IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LEROY "BUD" BENSEL, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 02-2917 (JEI)
	)	
ALLIED PILOTS ASSOCIATION, et al.	)	Motion Date: February 1, 2010
	)	
Defendants.	)	

MEMORANDUM OF DEFENDANT, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, IN SUPPORT OF ITS MOTION FOR CERTIFICATION OF THE ORDER OF DECEMBER 17, 2009, DENYING SUMMARY JUDGMENT, FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b)

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As this Court observed in its decision of December 17, 2009, taking note of other court decisions, "it is not entirely clear, as a legal matter, what conduct constitutes a bad faith breach of a union's duty of fair representation." Dec. 17, 2009 Opinion at 15. Given this lack of clarity, ALPA respectfully submits that interlocutory review of two key contested issues concerning the bad faith standard would serve the interests of the Court and the parties. We accordingly ask the Court to certify the case for immediate review under 28 U.S.C. §1292(b).

The first issue concerns the level of evidence required to establish that a union acted in bad faith in a duty of fair representation case, or, looking at it from the other side, the level of deference owed to a union's collective bargaining decisions by a court or jury where the plaintiffs claim the union made these decisions in bad faith. The issue is central to this case because Plaintiffs argue that a jury could establish bad faith simply by inferring that a union was motivated to benefit a group of employees represented by another organization at the expense of its own bargaining unit if the two groups had interests adverse to each other at the time the union was seeking to expand its representation to the other group. This view also appears to be reflected in the Court's evaluation of the proof required to establish bad faith motivation in this case.

This position is in tension, however, with the view, expressed by the Supreme Court, that, when plaintiffs, as in the present case, claim the union has engaged in bad faith in the collective bargaining arena, courts owe a high degree of deference to the union's decisions, and plaintiffs, to withstand a summary judgment motion, must therefore present "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore*, 375 U.S. 335, 348 (1964). The apparent opposition between these viewpoints is not academic, but has a material effect in the present case because Plaintiffs' case that ALPA was motivated to favor

the American pilots over the TWA pilots was built almost entirely, if not entirely, on the inference that Plaintiffs argued could be drawn from the evidence that ALPA sought to expand its representation to the American pilots.[1]

The second issue that would benefit from interlocutory review, also material to the request for certification, is the question of causation. Specifically, the question is whether plaintiffs claiming bad faith union conduct can avoid summary judgment without showing that they could prove to a reasonable jury that the union's conduct would have been different in the absence of such motivation or that the union conduct (as opposed to conduct by others) caused them harm. That is, did the union's conduct put the plaintiffs in a worse position than they would have been without that conduct?

The complexity of this issue is evident in the December 17 Opinion. The Court observed on the one hand that a bad faith DFR violation can stand "'only if the breach directly causes damages to an individual or group to whom the duty is owed.'" Opinion at 13 (quoting *Deboles v. Trans World Airlines*, 552 F.2d 1005, 1019 (3d Cir. 1977)); *see also Spellacy v. Air Line Pilots Ass'n*, 156 F.3d 120, 130 (2d Cir. 1998) (requiring that plaintiffs demonstrate that the union's bad faith conduct "caused their injury"). On the other hand, however, the Court determined that Plaintiffs could avoid summary judgment "with respect to allegations of bad faith," Opinion at 13, without regard to whether the actions Plaintiffs say ALPA should have taken but did not take would have made a difference to the TWA pilots. *Id.* at 26. ALPA

[1]For purposes of this motion, ALPA need not contest that its efforts to represent the American pilots continued during American's acquisition of TWA. In ALPA's view such a goal is not a "conflict" but rather an expression of the members' desire to strengthen their union. If the case goes to trial, and if the point is relevant, ALPA will certainly contest that it was actively pursuing that goal at the time of its decisions in the TWA matter. As ALPA showed in its opening summary judgment brief, at 24-33, Plaintiffs knew that the Allied Pilots Association ("APA") opposed any consideration of re-affiliation because ALPA Merger Policy gives member pilot groups the right to arbitrate the integration of seniority lists. This is one of the reasons no effort to organize the American Airlines pilots to re-join ALPA could ever have succeeded while the seniority integration was proceeding.

suggests that this case would also benefit from a resolution of the apparent conflict between these respective points of view.

ALPA submits that resolution of these two pivotal issues under 28 U.S.C. §1292(b) would serve the interests of the Court and the parties. We therefore ask that the Court permit the parties to raise these two key issues for review at this time by the Court of Appeals.

I. The Standard for the Court to Certify Its Order for an Interlocutory Appeal

As the Third Circuit has explained, "Section 1292(b) was the result of dissatisfaction with the prolongation of litigation and with harm to litigants uncorrectable on appeal from a final judgment which sometimes resulted from strict application of the federal final judgment rule." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 753 (3d Cir. 1974) (en banc). In order to justify an interlocutory appeal pursuant to §1292(b), the Court must find "(1) that the order at issue involves a controlling issue of law, which if erroneously decided, would result in reversible error on final appeal, (2) that there is substantial ground for difference of opinion about the resolution of the issue, and (3) that an immediate appeal will materially advance the ultimate termination of litigation." *Viking Yacht Co. v. Composites One L.L.C.*, No. 05-538 (JEI/JS), 2009 WL 1683991, at *1 (D.N.J. June 15, 2009) (quoting *Levine v. United Healthcare Corp.*, 285 F. Supp. 2d 552, 556-57 (D.N.J. 2003)).[2] ALPA seeks to demonstrate below that the Court's December 17 Order satisfies these three criteria for the Court to grant a §1292(b) certificate. *See, e.g.*, *Levine*, 285 F. Supp. 2d at 566-67; *Pub. Interest Research Group of N. J., Inc. v. Hercules, Inc.*, 830 F. Supp. 1549, 1554 (D.N.J. 1993); *United States v. 92 Buena Vista Ave.*, 742 F. Supp. 189, 191 (D.N.J. 1990) (authorizing interlocutory review of "the thorny and

[2] The terms of §1292(b) permit a party to petition the appellate court for review of an interlocutory order when the district court certifies that it "is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

controlling legal issues posed by this case").

II. This Court Should Certify the Key Issues in its December 17 Order

A. "Controlling Questions of Law"

The two issues identified above both "involve a 'controlling question of law,'" *Hercules, Inc.*, 830 F. Supp. at 1554, and each satisfies the statutory test because it presents purely a legal issue, determining liability in this case, rather than an issue of fact, an exercise of judicial discretion, or a mixed question of fact and law. If the case were to proceed to trial without an interlocutory appeal, a verdict adverse to ALPA would be subject to reversal if the Third Circuit later determines that these issues were erroneously decided.

An interlocutory appeal may result in an appellate ruling that ALPA is entitled to summary judgment in its favor. Or, if a trial remains necessary, the Third Circuit's clarification of the issues could result in different evidentiary rulings and jury instructions, as we discuss in Point II.C below. Thus, not only are these issues important to the proper handling of the case, but they are controlling issues, "which if erroneously decided, would result in reversible error on final appeal." *Viking Yacht Co.*, 2009 WL 1683991, at *1.[3]

B. "Substantial Ground for Difference of Opinion"

As U.S. District Judge Louis H. Pollak explained, "It is the duty of the district judge faced with a motion for certification to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a *substantial* ground for dispute." *Max Daetwyler Corp. v. R. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983). This Court's Opinion recognizes that the issues in question are at the very least debatable, stating, at 15, "[I]t is not entirely clear, as a legal matter, what conduct

[3] The Third Circuit has held that "controlling" means "serious to the conduct of the litigation, either practically or legally." *Katz*, 496 F.2d at 755 (citations omitted). The court added, "And on the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor." *Id.*

constitutes a bad faith breach of a union's duty of fair representation." The Court discusses the differing approaches taken on this issue in various courts, and concludes, at 16: "There is no single standard by which to evaluate claims of bad [faith] breaches of DFRs." Accordingly, we submit that this prong of the §1292(b) test is met.

1. <u>The Standard for Determining Bad Faith.</u>

This case unfolded in what seems at first to be a unique context, but on examination the context is not unusual: ALPA, a national union for airline pilots since its inception in the 1930s, represented the pilots of several dozen airlines and had as a legitimate union goal the representation of all commercial airline pilots. That goal was established by the ALPA Board of Directors, made up of the elected representatives (the members of the MECs) of all those airlines (including the TWA MEC). Opinion at 3. This situation was not unique to this case, or to ALPA, but is generally applicable to unions that represent multiple units across various employers and make a trade union judgment that representing more employee units in an industry will strengthen their collective bargaining position.

As the bargaining representative for the TWA pilots, ALPA, acting through its governance structure, was legally authorized to make decisions on behalf of that pilot group with respect to the existing collective bargaining agreement. And, under the ALPA governance structure, the consent of the TWA MEC—TWA pilots elected by the TWA membership—was required in order to renegotiate the TWA-ALPA collective bargaining agreement. Thus, the TWA MEC members—as part of a national organization—participated in determining ALPA national policy goals and—through their own MEC—made decisions on renegotiation of the agreement covering the TWA pilot group.

It was this specific situation that gave rise to the first of the two determinative legal

issues with which the Court and the parties have grappled from the beginning of this case. This issue is: whether a fact finder can infer that in acting for and advising the TWA pilots ALPA was motivated to subordinate their interests to those of the American pilots just because at the same time ALPA had a national goal to represent all commercial airline pilots, including the American pilots, or whether more evidence was required, and, if so, how much more?

In an interlocutory appeal regarding this issue, ALPA would ask the Court of Appeals to determine that the same legal and evidentiary standard applies to claims of bad faith motivation in this situation as in all other situations facing a union. This is the standard adopted by the Supreme Court in *Humphrey*, 375 U.S. at 348, requiring "substantial evidence of fraud, deceitful action or dishonest conduct" in order to establish bad faith.

The *Humphrey* standard is an application of the well-settled rule that courts and juries are to treat union collective bargaining decisions with a high degree of deference—a requirement in turn born of the heavy responsibilities placed on unions as democratic membership organizations. Like ALPA, such organizations often have governing structures extending from the national level to the employee unit level, and their responsibilities require them to function, and to make a wide variety of decisions, often under great pressure, in complicated and difficult circumstances. Thus, as the Supreme Court has stressed, "Any substantive examination of a union's performance . . . must be *highly deferential*, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991) (emphasis added). As a result, "the relationship between the courts and labor unions is similar to that between the courts and the legislature." *Id.*

This requirement of judicial deference applies to bad faith claims as well as other DFR

claims. *Id.* at 77 (holding that tripartite standard applied to all union representation activity). The Fifth Circuit in *O'Neill*, on remand from the Supreme Court, affirmed summary judgment in favor of ALPA on the plaintiffs' bad faith claim, holding that "'there must be a demanding standard for measuring'" such claims. *O'Neill v. Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1202 (5th Cir. 1991) (quoting *Swatts v. United Steelworkers,* 808 F.2d 1221, 1225 (7th Cir. 1986)).[4]

Although this Court has recognized the requirement for deference, Opinion at 17 (quoting *O'Neill*), the Court's decision nonetheless presents the question whether a lower degree of deference is applicable where, as here, the union "is accused of favoring an outside group of pilots, represented by a rival union." Opinion at 19. Thus, the decision raises the question whether to apply the test for deference in *Humphrey* and *O'Neill* or whether to apply tests drawn from "other areas of the law, legal professional conduct and honest services wire and mail fraud." *Id.*

This contested question presents a controlling issue of law because the distinction between standard DFR law governing labor union conduct and the rules governing lawyers or the honest services requirement is of controlling significance in the present case. On the one hand, a requirement to come forward with "substantial evidence" of ALPA's improper motivation to favor the American pilots over the TWA pilots would most likely lead to

[4] Likewise upholding the applicability of *O'Neill*'s "highly deferential" standard, even in the face of allegations of bad faith, is *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1532 (7th Cir. 1992). We respectfully submit that the decision in *Ramey v. Int'l Ass'n of Machinists,* 378 F.3d 269, 277 (2d Cir. 2004), does not conflict with *Rakestraw*, notwithstanding the Court's discussion of the decision in its Opinion at 18 n.15, nor does the *Ramey* decision support the denial of summary judgment in the instant case. In *Ramey,* the Second Circuit upheld the jury verdict finding that IAM had committed a DFR breach on the ground that "IAM revoked plaintiffs' seniority because it was hostile toward them as a result of their association with AMFA." *Id.* In dovetailing the USAir and Trump Shuttle seniority lists, IAM had used the Trump mechanics' Trump Shuttle dates of hire instead of their earlier dates of hire with Eastern Air Lines. Thus, unlike in the present case, IAM retaliated against the Trump mechanics in connection with the USAir-Trump Shuttle seniority integration because they had voted IAM out when they transitioned from Eastern to the Trump Shuttle. Here, by contrast, ALPA did not combine the American and TWA seniority lists and is not alleged to have retaliated against the TWA pilots.

summary judgment for ALPA, whereas, as the Court observed, the application of these other areas of the law might permit a fact finder to find that the union "could not completely fulfill its duty to fairly represent Plaintiffs" just because it presumably also sought to represent another group having "adverse interests." Opinion at 22. Thus, under an approach relevant to the provision of legal services, a union's refusal to entertain a lawyer's litigation strategy could be used to prevent summary judgment merely because of an inference of suspicion as to the reasons for the union's decisions—without regard to the merits of the decision and without any evidence that the union made the decision for reasons other than those stated, in other words, as the Court put it, "regardless of why." *Id.* at 26.

So, too, under a rule of heightened scrutiny applicable to lawyers or the honest services statute, 18 U.S.C. §1346, a court could permit a jury to find that the union's decisions and statements reflected an intent to favor an outside group simply by permitting it to find that the union was taking steps to attempt to represent that group, *e.g.*, Opinion at 25 (discussing evidence that ALPA continued to seek representation of the American pilots) or that the union leadership wished the represented group to be "reasonable" in its approach to seniority integration with the much stronger outside group. *Id.* These potential findings—even if permitted by the record[5]—supply no basis for a finding that the union was motivated to harm

[5]ALPA disputes that it continued to actively seek representation of the American pilots after the announcement of the acquisition because such an effort was not practical, but the point of this motion is that, even if ALPA did continue to do so, that is not a basis for inferring improper motivation in its representation of the TWA pilots. Still, it is important to note that the evidence cited in the Opinion, at 25, does not support a finding of continued efforts to represent the American pilots or of any intent to harm the TWA pilots. First, nothing was expected to come of the January 2001 letter from ALPA's general manager offering to reimburse APA's expenses, no response was ever received, and "with the announcement of the TWA merger we knew that any further progress with APA was a dead issue." Att. 106: Johnson I: 116, 125. Similarly, Duane Woerth's briefings to the ALPA Executive Council reported on the implementation of the October 2000 ALPA Board of Directors Unity Resolution, but no evidence contradicts Woerth's testimony that the only progress in organizing that he reported—and the only organizing activities that were underway—were at Continental, FedEx and Air Canada, not at American. Att. 21: Woerth 60-64. Lastly, as noted in ALPA's reply brief at 25 n.9, not a shred of *admissible evidence* supports Plaintiffs' theory that Woerth told the APA Board of Directors on April 5, 2001, that the TWA pilots needed to "get real." American Airlines pilot Robert Reifsnyder denied any recollection of writing the electronic bulletin board post in question and

its own represented group in favor of the outside group, *unless* the applicable rule of law permits the fact finder to infer improper motivation simply from the fact that the union desired to represent all of the employees in the industry, in accordance with the legitimate goal declared by its elected representatives.

DFR law allows unions great leeway in choosing the proper approach to negotiations and "'[m]ere disagreements over tactics and strategy' will not support a claim for breach of the duty of fair representation." *Morales v. P.F. Labs, Inc.*, No. 00-150 (JCL), 2000 WL 33678049, at *2 (D.N.J. Aug. 3, 2000) (quoting *De Fillippes v. Star Ledger*, 872 F. Supp. 138, 141 (D.N.J. 1994)). Plaintiffs have presented no evidence to support a finding that a disagreement over negotiation or litigation strategies represents bad faith, and the fact that ALPA sought to expand representation does not fill the evidentiary gap. If ALPA's motive was improper solely because of its organizing goal, all of its decisions would be suspect, regardless of whether ALPA supported Plaintiffs' proposed litigation. The result of this Court's analysis in the case at bar is that ALPA's decisions regarding "tactics and strategy" are given no deference, as the Court bars summary judgment in ALPA's favor *even if ALPA indisputably made reasonable choices in bargaining strategy*.

The Opinion appears to prefer the standards for deciding ethics cases against lawyers or cases under the honest services statute, rather than the normal "highly deferential" DFR standard, *O'Neill*, 499 at 78, on the ground that the TWA situation did not involve dealing with

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denied any recollection of what Woerth said to the APA Board of Directors, Opinion at 26 n.19, thus rendering the post inadmissible hearsay, unavailable for use in opposing a summary judgment motion. *See Walker v. Wayne County, Iowa*, 850 F.2d 433, 434-35 (8th Cir. 1988) (unsworn, non-verbatim statements in police interview reports were hearsay, inadmissible and unusable in connection with summary judgment motion); *Philbin v. Trans Union Corp.*, 101 F.3d 957, 961 n.1 (3d Cir. 1996) (inadmissible hearsay "could not be considered on a motion for summary judgment"); *Edwards v. Schlumberger-Well Servs.*, 984 F. Supp. 264, 275 (D.N.J. 1997) (same). The DFW Domicile News is likewise inadmissible hearsay, unusable on summary judgment. Pl. Ex. 99. These three isolated and unrelated incidents cannot be construed, either singly or collectively, as "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey*, 375 U.S. at 348.

competing interests of members of the same union, Opinion at 18, but rather involved a claim that the union subordinated the interests of the represented group to those of the APA-represented American pilot group. This view presents not only a controlling issue, as discussed above, but also a novel one—in that ALPA is unaware of any other DFR case in which the standard rule of deference was supplanted by a rule that tested the union's performance in making collective bargaining decisions by applying the standards of review applicable to attorney conduct or conduct challenged under 18 U.S.C. §1346.

Maintaining the normal DFR standard for judicial deference in the situation presented by this case is entirely reasonable. Lawyers and labor unions engage in tasks and perform their work very differently. The circumstance of the present case is itself not unusual for a labor union, and effectively illustrates this difference. Unlike lawyers' professional obligations, it is part of the everyday life of national and international labor unions like ALPA not only to represent multiple groups of employees with often-competing interests but also constantly to seek to extend representation to other groups of employees even though they may have competing interests. In the collective bargaining context, the duty of fair representation is carried out, not by establishing a separate rule for cases such as this one, but by applying the overarching principle that the union owes a duty of fair representation to the employees in each unit it represents, regardless of the fact that it also represents employees in other units or is simultaneously seeking to extend its representation to units represented by another organization or that have no representation.

ALPA thus respectfully submits that the requirement of deference enunciated by the Supreme Court, *O'Neill*, 499 at 78, is properly applicable here and that the level of evidence required to prove a bad faith DFR violation in a context like the present case should be no

different than in any other situation facing a union. Put another way, the existence of potentially competing interests in a case involving employees represented by two different unions should not be permitted to supply the missing evidence of improper motivation that would be required if both employee groups were represented by the same union. Rather, Plaintiffs should not be able to establish a DFR bad faith breach unless they produce "substantial evidence of fraud, deceitful action or dishonest conduct," *Humphrey*, 375 U.S. at 348—a showing that has not been made on the record in this case. An interlocutory appeal can resolve the issue and either end the dispute or provide necessary guidance for trial.

2. Causation.

The second issue that would benefit from interlocutory review is the question of causation. Here, too, comparing the harm alleged in the case at bar to the harm in lawyer-client conflict of interest cases or honest services fraud cases produces a causation test not applicable in DFR law. Opinion at 20. The well-settled DFR principle is that a bad faith DFR violation can stand "'only if the breach directly causes damages to an individual or group to whom the duty is owed.'" *Id.* at 13 (quoting *Deboles,* 552 F.2d at 1019); *see also Spellacy*, 156 F.3d at 126 (requiring that plaintiffs demonstrate that the union's bad faith conduct "caused their injury"); *Ackley v. W. Conference of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992); *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 578-81 (8th Cir. 1981).

Here, however, Plaintiffs provided no evidence that ALPA's presumed interest in representing the American pilots altered the advice of the lawyers and other professionals attending the TWA MEC meeting on April 1-2, 2001, ALPA's decisions concerning litigation strategies, or any other aspect of ALPA's conduct. Nor did Plaintiffs provide any evidence that attempting the litigation strategies they now support would have preserved the seniority

integration requirements of the TWA collective bargaining agreement or improved the TWA pilots' seniority integration as compared to the one APA and American imposed on them.

Yet, the Opinion appears to suggest that such a showing is unnecessary in the present kind of bad faith case because of the analogy to legal malpractice or honest services cases. The Court states, for example, that "the real question is whether ALPA made its decisions, right or wrong, in good faith." Opinion at 21. Certainly, although the Court discusses "the harm caused by a breach of the duty of undivided loyalty," *id.* at 20, it does not identify any evidence that Plaintiffs were harmed in the collective bargaining context by ALPA's actions, as opposed to the actions of APA and American. Again, ALPA is unaware of any DFR case that declines to require proof of causation based on a claim that the union sought to subordinate the interests of represented employees to those of employees not represented, or in any other context, and this too presents a novel and controlling issue of law.

We respectfully suggest that this issue, too, would benefit from immediate review. On appeal, ALPA would argue that the absence from the record of any evidence that ALPA's conduct would have been different if it were not for the alleged conflict of interest or that ALPA's conduct actually injured Plaintiffs entitles ALPA to summary judgment in its favor under such decisions as *Deboles* and *Spellacy*. Hence, if the traditional DFR causation standard is applied, in contrast to a standard drawn from lawyer-client relationships, the Court of Appeals might well decide that ALPA is entitled to summary judgment or, at the least, help clarify the future course of the case.

C. "May Materially Advance the Ultimate Termination of the Litigation"

If the Third Circuit agrees with ALPA, it may direct the District Court to grant summary judgment. If it does not, it will at least clarify the applicable legal standard. In either

event, the appeal will expedite the termination of this case.

Without such appellate court guidance, the case may need to be retried, with a tremendous waste of judicial and legal resources, if the evidence admitted or the jury instructions are reversed on review at some later stage of the proceedings. For example, Plaintiffs may argue that the Court should exclude testimony concerning the reasonableness of the decisions about bargaining tactics on the theory that only ALPA's intent matters. *See* Opinion at 20-21. Evidentiary rulings and jury instructions premised on such an approach would subject a jury verdict adverse to ALPA to reversal on appeal if the Third Circuit were subsequently to uphold ALPA's view of the proper legal standard for bad faith DFR breaches.

The principal goal of §1292(b) was to avoid the need for retrying a case when an interlocutory appeal could resolve a controlling legal question, as here. *Katz*, 496 F.2d at 755 ("[T]he clear intention of the sponsors [was] to avoid a wasted trial."); *see also Hercules, Inc.*, 830 F. Supp. at 1555 (certifying interlocutory appeal in order to "save the time and resources of this court and reduce the parties' litigation expenses"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1244 (E.D. Pa. 1980) ("[A] retrial of a major portion of the litigation would be an enormous waste of the resources of the judicial system, as well as the parties, witnesses, lawyers, jury, and everyone else involved in the litigation."). Here, as in *Abrams v. United Steelworkers of Am., AFL-CIO-CLC*, No. 1:07-CV-181, 2009 WL 700699, at *2 (S.D. Ohio Mar. 13, 2009),

> this is not a suit that will be tried and disposed of on its merits in a few days. To the contrary, the time and resources required to litigate this case . . . will be substantial. Thus, an interlocutory appeal "may avoid protracted and expensive litigation," which was Congress' intention in enacting §1292(b).

The bifurcation order would exacerbate the potential waste of judicial and legal resources absent an interlocutory appeal in this case. Without certification, there will be no appealable

order on the pivotal issues until after both a jury verdict finding liability and the damages phase of the case, adding extensive discovery and trial time on the complex issues associated with damages. Determining the measure of damages caused by APA's and American's imposition of the existing combined seniority list would require substantial and complex evidence and analysis—determining, if at all possible, a different merged seniority list, comparing that list to the existing list in use at American, and evaluating the effects of external events, including the September 11 terrorist attacks, the recessions, the SARS crisis and the oil price increases that have devastated airline industry employment during the last decade. All of these calculations, moreover, would rest on a determination, contrary to the TWA MEC's decision reached on April 2, 2001, that proposed litigation schemes would somehow have prevented TWA's liquidation or its successful abrogation of the TWA pilots' collective bargaining agreement under Section 1113 of the Bankruptcy Code. As well, any damages calculations greater than zero would vary from pilot to pilot, further adding to the complications involved.

Pursuing this case through trial to final judgment would thus constitute a major undertaking, impose a substantial burden on judicial resources and prove time-consuming and expensive for the parties. This Court should authorize the parties to settle the key legal issues at the Third Circuit now.

CONCLUSION

We respectfully request the Court to amend its Order of December 17, 2009, denying summary judgment, to certify the Order for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

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