described the decision, "The majority reaches out to invalidate the contract, not because the train porters are brakemen entitled to fair representation

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right or wrong, it cannot be attached collaterally: "A direct attack in such circumstances was the remedy"); Restatement 2d of Judgments §83(1) (1982) (administrative determinations have the same res judicata effects as those of a court).

Now, however, in an attempt to impose a pre-certification duty on the APA, the Class would reverse the position the TWA MEC took before the NMB and contend that American and TWA LLC were actually "joint employers" or "alter egos." Ap. Br. at 45-49. Under established precedent in this Circuit, the Class should be judicially estopped from effecting this turnabout. Anjelino, 200 F.3d at 100; Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121-22 (3d Cir. 1992); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988). Moreover, any such determination of joint employer or alter ego status lies within the exclusive jurisdiction of the NMB. See, e.g., Switchmen's Union, 320 U.S. at 297.

by the Brotherhood, but because they are Negroes who were discriminated against by the carrier at the behest of the Brotherhood." 343 U.S. at 777-78 (Minton, J. dissenting). What is relevant here about Howard was explained by the Supreme Court in Allied Chem. & Alkali Workers 404 U.S. at 181 n.20:

> The reach and rationale of Howard are a matter of some conjecture. . . . But whatever its theory, the case obviously does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.

In Jones, Gvozdenovic and Bernard, the unions at issue each took on the duty of fair representation because each of the complaining groups was part of the pertinent bargaining unit at the time the unions took the actions complained of. In Jones, even the passage quoted by the Class indicates that the non-union passenger relations agents were "minority members of the collective bargaining unit" when the union entered into a new agreement with the employer disadvantaging the agents. See Ap. Br. at 53, quoting Jones, 495 F.2d at 798.[8] Similarly, in

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[8]As this Court has read Jones, the case concerns a minority group of "de facto members" of the pertinent bargaining unit at the pertinent time. Deboles v. Trans World Airlines, 552 F.2d 1005, 1016 (3d Cir. 1977) (citing Jones, 495 F.2d at 797). In this Circuit, "Jones thus stands for the limited and undisputed proposition that discrimination against non-member employees who are part of the bargaining unit is impermissibly arbitrary if no relevant distinctions exist between the union and non-union employees." Deboles, 552 F.2d at 1016 (emphasis added).

Gvozdenovic, "as of the date" the Association of Flight Attendants (representing the incumbent flight attendants at United) "ratified the allegedly violative agreement," "the 1,202 incoming flight attendants [from Pan American] already had been working for United" and were therefore part of the United bargaining unit to which the AFA owed the duty of fair representation. Gvozdenovic, 933 F.2d at 1106 (emphasis added). Finally, there was no dispute in Bernard that the non-union Jet America pilots had entered the Alaska Airlines workforce and bargaining unit prior to the October 6, 1987, agreement between ALPA and Alaska that adversely affected their seniority placement: "The district court found no genuine issue of material fact concerning whether ALPA represented the Jet America pilots on and after October 1, 1987 [the date the Jet American and Alaska workforce were combined], and ALPA does not dispute this finding." Bernard, 873 F.2d at 216; see McNamara-Blad, 275 F.3d at 1170, 1172 (distinguishing Bernard).

Thus, while the Class would prefer that "impending" inclusion within the pertinent bargaining unit - - rather than actual inclusion - - trigger the attachment of the duty of fair representation, Ap. Br. at 55-58, none of the cases the Class cites - - or could cite - - expands the ambit of the duty to cover those not actually "in" the pertinent bargaining unit. Given the self evident difficulty of determining

when "impending" entry into a collective bargaining unit is "impending" enough to warrant imposing the duty, it is small wonder that no court has ever attempted such a determination. Any such attempt here would of necessity create the legally and practically impossible situation where a single group of pilots (i.e., the Class) would have two "exclusive" bargaining representatives (ALPA and the APA) at the same time, both with the same sorts of duties to the Class but neither with any direction as to how to carry out those duties. In short, the Class' proposed expansion of the duty to cover its situation is not only devoid of legal support and unworkable, but would also require a fundamental restructuring of settled labor law.

B. The Class Has Failed to Assert a Colorable Post-Certification Duty of Fair Representation Claim Against the APA

Neither in its presentation to the district court nor on this appeal has the Class adduced any facts to suggest that the APA did anything (i.e., take any action) to breach the duty of fair representation to the Class once that duty attached on April 3, 2002.[9] Thus, the Class failed to meet its burden to avoid summary judgment on any such theory. See Anderson, 477 U.S. at 248;

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[9]The only specific post-certification act referenced in the Complaint concerns a certain May 26, 2002, arbitration award in Count X. A0073, 0086-87 (¶¶127, 195-199). On the Class' own motion, the district court dismissed that claim, A0041-42, and it is not part of the instant appeal.

Matsushita Elec. Indus. Co., 475 U.S. at 586. The Class' only remaining allegation is that the APA breached the duty post-certification by refusing to negotiate a seniority agreement more amenable to the Class' desires. A0073 (Complaint ¶125). In so alleging, the Class essentially claims that the APA failed to correct its alleged prior breach of duty of negotiating and executing Supplement CC. A failure to correct a prior alleged breach of duty, however, cannot constitute a colorable independent breach of that duty. See, e.g., Christiansen v. APV Crepaco, Inc., 178 F.3d 910, 916 (7th Cir. 1999) ("Once the union's decision became final . . . its subsequent inactivity did not amount to a new violation [of the duty of fair representation]").

Therefore, the Class is left on this appeal with no colorable post-certification breach of duty claim against the APA that was actually asserted below. Undeterred, the Class raises for the first time on this appeal an entirely new theory that when the TWA LLC/ALPA Transition Agreement expired by its own terms on April 3, 2002, the seniority structure established in that Agreement constituted the "status quo" for the Class members' seniority in the combined TWA LLC/American bargaining unit, which could not be changed without negotiation with American. Ap. Br. at 44-49. Because the APA failed to engage in those negotiations and alter the seniority integration structure established in

Supplement CC, the Class maintains, it breached its duty of fair representation. Id.

This belated contention is unavailing for a several reasons. First, because the contention was not raised below, it may not be considered on appeal absent an indication - - not present here - - that the Class was somehow prevented from raising the issue below. See, e.g., Bell Atl.-Pa. v. Pa. Pub. Util. Comm'n, 273 F.3d 337, 344 n.3 (3d Cir. 2001), cert denied, 537 U.S. 941 (2002); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635, 646-47 (3d Cir. 1998).

Second, as the Class freely admits, the TWA LLC/ALPA Transition Agreement intentionally excluded any reference to what sort of seniority integration would ensue upon a determination by the NMB that TWA-LLC and American constituted a single employer. A0551 (Pastore Declaration ¶¶26, 28). Thus, that Agreement contained no terms that could possibly be used to define any "status quo" with respect to seniority integration in the new combined unit. In reality, as was acknowledged in the Facilitation Agreement, upon inclusion of the TWA pilots in the American bargaining unit, the terms governing seniority integration were to be found in a modified Section 13 of the Green Book, not the terminated TWA LLC/ALPA Transition Agreement. A0319-320.[10]

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[10]The Class' very notion that the former TWA pilots had any pre-existing "right" to a particular level of seniority at American is incorrect as a matter of law. In the absence of a statutory pronouncement to the contrary - - and the RLA has

The case on which the Class principally relies for its "status quo" argument, AFA v. USAir, Inc., 24 F.3d 1432 (D.C. Cir. 1994), amply demonstrates this point. Ap. Br. at 47-48. AFA concerned US Air's assumption of control over the operations of Shuttle, Inc. When the NMB determined that the two operations constituted a single carrier, USAir refused to apply the terms of its collective bargaining agreement with the AFA to the Shuttle flight attendants, who, prior to the single carrier finding, operated under their own collective bargaining agreement with Shuttle. The AFA sued, contending that its agreement with USAir should be applied. USAir defended on the ground that nothing in its AFA

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none - - seniority rights arise from and are defined by the pertinent union contract. Trailmobile Co. v. Whirls, 331 U.S. 40, 53 n.21 (1947); Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 526 (1949); see e.g., Wightman v. Springfield Terminal Ry., 100 F.3d 228, 232 (1st Cir. 1996) (in the absence of contract, seniority rights do not exist). As creatures of contract, moreover, seniority rights do not "vest." Wightman, 100 F.3d at 232; McMullans v. Kan., Okla. & Gulf Ry., 229 F.2d 50, 53 (10th Cir. 1956); Local 1251 UAW v. Robertshaw Controls Co., 405 F.2d 29, 33 (2d Cir. 1968). Instead, seniority rights are subject to revision or even termination with the termination or renegotiation of the pertinent collective bargaining agreement on which those rights depend. Wightman, 100 F.3d at 232; Dempsey v. Atchison, Topeka & Santa Fe Ry., 16 F.3d 832, 839 (7th Cir. 1994); Robertshaw Controls Co., 405 F.2d at 33; McMullans, 229 F.2d at 53. Thus, in a merger or acquisition situation, outside of seniority rights an employee may gain pursuant to the contract of his or her new employer, an employee "acquired" as the result of a merger or similar corporate transaction has no statutorily protected right to seniority. NLRB v. Whiting Milk Corp., 342 F.2d 8, 10 (1st Cir. 1965). Thus, once the TWA LLC/ALPA Transition Agreement terminated, the only seniority "right" any class member had was as defined by Supplement CC.

agreement required that result and, until USAir and AFA agreed otherwise, the terms of the Shuttle agreement constituted the "status quo" for the Shuttle flight attendants. The D.C. Circuit accepted USAir's position.

Beginning with the proposition that a mere change in union representation -- without more -- had no effect on the "status quo" for Shuttle employees, the AFA court observed that "[t]he AFA-USAir agreement nowhere mandates that its coverage be extended to new units of flight attendants"; on the contrary, the AFA itself had conceded that the Shuttle flight attendants were not expressly covered or contemplated by the USAir-AFA agreement. 24 F.3d at 1437-38. In a pronouncement directly pertinent here, however, the court made clear that the situation would have been drastically different had the AFA/USAir agreement included terms to cover new entrants to the bargaining unit like the Shuttle employees:

> Yet, there is no doubt that AFA and USAir could have included some such clause in their agreement to cover new units or groups of flight attendants added to the USAir transportation system. In that case, any dispute whether Shuttle flight attendants were covered would be a question concerning "the meaning or proper application of a particular provision with reference to a specific situation," and thus would be a minor dispute subject to mandatory arbitration, rather than judicial review." Elgin, Joliet & E. Ry. Co., 325 U.S. [711], 723 [(1945)].

24 F.3d at 1438. The D.C. Circuit's view is perfectly consistent with the general proposition, established in a case also relied upon by the Class, that a carrier and its employees' representative are free to define the status quo by "entering into an agreement to utilize 'rates of pay, rules, or working conditions' other than those in existence at the time when the [RLA] Section 6 notice was filed." See ALPA v. Pan Am. World Airways, Inc., 765 F.2d 377, 381 (2d Cir. 1985), quoted in Ap. Br. at 30; see also, e.g., RLEA v. Boston & Maine Corp., 664 F. Supp. 605 (D.Me. 1987); ALPA v. Aloha Airlines, Inc., 126 L.R.R.M. (BNA) 2822 (D. Hawaii 1987).

The situation hypothesized in AFA is precisely the situation here. American and APA had, in fact, agreed upon the terms, including the seniority terms, that would govern the combined pilot bargaining unit when the NMB made a single employer determination and extended the APA's representational certification to cover the combined unit. First, in the July 10, 2001 American/APA Transition Agreement, American and APA had expressly agreed that upon extension of APA's certificate to represent the TWA-LLC pilots, the American and TWA-LLC seniority lists would be combined pursuant to Section 13 of the Green Book, or as American and APA might decide to modify Section 13. A0305. Section 13 of the Green Book was indeed modified by Supplement CC, and APA and American

expressly agreed that the Supplement would become operative on the "Implementation Date," defined as "the date on which the National Mediation Board issues a decision finding that American and TWA-LLC are or have become a single carrier." A0326, 0328.

Thus, precisely as the AFA case contemplated, any question concerning the seniority terms applicable to the Class on April 3, 2002, does not implicate a question of "status quo" (or a "major" dispute permitting access to the courts). Rather, because the Green Book as amended by Supplement CC provided the seniority integration terms for TWA-LLC pilots that were lacking in the USAir/AFA agreement, any question concerning those terms would be, at best, a matter of interpretation of Supplement CC and therefore a "minor" dispute not subject to the jurisdiction of the district court or this Court. AFA, 24 F.3d at 1437-38.[11] Because the "status quo" provisions of the RLA are not implicated in this

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[11]It is well-settled that, where "it is arguable that the existing agreements between the parties, when interpreted and applied within the context of their past practices, can conclusively resolve the dispute," the dispute is a "minor" dispute under the RLA, and "established procedures under the Act allow each party to act on its own interpretation of the agreements until a decision has been reached through arbitration." Gen. Comm. of Adjustment v. CSX R.R. Corp., 893 F.2d 584, 586 (3d Cir. 1990). Thus, the implementation of such agreement, even if under challenge, is no violation of the "status quo." See McQuestion v. N.J. Transit Rail Operations, Inc., 30 F.3d 388, 394 (3d Cir. 1994); Miklavic v. USAir, Inc., 21 F.3d 551, 554-555 (3d Cir. 1994). This remains true even after the original collective bargaining representative ceases to act in that capacity.

case, moreover, the APA could not have had any duty to negotiate over any alleged "status quo" terms when it became the Class' representative on April 3, 2002. As the district court properly found, the APA engaged in the requisite negotiations regarding seniority integration when it negotiated first with the TWA MEC Merger Committee and then with American over what became Supplement CC. A0030-31.[12] Accordingly, the Class' theory of a post-certification breach of duty must fail.

III. The District Court Correctly Ruled That All of the Class' State Law Claims Are Preempted and Extinguished by the RLA

In addition to its overt duty of fair representation claim against the APA, the Class asserts five state law claims arising from the same conduct at issue in its federal claim. See supra at 6. As the district court found, "[t]aken together and individually," the state law claims all "assert that the Defendants discriminated against the Plaintiffs, acted in bad faith and dishonestly towards the Plaintiffs, and that the Plaintiffs were treated arbitrarily." A0039. In other words, the state law

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Miklavic v. USAir, 21 F.3d at 555-56.

[12]The Class cannot escape the fact that, to the extent it had a right to negotiate over seniority integration, its own TWA MEC, chaired by Class Representative Pastore, agreed to do its negotiating with the APA pursuant to the Facilitation Agreement. A0319-0323. What the Class never had was a right to serial negotiations with a succession of parties until it succeeded in achieving integration terms more favorable to the Class.

claims allege wrongdoing no different from that encompassed by the federal duty of fair representation claim against the APA. Id. Relying on the familiar labor preemption principle of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) - - expressly made applicable to the RLA in Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380-81 (1969) - - that federal labor law preempts state laws purporting to regulate activities protected, prohibited or arguably so by the federal labor laws, the district court held that all of the Class' claims were preempted and extinguished. A0038. As the district court also correctly noted, each and every one of the Class' particular state law claims had been previously deemed preempted by the RLA. A0039, citing cases.[13]

The Class takes no issue with the district court's finding that its state law claims concern the same conduct as the federal breach of duty claim; indeed, the

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[13]Concerning the Class' claim in Count III that the APA breached a fiduciary duty in connection with American's alleged failure to "treat" with the Class, the district court also found that the duty alleged was no different from the duty of fair representation. A0033. On this Court's well established notion that artful pleading of a claim will not avoid preemption of state law, the court therefore correctly dismissed Count III as against the APA. Id., quoting, Johnson v. UFCW Local No. 23, 828 F.2d 961, 967 (3d Cir. 1987). It is also well settled that artful pleading of another federal claim - - if that is what Count III is intended to be - - will not escape the preemptive powers of the federal labor laws. See Monroe v. Mo. Pac. R.R., 115 F.3d 514 (7th Cir. 1997) (FELA claim preempted by RLA); Fry v. ALPA, 88 F.3d 831 (10th Cir. 1996) (RICO claim preempted by RLA); Mann v. ALPA, 848 F. Supp. 990, 993 (S.D. Fla. 1994) (RICO claim preempted by RLA and recharacterized as duty of fair representation claim).

Indus. Union of Marine & Shipbuilding Workers, 132 F.3d 824, 830 (1st Cir. 1997) (quoting Condon v. Local 2944, United Steelworkers, 683 F.2d 590, 594-95 (1st Cir. 1982)).

Applying the terms of Garmon, the APA's conduct in seeking to advance the interests of the American pilots is conduct either protected or arguably protected by the RLA. Garmon, 359 U.S. at 239, 244. As the Class admits, the "very essence of Garmon preemption" is that "the courts may not adjudicate common-law claims based on conduct that is protected or prohibited by federal labor law, or arguably so[.]" Ap. Br. at 68-9 (emphasis added). Accordingly, if the Class were free to pursue state law claims seeking to impose liability and potentially damages on the APA for conduct that was protected or arguably protected by federal labor law, a direct conflict between the two legal regimes would ensue - - precisely the result the preemption doctrine will not permit. As the Supreme Court explained in Garmon,

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be

> exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

359 U.S. at 246-47, citing Garner v. IBT, 346 U.S. 485, 492-97 (1953).

Even if one were to posit, as the Class apparently does, that the APA's conduct was prohibited or arguably prohibited by federal labor law and that the state claims asserted are therefore consistent with federal law, preemption is still required. Garmon, 359 U.S. at 246 n.5 ("When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition. . . .") (citation omitted). Pa. Nurses Ass'n v. Pa. State Educ. Ass'n, 90 F.3d 797, 802 (3d Cir. 1996) ("Either of the polarities of the Garmon analysis, arguable protection or arguable prohibition, will ordinarily suffice" for preemption); see also, Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 286-87 (1986) (state law that seeks no more than to add additional remedies for violations of federal labor law is preempted). Thus, the district court committed no error in dismissing the Class' state law claims as preempted.[14]

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[14]In light of Garmon, the APA submits that Krantz v. ALPA, 427 S.E.2d 326 (Va. 1993), cited in Ap. Br. at 69-70, was incorrectly decided. Despite finding that federal labor law likely prohibited a union's retaliatory blacklisting of a "scab," the state court nevertheless held that Krantz's state law claims were not preempted because, as an applicant for employment, he had no federally protected right to sue the union. 427 S.E.2d at 329-30. Although the decision flies directly in the face of Garmon, the state court made no mention of Garmon.

IV. Even If the APA Had Had A Pre-Certification Duty to the Class, Any Claim of Breach of that Duty Would Be Time-Barred

Because the district court correctly determined that the APA did not have - - and therefore could not breach - - a duty of fair representation to the Class prior to certification, the court did not reach the APA's contention that such breach of duty claim would be untimely. Because the limitations contention was presented and fully briefed below, this Court may affirm the dismissal of the Class' claim against the APA on this alternative ground. Ford Motor Co. v. Ins. Comm'r of Pa., 874 F.2d 926, 935 n.13 (3d Cir. 1989); see, Langer v. Monarch Life Ins. Co., 966 F.2d 786, 796 (3d Cir. 1992).

As the Class makes clear on appeal, the heart of the Class' entire claim against the APA is "the unilateral implementation of a seniority scheme ("Supplement CC") entered into between AA and APA, the result of which was to strip the Class of their most valuable employment right - - its seniority." Ap. Br. at 9. Consistent with that unequivocal central contention, all of the wrongdoing the Class alleges against the APA culminated in the execution of Supplement CC on November 8, 2001, and the November 9, 2001, petition to the NMB for a single carrier determination and representational rights over the combined American/TWA LLC bargaining unit (the necessary prerequisites for the

implementation of Supplement CC). After November 9, 2001, the APA took no further action to devise, alter, finalize or implement the seniority structure of which the Class complains.

The Class is correct, of course, that a duty of fair representation claim accrues for limitations purposes when the claimant suffers some sort of injury. See Ap. Br. at 39-40, citing cases. On this subject, the Class expressly charges, that its members had experienced sufficient injury from the APA's (and American's) conduct by September 24, 2001 - - even before the execution of Supplement CC - - to lodge and pursue a grievance against American over an alleged breach of its "best efforts" commitment. A0061 (Complaint ¶66), A0453 (Declaration of John Hefley). And Class Representative Pastore and the TWA LLC MEC argued to the NMB that the execution of Supplement CC injured the TWA LLC pilots because it interfered with any effort ALPA might make to win representational rights at the combined bargaining unit. A0535. Both alleged injuries were suffered no later than November 9, 2001, and were sufficient to trigger the running of the limitations period.

Moreover, the basis of the Class' claim that APA owed it a duty prior to certification is the common understanding from the outset that APA would one day become the Class' representative. A0071 (Complaint ¶114). It was also

known to all the moment that Supplement CC was executed that Supplement CC would apply to the Class at such time as the APA was designated the Class' representative by the NMB. Ap. Br. at 15n.3. For limitations purposes, then, this case is no different from those cases in which claimants claim injury as a result of a union's entry into any collective bargaining agreement. In those cases, the limitations period for a breach of duty claim begins to run from the date of execution of the pertinent agreement. Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 415-17 (1960); United Indep. Flight Officers, Inc. v. United Airlines, 756 F.2d 1262, 1273 (7th Cir. 1985); Gvozdenovic, 933 F.2d at 1106.[15]

The fact that the allegedly injurious terms of a collective bargaining agreement are not implemented or enforced until a later date does not toll the limitations period; neither does it give rise to a separate cause of action upon implementation of that agreement. Local Lodge No. 1424, 362 U.S. at 422-23 ("[T]he vice in the enforcement of this agreement is manifestly not independent of

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[15]If, on the other hand, at the time of the execution of Supplement CC and the APA's NMB petition, it was not sufficiently certain that the APA would actually become the representative for the combined unit or that Supplement CC would apply to the Class, see App. Br. at 40, then the Class' claim that APA owed it any duty prior to certification dissolves. There certainly could be no claim that the APA had any duty to a group of pilots if there were uncertainty if the APA would ever represent the group.

the legality of its execution. . . . In any real sense, then, the complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution"); see McNamara-Blad, 275 F.3d at 1172. Put another way, "The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980) (quoting Abramson v. Univ. of Haw., 594 F.2d 202, 209 (9th Cir. 1979)). This rule specifically holds true in cases involving the adoption of a seniority system. The limitations period for complaints about the operation of such a system begins to run when the system is adopted, not when it is applied. See Lorance v. AT&T Techs., Inc., 490 U.S. 900, 909 (1989). As the Third Circuit summarized the Lorance rule, "Under a seniority system, an employee's status with respect to co-workers is fixed, not tentative. The across-the-board adjustment of each employee's status in any seniority system fixes the employees' competitive benefits with respect to their co-workers at the time it is adopted. . . ." Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1419 (3d Cir. 1991).

The statute of limitations for a breach of duty of fair representation claim (or a state claim preempted and recharacterized as a breach of duty claim) is six

months. DelCostello v. IBT, 462 U.S at 171-72; Sisco v. Consol. Rail Corp., 732 F.2d 1188, 1193-94 (3d Cir. 1984); May v. Shuttle, Inc., 129 F.3d 165, 177-78 (D.C.Cir. 1997) (state claims preempted by and recharacterized as duty of fair representation claims are governed by the six month limitations period). Based on the Class' complaint, the very last acts the APA took that allegedly constituted a breach of duty occurred on November 8 and 9, 2001. Thus, the limitations period for a breach of duty claim against the APA ran no later than May 9, 2002. The Class first lodged its duty of fair representation claim against the APA in its October 3, 2002, counterclaims, A 0008, almost five months after the limitations period for the claims had run. Thus, even if the APA had a duty prior to certification, that claim is untimely.[16]

The Class cannot seek to extend the limitations period on the theory that its

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[16]Even if the Class' counterclaims are deemed to relate back to the date on which the APA initially filed this suit, the Class' breach of duty claim is still untimely because the APA filed this suit on June 19, 2002. A0007. There is, of course, no basis for "relation back" to the date the APA initially filed its lawsuit in Texas because the Class never filed counterclaims in that case. Moreover, because the case was dismissed on personal jurisdictional grounds, it could not toll the running of the limitations period. Davis v. Smith's Transfer Inc., 841 F.2d 139, 140 (6th Cir. 1988) ("The initial filing of plaintiff's suit within the six-month time period is simply not the effective filing date of plaintiff's suit because it was later dismissed. . . . A suit, so dismissed, does not toll nor effect in any way the continuous running of the applicable statutory time period"); Nelson v. Local 854 Dock Loaders, 993 F.2d 496, 498-99 (5th Cir. 1993).

repeated requests that the APA reconsider and modify Supplement CC kept the period running or on a continuing violation theory. Concerning the former, it is well settled that requests that a labor union reconsider a prior decision - - e.g., the decision to enter into Supplement CC or petition the NMB for representational rights - - will not toll the limitations period. E.g., Vadino v. A. Valey Eng'rs, 903 F.2d 253, 262-63 (3d Cir. 1990); Pantoa v. Holland Motor Express, Inc., 965 F.2d 323, 328 (7th Cir. 1992); Martin v. Constr. Laborers Pension Trust for S. Cal., 947 F.2d 1381, 1384 (9th Cir. 1991); Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir. 1991). As this Court has explained, if such "repeated requests to a union . . . were to perpetually toll the statute of limitations . . . the statutory time bar would be illusory." Vadino, 903 F.2d at 262-63. By the same token, the APA's refusal to renegotiate or alter Supplement CC after it was certified as the Class' representative cannot constitute a separate breach of duty. APV Crepaco, Inc., 178 F.3d at 915-16.

In order to establish a continuing violation, the Class would have to establish a continuing series of wrongful acts on the APA's part, at least one of which occurred within the limitations period. See, e.g., Brenner v. Local 514, United Bhd of Carpenters & Joiners, 927 F.2d 1283, 1295 (3d Cir. 1991), cited in Ap. Br. at 40-41. But a continuing violation theory will not apply when the

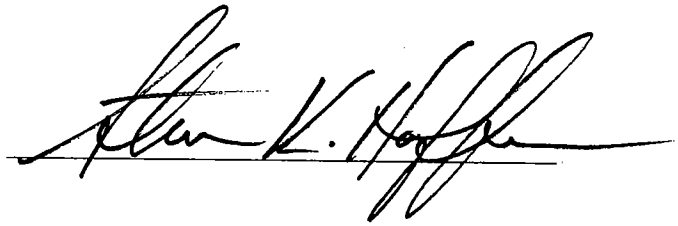
plaintiff complains of the continuing consequences or effects of a past wrongful act. Brenner, 927 F.2d at 1296, citing Delaware State College v. Ricks, 449 U.S. at 258, and United Air Lines, Inc. v. Evans, 431 U.S. 553, 557-58 (1977) (allegation that employer's seniority system "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination" is insufficient to establish a continuing violation).

In this case, the last APA acts about which the Class complains are the entry into Supplement CC and the filing of the NMB petition. Both of those acts occurred no later than November 9, 2001, and the Class alleges no subsequent APA act that did it harm - - only the allegedly harmful consequences of those November 2001 acts. Accordingly, the Class cannot establish a continuing violation theory, and its pre-certification breach of duty claim against the APA is time barred.

CONCLUSION

For the reasons set forth above, the judgment of the district court dismissing all claims against the APA should be affirmed.

Respectfully Submitted,



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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify, pursuant to 3d Cir. LAR 46.1, that I, the undersigned attorney for Appellee the Allied Pilots Association, am a member of the Bar of this Court.

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Dated: December 15, 2003

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,747 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: December 15, 2003

CERTIFICATE OF SERVICE

I hereby certify that the original and ten (10) copies of the Brief of Appellee Allied Pilots Association and this Certificate of Service were served this 15th day of December, 2003, upon the United States Court of Appeals for the Third Circuit at 601 Market Street, Room 21400, Philadephia, PA 19106-1790 via third party commercial carrier for next day delivery. I further certify that I served two (2) copies of the Brief and this Certificate of Service via first class mail, postage prepaid, on the following counsel:

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