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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: AMR CORPORATION, et al., Debtor.	Case No. 11-15463 Chapter 11

JOHN KRAKOWSKI, KEVIN HORNER and M. ALICIA SIKES,

Plaintiffs,

v.

Adv. Proceeding No. 16-01138-SHL

AMERICAN AIRLINES, INC.,

and

ALLIED PILOTS ASSOCIATION,

Defendants.

JURY TRIAL DEMANDED

PLAINTIFFS' COMBINED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS [DOC. NOS. 13 and 15]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

For their combined response to Defendants Allied Pilots Association ("APA") and American Airlines, Inc.'s ("American") Motions to Dismiss, Plaintiffs state:

This action stems from a labor arbitration conducted in 2013 between APA and American to determine what job protections for the former TWA pilots should replace the protections they had in St. Louis before American's 1113 motion was granted, and Supplement CC was terminated. The resulting Award created few protections for the former TWA pilots, and in *Krakowski I,* Plaintiffs seek to vacate the Award because it was tainted by APA's breach of its fiduciary duty. Discovery in that case revealed a previously unknown additional basis to vacate the Award, namely that one of the arbitrators had extensive private communications with one of American's key witnesses, and even formalized an undisclosed business relationship with the arbitrator **while the arbitration was pending**. Plaintiffs claim these undisclosed sources of bias require the Award be vacated.

APA and American have moved to dismiss the Complaint, each stating three grounds in support: (1) that Plaintiffs lack standing to challenge the Award; (2) the claim is barred by the statute of limitations; and (3) the Complaint fails to state a claim. None of Defendants' arguments have merit. Plaintiffs have standing under the Railway Labor Act ("RLA"), since it explicitly grants standing to employees aggrieved by arbitration awards. Plaintiffs' claim is timely, since the ten day statute of limitations was tolled until Plaintiffs learned the extent of the arbitrator's bias, which was June 15, 2016. And Plaintiffs state a cause of action, as they allege arbitrator bias and *ex parte* communications deprived them of due process.

I. FACTUAL BACKGROUND

The foregoing facts come from Plaintiffs' Complaint to Vacate Arbitration Award ("Complaint").

The 2013 collective bargaining agreement between Defendants included a side letter agreement known as "LOA 12-05" by which they agreed that American will close its St. Louis pilot base, and the replacement rights to be afforded former TWA pilots would be submitted to arbitration pursuant to 45 U.S.C. § 157 (Section 7 of the RLA). *Complaint*, para. 22.

American and APA agreed that a panel of three arbitrators would hear the LOA 12-05 arbitration, and selected Stephen Goldberg ("Goldberg") as one of the three arbitrators. Goldberg is the president and founder of Mediation Research & Education Project, Inc. ("MREP"), which is an arbitration and mediation service he formed in 1980. MREP focuses on labor/management disputes, and consists of more than 60 member arbitrators and mediators. *Id.*, paras. 25-27.

Mark Burdette was one of of American's key witnesses at the arbitration. From the day Goldberg was selected to be an arbitrator, through the day the Award was entered, he and Burdette communicated privately, and and on such topics as Goldberg's MREP business, and the arbitration itself. In particular:

> A. On January 10, 2013, Burdette e-mailed Goldberg congratulating him on his appointment to the panel and informed him that he (Burdette) would be a likely participant in the case. Goldberg responded with, "Thx for the note, but I'd rather see you there as a member of the arbitration panel than as a witness. One of these days..."
>
> B. On March 21, 2013, less than two weeks before opening briefs were due, Goldberg and Burdette had another email conversation. Among other things, Burdette said to Goldberg, "You mentioned sometime back about training

me and putting me on the MREP panel. Is that still a possibility?" Goldberg and Burdette then discussed the logistics of Burdette going to Chicago to receive MREP training from Goldberg.

C. In their March 21 conversation, Goldberg and Burdette also discussed Edgar James, APA's attorney, and how James could refer business to Goldberg. Burdette commented that, "I think Ed James would gladly recommend you [for mediation work to a lawyer for U.S. Airways]," to which Goldberg responded, "By the way, I know that Ed is a great fan of yours...He told me he thought you should be Senior V-P, HR (to which I wholeheartedly agreed)."

D. Shortly after the arbitration began, Burdette followed through on becoming an MREP member. He went to Chicago in April 2013 for MREP training with Goldberg, and then became a member of Goldberg's company, all while the arbitration was pending.

E. On July 12, 2013, ten days before the arbitrators issued their initial Award, Burdette sent an e-mail to Goldberg. In it he said, among other things, "I will be sending a voluntary contribution to MREP as suggested in the annual report." Goldberg responded, "A contribution would be appreciated, but maybe you had better wait until you have some income!"

F. After Burdette offered to give money to Goldberg's company, the two then immediately began discussing the upcoming Award. In the conversation, Burdette mentioned that he had prepared a mock award that he was eager to share with Goldberg after the release of the Award.

G. On July 22, 2013, the day the arbitrators issued the initial Award, but two months before their Ruling on final Contract Language, Burdette shared his mock award with Goldberg. In his response on July 23, Goldberg said, "Looks to me like you're as good an arbitrator as we are...maybe better!" Immediately after that, Goldberg explained his reasoning on one of the key points in the Award, and that paragraph was bookended by a "CONFIDENTIAL" warning at the beginning and a "CONFIDENTIAL: WHAT IS IN THIS PARAGRAPH IS FOR YOUR EYES ONLY" warning at the end. Burdette then responded with, "Understood about confidentiality. Appreciate your sharing the logic, but it goes no further."

Id, paras. 47-54.

Goldberg never disclosed any of these communications to the participants in the arbitration, which included an APA committee of former TWA pilots, and did not disclose

that Burdette became a member of his company in the midst of the arbitration. *Id.*, para. 57.

Goldberg was not the only arbitrator on the panel that had *ex parte* communications with one of American's key members to the arbitration. Tom Reinert ("Reinert"), American's lawyer in the arbitration, spoke privately with arbitrator Richard Bloch ("Bloch"). Bloch proposed a possible settlement to Reinert and asked him to pass it along to APA. And in a May 17, 2013 e-mail, Reinert asked Bloch to call him, which phone call was a follow-up to the initial conversation. *Id.*, paras. 58-59.

The American Arbitration Association, the National Academy of Arbitrators, and the Federal Mediation and Conciliation Service have jointly promulgated standards of conduct for labor arbitrators. These standards are found in the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" (the "Code"). This Code is the industry standard to which labor arbitrators are held, and Section 1(C)(3) of the Code provides: "An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality." *Id.*, paras. 35, 36.

Section 2(D)(1) of the Code further provides: "An arbitrator must make every reasonable effort to conform to arrangements...mutually desired by the parties regarding communications and personal relationships with the parties." *Id.*, para. 37. Defendants' Arbitration Agreement outlined the protocol for the LOA 12-05 arbitration, and expressly limited *ex parte* conversations with any single arbitrator. The Arbitration Agreement stated, "The Board [defined as all three arbitrators] may conduct informal *ex parte*

discussions to the extent it deems such discussions useful in an attempt to obtain a voluntary resolution of the dispute." *Id.*, paras. 31-33.

Arbitrators Goldberg and Bloch violated the Code and Defendants' Arbitration Agreement by their *ex parte* communications with one of American's key witnesses and its lawyer. And their resulting Award most closely followed American's proposal, which protected few former TWA pilots' jobs. *Id.*, paras. 38-42. As a result, the vast majority of former TWA pilots lost their jobs in St. Louis, and because of their continued poor seniority, most of them are unable to hold equivalent jobs at any of American's other bases. These pilots now sit on reserve, and will do so for many years. *Id.*, para. 46.

II. ARGUMENT

A. Legal Standard

In ruling on a Rule 12(b)(6) motion to dismiss, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The Court must also "draw all reasonable inferences in plaintiff's favor." *Hunt v. Enzo Biochem, Inc.*, 530 F.Supp. 2d 580, 591 (S.D.N.Y. 2008). The inquiry "is not whether the complaint states a strong case but whether the complainant is entitled to offer evidence to support the claim." *EEOC v. Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 2012 U.S. Dist. LEXIS 115947 at *15 (S.D.N.Y. 2012)(internal quotations omitted). "The possibility that recovery may appear remote and unlikely on the face of the pleading is immaterial." *Id.*

B. Plaintiffs Have Standing Under the RLA.

Contrary to Defendants' assertions, Plaintiffs have standing under the RLA to challenge the Award. The only standing provision included in the RLA explicitly grants standing to employees or groups of employees such as Plaintiffs, and none of the cases Defendants cite are controlling.

The LOA 12-05 case was an "interest" arbitration conducted pursuant to Section 7 of the RLA, 45 U.S.C. § 157. Section 9 of the RLA, 45 U.S.C. § 159, authorizes challenges to the awards entered in Section 7 cases, but does not contain a standing provision. Plaintiffs could not find a case where a court analyzed standing issues under Sections 7 or 9, regardless of the outcome, but Section 3 of the RLA, 45 U.S.C. § 153, which deals with challenges to awards entered in grievance arbitrations, contains a clear standing provision. It provides that:

> if any employee or **group of employees**, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or **group of employees** or carrier may file...a petition for review of the division's order.

45 U.S.C. § 153(q) (emphasis supplied). Under this provision, Plaintiffs would clearly have standing, since they are a "group of employees" who were "aggrieved by...the terms of an award."

Since Sections 7 and 9 of the RLA are silent on the issue of standing, the Court should apply the standing provision in Section 3 to this case. *Brotherhood of Locomotive Engineers v. Atchison, T. & S. F. R. Co.*, 768 F.2d 914 (7th Cir. 1985) is particularly instructive on this point. In *Atchison*, an employer and union conducted an

interest arbitration pursuant to Section 7, and the union then sought to vacate the award pursuant to Section 9. *Id.* at 918. The Seventh Circuit had to first determine the applicable standard of review because Sections 7 and 9 had no provision for the standard of review at the time. Section 3, however, had such a provision, and the court thus held that absent a controlling provision, the standards in Section 3 should apply. *Id.* at 921. The court reasoned that because

> most of the cases deal with review of decisions of the National Railroad Adjustment Board, which is a permanent arbitral tribunal created by the Act, and although the statute does not contain a standard for judicial review of decisions of Public Law Boards [conducted pursuant to Section 7], the optional method of dispute resolution in this case, courts assume the standard is the same. This must be right... Probably, as we are about to see, the scope of federal judicial review of arbitration is the same, regardless of the statute; it must also be the same within the statute. The Railway Labor Act is a somewhat underdeveloped statute; much has been left to inference.

Id. (internal citations omitted).

This same reasoning should apply here. There is no directly controlling standing provision for this case, so the Court should apply the next most applicable provision, which is the standing provision in a different section of the same statute. Therefore, like the court in *Atchison*, the Court should apply the corresponding provision in Section 3. This would be 45 U.S.C. § 153(q), which expressly gives Plaintiffs standing.

In addition to the clear language of 45 U.S.C. § 153(q), at least one court has previously found that non-parties to a labor arbitration carried out pursuant to the RLA have standing to dispute the award. In *McQuestion v. New Jersey Transit Rail Operations*, 892 F.2d 352 (3rd Cir. 1990), two employees, who were not parties to an arbitration brought by their union to adjudicate their grievances, challenged the awards

in their own names. *Id.* at 353. The Third Circuit, interpreting 45 U.S.C. § 153(q), found that even though the employees were not parties to the arbitration, due to "the literal wording of the statute, the [employees] did have standing to seek review in the district court." *Id.* at 354.

APA tries to distinguish this case by claiming that the Third Circuit was creating and applying a "uniquely individual grievance" exception. This is wrong. The court only mentions "uniquely individual grievance" once in its decision, and in no way carves it out as an exception to any standing rule. The bulk of the opinion is focused on the literal meaning of the statute, which supports Plaintiffs' standing here. *See id.* at 354 ("thus, confining ourselves to the literal wording of the statute, the appellants did have standing," "we do not believe this argument of the railroad requires us to deviate from the literal language of the review statute," "we do not believe that the railroad's position can prevail in light of the clear statutory language," "the railroad again fails to recognize that the appellants fall within the literal language of (q).").

In addition to emphasizing the literal language of the RLA, the court in *McQuestion* espoused reasoning that further supports Plaintiffs' standing in this case. Twice it observes that the employees were the "true" or "real parties in interest in [the arbitration] proceedings." *Id.* This is completely analogous to the case here. The LOA 12-05 arbitration did not adjudicate any rights of the APA; it adjudicated the rights of the pilots represented by APA, including Plaintiffs and the other former TWA pilots. Like the employees in *McQuestion,* they were "real parties in interest" in the arbitration, and as a result, Plaintiffs have standing under the RLA to challenge the Award.

Defendants cite several cases for the proposition that an employee (or group of employees) cannot bring a challenge to an arbitration where the union and company were the sole parties. Not only does this prospect fly in the face of the RLA's unambiguous language, none of the cases Defendants cite are applicable here, as virtually all of them are decided under statutes or collective bargaining agreements that specifically limit the parties with standing.

The majority of cases cited by Defendants on this issue were decided under the Federal Arbitration Act (FAA). *See Katir v. Columbia Univ.*, 821 F.Supp. 900, 901 (S.D.N.Y. 1993)("the Arbitration Act, 9 U.S.C. § 1 *et seq.* governs Katir's claim") *aff'm Katir v. Columbia Univ.*, 15 F.3d 23 (2d Cir. 1994); *Shait v. The Millennium Broadway Hotel*, 2001 U.S. Dist. LEXIS 6575 at *26 (S.D.N.Y. 2001)("Plaintiffs seek to vacate the awards...pursuant to the Federal Arbitration Act."); *Duffy v. Legal Aid Soc'y*, 2013 U.S. Dist. LEXIS 19456 at *6 (S.D.N.Y. 2013)("the petition is considered under the Federal Arbitration Act"); *U.S. Postal Serv. v. Am. Postal Workers Union*, 564 F.Supp. 545, 546 (S.D.N.Y. 1983)("This action is now before the court...pursuant to 9 U.S.C. section 11); *Johnson v. Am. Arbitration Ass'n*, 1999 U.S. Dist. LEXIS 5319 at *3 (S.D.N.Y. 1999)("Plaintiffs...[allege violations of] the Federal Arbitration Act."). APA also cites *Smith v. Wilson*, 1997 U.S. Dist. LEXIS 20548 (S.D.N.Y. 1997), which arose under the Labor Management Relations Act. Challenges to awards under the LMRA, are "considered under the Federal Arbitration Act." *Duffy*, 2013 U.S. Dist. LEXIS 19456 at *6.[1]

[1] APA also cites *Anderson v. Norfolk & W.R. Co.*, 773 F.2d 880 (7th Cir. 1985). That case involved an arbitration pursuant to an agreement under the Interstate Commerce Act, which has

The Court should give no credence to any of the above cases, as the FAA has a completely different standing provision than the RLA. The FAA provides that "in any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of **any party to the arbitration.**" 9 U.S.C. § 10 (emphasis supplied). The FAA thus expressly limits standing to the parties to the arbitration, contrary to the wider net the RLA casts to include an "employee" or "group of employees." Any case decided under the FAA is simply inapplicable here.

Defendants also cite two cases decided under the RLA, *Mackenzie v. Air Line Pilots Ass'n*, 598 F. App'x 223 (5th Cir. 2014), and *Mitchell v. Cont'l Airlines, Inc.*, 481 F.3d 225 (5th Cir. 2007). But both of those cases are just as inapplicable, as the collective bargaining agreements governing those arbitrations gave the union the exclusive right to pursue claims, including claims challenging arbitration awards. *See Mitchell*, 481 F.3d at 232 ("when a **collective bargaining agreement** establishes a mandatory, binding grievance procedure and gives **the union the exclusive right** to pursue claims on behalf of aggrieved employees"); *Mackenzie*, 598 F. App'x at 226 ("When a **CBA formed pursuant to the RLA** establishes a mandatory, binding grievance procedure and vests the **union with the exclusive right** to pursue claims on behalf of aggrieved employees")(emphasis supplied).

Unlike the collective bargaining agreements in those cases, Defendants' 2013 agreement has no such limitation. In fact, Section 23(J) of the 2013 CBA (attached

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no standards of arbitral review, and *Anderson* only cites cases decided under the FAA in support of its reasoning. *Anderson* is thus inapposite.

hereto), which governs interest arbitrations, provides that "Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded ...to the employees...under the provisions of the Railway Labor Act."[2] Defendants' 2013 CBA clearly gives employees, including Plaintiffs, all of the rights under the RLA. And, as described above, those rights include standing to challenge arbitration decisions.

Plaintiffs have standing to pursue this case.

C. Plaintiffs' Claim is Timely

45 U.S.C. § 159 provides a ten-day statute of limitations for challenging arbitration awards issued pursuant to 45 U.S.C. § 157. Plaintiffs' Complaint was obviously filed more than ten days after the LOA 12-05 Award was issued, but arbitrators Goldberg and Bloch concealed their communications with American's witness (Burdette) and lawyer (Reinert).[3] As a result, Plaintiffs could not possibly have known the facts necessary to bring their claim until they took Burdette's deposition in *Krakowski I* on June 15, 2016. The statute of limitations thus tolled until that date.[4]

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[2] Although not attached to the Complaint, the Court may take judicial notice of the CBA's existence and its terms, especially in light of the fact that this Court approved the CBA. *See Nakahata v. New York Presbyterian Healthcare Sys.*, 2011 U.S. Dist. LEXIS 8585 (S.D.N.Y. 2011); *Ackerman v. Local Union 363, IBEW*, 423 F.Supp. 2d 125 (S.D.N.Y. 2006).

[3] Burdette's emails with Goldberg resided on American's email server, but there is no evidence they were shared with APA or any pilot who participated in the arbitration until they were produced in *Krakowski I*.

[4] The tenth day after June 15, 2016 was a Saturday. Plaintiffs timely filed their Complaint the following Monday, June 27.

American does not address tolling in its motion, while APA claims equitable tolling is not available under the RLA. APA is wrong. Equitable tolling is read into the RLA as a matter of law.

"[A] statute of limitations may be tolled as necessary to avoid inequitable circumstances." *Iavorski v. I.N.S.*, 232 F.3d 124, 129 (2d Cir. 2000). "This equitable doctrine is read into every federal statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). *See also Photopaint Techs., LLC v. Smartlens Corp.*, 207 F.Supp. 2d 193, 204 (S.D.N.Y. 2002); *Moll v. U.S. Life Title Ins. Co.*, 700 F.Supp. 1284, 1287 (S.D.N.Y. 1988); *Kassman v. KPMG LLP*, 2015 U.S. Dist. LEXIS 118542 at *9 (S.D.N.Y. 2015).

The Second Circuit held that the "policy" in the "Supreme Court's opinion in *Holmberg v. Armbrecht* ... is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language." *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236, 240-241 (2d Cir. 1962). *See also Moll*, 700 F.Supp. at 1287-1288 (same).[5]

The RLA does not "expressly" and "in clear and unambiguous language" preclude equitable tolling of the ten day limitations period in 45 U.S.C. § 159. Equitable

[5] In recognition of this principle, courts consider equitable tolling in RLA cases. *See Woodruff v. AMTRAK*, 2009 U.S. Dist. LEXIS 119006 (S.D.N.Y. 2009); *Lekas v. United Airlines, Inc.*, 282 F.3d 296 (4th Cir. 2002); *Marshall v. Grand Trunk Western*, 1984 U.S. App. LEXIS 14398 (6th Cir. 1984); *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment CSX Tranp. N. Lines v. CSX Tranp.*, 522 F.3d 1190 (11th Cir. 2008).

tolling must therefore be read into the statute, as mandated by the Supreme Court and the Second Circuit.[6] This defeats Defendants' statute of limitations argument.

While Defendants correctly state that a case may be dismissed when a statute of limitations defense appears on the face of the complaint, their citation to the standard of review omits the fact that a "court must deny a motion to dismiss based on the statute of limitations unless 'all assertions of the complaint, as read with required liberality, would not permit the plaintiffs to prove that this statute was tolled.'" *S. African Apartheid Litig. v. Daimler AG*, 617 F.Supp. 2d 228, 287 (S.D.N.Y. 2009), quoting *Mirman v. Berk & Michaels, P. C.*, No. 91 Civ. 8606, 1992 U.S. Dist. LEXIS 16707, 1992 WL 332238 (S.D.N.Y. Oct. 30, 1992) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980)). *See also Glick v. Berk & Michaels, P.C.*, 1991 U.S. Dist. LEXIS 10347, *23 (S.D.N.Y. July 26, 1991); *Alves v. Valeo Elec. Sys., Inc.*, 2009 U.S. Dist. LEXIS 12338, *22-23 (W.D.N.Y. 2009).

Plaintiffs' Complaint pleads substantial facts that would permit them to prove equitable tolling. And although Defendants do not even address this issue, which is their burden in supporting a statute of limitations affirmative defense, Plaintiffs will address the issue.

"Equitable tolling may be used to suspend the statute of limitations against a plaintiff who is unaware of his cause of action." *Yu G. Ke v. Saigon Grill, Inc.*, 595

[6] APA (but not American) cites *Catalano v. Brotherhood of Ry., Airlines & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 348 F.Supp. 369, 371 (S.D.N.Y. 1972) for the proposition that equitable tolling does not apply to the RLA's ten day limitations period. That court, however, cited no authority in support of its holding, and no court has followed it. Indeed, that holding ran counter to the well-established law settled by the Supreme Court and the Second Circuit that equitable tolling **must** be read into the statute. The Court should thus not follow *Catalano*. It is an erroneous decision, and not precedential.

F.Supp. 2d 240, 259 (S.D.N.Y. 2008)(internal quotations omitted). The doctrine "stops the limitations period from running until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Kronisch v. United States*, 1996 U.S. Dist. LEXIS 22194 at *26 (S.D.N.Y. 1996)(internal quotations omitted). "Equitable tolling applies as a matter of fairness where a party has been prevented in some extraordinary way from exercising his rights." *Iavorski*, 232 F.3d at 129. The doctrine applies here.

Arbitrator Goldberg did not disclose his obviously friendly and business relationship with Burdette as part of the LOA 12-05 arbitration. *Complaint*, paras. 57 and 64. Plaintiffs only learned of that relationship in the course of their discovery in *Krakowski I*. Specifically, Plaintiffs had no knowledge of the most important facts supporting this case until Burdette was deposed on June 15, 2016.[7] He therein testified to the authenticity of his emails with Goldberg, and to many other additional key facts concerning his relationship with Goldberg. *Complaint*, para. 56. For instance, Burdette testified that he traveled to Chicago to meet Goldberg for MREP training in April 2013, while the arbitration was ongoing, and he thereafter became a member of MREP. *Id.*, para. 51. Burdette also admitted that Goldberg's e-mail discussing the rationale behind the Award was typically improper, but Burdette justified it as part of his continuing MREP training. *Id.*, para. 55.

[7] American produced the Goldberg/Burdette emails on March 15, 2016 as part of a 2,300 page production. Plaintiffs served Burdette with a subpoena at his Texas home on May 13, 2016, and the deposition was then scheduled at a date mutually agreed upon by Burdette and all counsel. And while APA claims the tolling period ended in March 2016 when American produced the emails, unauthenticated hearsay is not a reasonable basis for a lawsuit. Pursuit of this lawsuit required a witness, and because arbitrators are generally immune from discovery, Burdette was the one and only witness who could testify to the emails. Securing his testimony was thus necessary before Plaintiffs could bring the case, and they did so with reasonable diligence.

Plaintiffs did not know the facts necessary to bring their claim until June 15, 2016, and under those cirumstances, it would be fundamentally unfair to bar them from bringing this claim. If nothing else, for purposes of Defendants' motions, it cannot be concluded that the "assertions of the complaint, as read with required liberality, would not permit the plaintiffs to prove that this statute was tolled.'" *S. African Apartheid Litig.*, 617 F. Supp. 2d at 287.

Defendants' statute of limitations arguments should be rejected.

D. Plaintiffs State A Claim.

Plaintiffs allege the Award should be vacated on due process grounds. While RLA Section 9 enumerates only three grounds upon which an interest arbitration award can be vacated, none of which Plaintiffs allege, the Second Circuit recognizes that "due process affords a fourth ground for judicial review." *International Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter R.R.*, 24 F.3d 369, 371 (2d Cir. 1994). *See also Shafi v. PLC British Airways and International Assoc. of Machinists and Aerospace Workers, AFL-CIO, District Lodge 100*, 22 F.3d 59, 64 (2d Cir. 1994)("an order of the NRAB or its counterparts is reviewable upon a claim that a participant was denied due process").

Defendants do not dispute that a due process violation can constitute grounds to vacate an arbitration award, they simply argue for a limited review under that ground. They cite three cases for the proposition that "due process typically requires giving each party sufficient opportunity to prepare its case...and the opportunity to call and cross-examine witnesses and to present pertinent evidence in support of its case."

Smith v. Am. Eagle Airlines, Inc. 2008 U.S. Dist. LEXIS 110368 at *14-15 (E.D.N.Y. 2008); *See also Shafi v. British Airways*, 872 F. Supp. 1178 (E.D.N.Y. 1995); *NLRB v. Wash. Heights Mental Health Council, Inc.*, 897 F.2d 1238 (2d Cir. 1990). Those fundamental rights are certainly part of due process, but the scope of due process review is significantly wider.

The Supreme Court has held that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). And in the RLA context, "bias or hostility on the part of any member of a System Board sufficient to amount to a denial of due process in the arbitration is sufficient to invalidate an award by that Board." *Wells v. Southern Airways, Inc.*, 616 F.2d 107, 110 (5th Cir. 1980).

The Supreme Court has further held that courts should "be more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968). "We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Id.*

No reasonable person can dispute that Goldberg's dealings with Burdette "might create an impression of possible bias," and yet, Goldberg violated the Supreme Court's "simple requirement" to disclose those dealings. *Commonwealth Coatings*, 393 U.S. at

149. The due process analysis could end here, but decisions from other courts further support Plaintiffs' due process claim.

Plaintiffs could find no case under the RLA that explains when arbitrator bias rises to a deprivation of due process. Therefore, it is appropriate to look "to non-rail arbitration cases for an articulation of the method to be used in applying the standard of review in rail labor cases." *Springfield T.R. Co. v. United Transp. Union*, 767 F. Supp. 333, 337 (D. Me. 1991). And "in labor arbitration hearings, the evident partiality standard applies" when dealing with claims of bias or impartiality. *United States v. International Bhd. of Teamsters*, 170 F.3d 136, 146 (2d Cir. 1999).

"The evident-partiality standard is, at its core, directed to the question of bias." *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012). Therefore, the Court can also apply this standard to determine whether or not the arbitrator Goldberg's bias deprived Plaintiffs of due process.

The "evident partiality" standard is well-established under Second Circuit law. Evident partiality exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefits Funds*, 748 F.2d 79, 84 (2d Cir. 1984)(internal quotations omitted). "Proof of actual bias is not required," and "a conclusion of partiality can be inferred from objective facts inconsistent with impartiality." *Scandinavian Reinsurance Co.* 668 F.3d at 72 (internal quotations and citations omitted).

"An arbitrator who knows of a material relationship with a party and fails to disclose it meets *Morelite's* 'evident partiality' standard: A reasonable person would

have to conclude that an arbitrator who failed to disclose under such circumstances was partial to one side." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007). This includes a relationship such as "arbitrator to witness." *Washburn v. McManus*, 895 F.Supp. 392, 398 (D.Conn. 1994).

Turning to the case here, Plaintiffs have more than sufficiently alleged that Goldberg was partial to American, and particularly one of its key witnesses, Burdette. As soon as Goldberg was appointed to the panel, Burdette congratulated him, which Goldberg followed up by saying that he wished Burdette was on the panel with him. *Complaint*, para. 48. Then, two weeks before opening briefs were due, Burdette asked Goldberg about joining MREP, Goldberg's corporation. *Id.*, para. 49. They also discussed how highly they thought of each other and how they could get others to refer each of them work. *Id.*, para. 50.

Burdette then went to Chicago in April, while the LOA 12-05 arbitration was ongoing, to receive MREP training from Goldberg, and to become an official MREP member. *Id.*, para. 51. And on July 12, 2013, ten days before the Award was issued, Burdette told Goldberg he was going to contribute money to MREP. *Id.*, para. 52. The two also discussed the arbitration itself multiple times, including a conversation that was marked "CONFIDENTIAL". *Id.*, paras. 48, 53-55. None of these communications were disclosed to the participants in the arbitration.

These conversations, along with Burdette's admission to MREP, paint a clear picture of Goldberg's evident partiality towards Burdette, and therefore American. They obviously had a significant relationship prior to Goldberg's appointment, since Goldberg

knew Burdette well enough to wish that he was on the panel. They then formed a business relationship during the arbitration itself. The two spoke in glowing terms about one another on multiple occasions, and each sought referrals for the other. Furthermore, Burdette offered to give money to Goldberg's organization a mere ten days before the Award came out. It is irrelevant whether or not money changed hands, as a reasonable person would conclude that Goldberg had an undisclosed, prior bias towards Burdette, and would be predisposed to give Burdette's testimony more weight than others. This is blatantly improper for a neutral, and since it was not disclosed to the parties, the Award should be vacated.

Furthermore, Plaintiffs do not have to show that Goldberg's bias affected the other arbitrators or the Award itself. "When a neutral arbitrator fails to disclose a relationship with one party that casts significant doubt on the arbitrator's impartiality, as in *Commonwealth Coatings*, it is appropriate to assume that the concealed partiality prejudicially tainted the award." *Delta Mine Holding Co. v. AFC Coal Props*, 280 F.3d 815, 8221-822 (8th Cir. 2001), citing *Commonwealth Coatings Corp.,* 393 U.S. at 148-149 (vacating arbitration award based on arbitrator's undisclosed business interest in arbitration). Therefore, Goldberg's bias is sufficient to taint the entire process.

In addition to Goldberg's obvious bias, the *ex parte* communications between him and Burdette, and between Bloch and Reinert, violated Plaintiffs' due process rights in that they created an appearance of impropriety. To overturn an arbitration award based on *ex parte* communications, the communications need to show "actual prejudice," or "misconduct that amounts to a denial of fundamental fairness of the arbitration

proceeding." *United House of Prayer for All People of the Church on the Rock of the Apostolic Faith v. L.M.A. Int'l, Ltd.*, 107 F.Supp. 2d 227, 232 (S.D.N.Y. 2000). Such misconduct includes the violation of arbitrator standards of conduct, *Catalyst Waste-to-Energy Corp. v. Long Beach*, 164 A.D.2d 817, 820 (N.Y.App. 1990)("the ex parte communications between the parties and the arbitrators violated AAA rules forbidding such direct contacts and warranted vacatur of the award"), when the conversation creates "the appearance of impropriety if not actual partiality," *Goldfinger v. Lisker*, 68 N.Y.2d 225, 232 (N.Y. Ct. App. 1986), or when the communication involves disputed issues. *Rosenthal-Collins Group, L.P. v. Reiff*, 748 N.E.2d 229, 232 (Ill. App. 2001)("ex parte contact involving disputed issues raises a presumption that the arbitration award was procured by fraud, corruption, or other means.").

The communications between Goldberg and Burdette, and Reinert and Bloch, as alleged deprived Plaintiffs of fundamental fairness, as Goldberg and Bloch violated the applicable arbitrator standards and the protocol agreement established by the parties. The applicable arbitrator standards here, the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes," provides that the arbitrators must "conform to arrangements...mutually desired by the parties regarding communications and personal relationships with the parties." *Complaint*, paras. 35, 37. The parties' protocol agreement provided that the "Board may conduct informal *ex parte* discussions to the extent it deems such discussions useful in an attempt to obtain a voluntary resolution of the dispute." *Id.*, para. 33. The "Board" is defined as all three arbitrators.

Both Goldberg and Bloch violated the protocol agreement in communicating privately with American's witness and lawyer, and in doing so violated their ethical responsibilities under the Code. Goldberg, on his own, communicated frequently with Burdette as described above. And Bloch and Reinert discussed a possible settlement outside of the presence of the rest of the Board and any other parties. *Complaint*, para. 59. This conversation was about a possible settlement, a disputed issue, and was done only between Bloch and Reinert, further violating the protocol agreement. These communications further show the arbitrators' bias towards American, and denied Plaintiffs fundamental fairness in the arbitration.

Plaintiffs have sufficiently pleaded that arbitrator bias and *ex parte* communication deprived them of due process.

III. CONCLUSION

Plaintiffs have standing to object to the Award, their claim is timely, and they state a cause of action for vacatur of the Award. As a result, APA and American's motions should be denied.

Dated: August 25, 2016

Respectfully submitted,

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AGREEMENT

between

AMERICAN AIRLINES, INC

and

THE AIRLINE PILOTS

in the service of

AMERICAN AIRLINES, INC.

as represented by the

ALLIED PILOTS ASSOCIATION

EFFECTIVE: JANUARY 1, 2013

Revision 1 - March 08, 2013

SECTION 23

SYSTEM BOARD OF ADJUSTMENT

A. Establishment

In compliance with the Railway Labor Act, as amended, the parties establish the American Airlines System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of this Agreement and which are properly submitted to it. The System Board of Adjustment may be constituted as either a Four Member Board or a Five Member Board. All grievances properly submitted to the Board will be heard by a Four Member Board, unless the President of the Association, or in the case of a Company grievance, the Vice-President Flight, elects to proceed directly to a Five Member Board.

B. Membership

1. A Four Member System Board shall consist of four (4) members, two (2) of whom shall be selected and appointed by the President of the Association, and two (2) by the Company. A Five Member System Board shall consist of five (5) members, two (2) of whom shall be selected and appointed by the President of the Association, two (2) by the Company, and a neutral Arbitrator. For a Five Member System Board, the parties shall select an Arbitrator by mutual agreement, as provided for in this Section, to serve as that Board's Chairman with respect to any case or cases scheduled before that System Board. In some cases, by agreement between the Association and the Company, each party shall appoint only one (1) member each to serve on the System Board with an Arbitrator.

2. The Association shall provide a System Board Coordinator who will determine the availability of the Arbitrators, coordinate their selection, and schedule arbitrations by the procedures contained in sections C. and D. of this Section. The System Board Coordinator shall be the contact point for all communications with Arbitrators, except when System Boards are in session. The System Board Coordinator shall coordinate the various dockets, meetings, and so forth, necessary to administer the System Board. The System Board Coordinator shall not be a participant in any capacity in any hearing, appeal, PAC, Mediation Panel, or System Board of Adjustment, except as may be necessary to testify as to the System Board Coordinator's duties.

C. Selection of Arbitrator

1. The Association and the Company shall, by mutual agreement, establish a list of Arbitrators to serve as the neutral member of the Five Member System Board. Arbitrators will be categorized as suitable for Disciplinary/Discharge hearings, and/or Contractual Dispute hearings. There shall be a minimum number of ten (10) Arbitrators on each list with the understanding that an Arbitrator can be on both lists.

   Every July, the Association and the Company shall disclose to each other the names of the Arbitrators that they want to either strike from or add to the list of acceptable Arbitrators. Every, August, the Association and the Company will meet to review and formally amend, if necessary, the list of acceptable Arbitrators. At the end of the August meeting, both lists of acceptable Arbitrators will be populated with ten (10) acceptable Arbitrators. The Association and the Company shall retain the right to add to (by mutual agreement) or delete from (unilaterally) the list of acceptable Arbitrators on an ad hoc basis at any time.

2. Either the Association or the Company, by written notice to the other, may at any time and without cause, remove any of the named Arbitrators. The Arbitrator so removed shall complete any pending matters in accordance with the Basic Working Agreement. If future arbitration dates have been reserved with the removed Arbitrator pursuant to the Agreement, the System Board Coordinator shall cancel those future dates, and the party requesting the removal of said Arbitrator will be responsible for any cancellation fees that may be incurred as a result of the cancellation of future dates. Upon the removal of any Arbitrator, the System Board Coordinator shall contact the remaining Arbitrators, to obtain additional dates. The

Five Member System Board, or the System Board members, in the case of a Four Member System Board, may take such action as appropriate to ensure that: (a) the other party is not prejudiced by the late disclosure of the document(s) or witness(es); (b) the proceedings are not unduly delayed; or (c) additional expense is not incurred.

4. The number of witnesses summoned at any one time shall not be greater than the number which can be spared from the operations without interference with the services of the Company.

H. Majority Decision is Final

All decisions of the Board shall be made by majority vote. Decisions of the Board in all cases properly referred to it shall be final and binding upon the parties. In the case of a Four Member System Board, the Board's decision shall be deemed final after at least three (3) concurring board members agree that no further Executive Board session(s) are appropriate and after the three (3) concurring board members have signed the final decision. In the case of a Five Member System Board, the Board's decision shall be deemed final after the Arbitrator and two (2) concurring board members agree that no further Executive Board session(s) are appropriate and after the Arbitrator and the two (2) concurring board members have signed the final decision.

I. Deadlock

If a deadlock occurs in a case properly submitted to a Four Member System Board, it shall be the duty of the Board to endeavor to reach a decision. In the event that the deadlock cannot be resolved or if a majority is not reached, then the grieving party (the Association or the Company) shall have the right to appeal to the Five Member System Board of Adjustment within thirty (30) days from the date the case is declared deadlocked. Failure to give timely notice will constitute withdrawal of the grievance.

J. Rights and Privileges of the Parties

Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees, the Association, or the Company, or their duly accredited representatives, under the provisions of the Railway Labor Act, as amended, and the failure to decide a dispute under the procedure established herein shall not, therefore, serve to foreclose any subsequent rights which such law may afford or which may be established by the National Mediation Board by orders issued under such law with respect to disputes which are not decided under the procedure established herein.

K. Records

Unless otherwise agreed by the parties, a transcript of the hearings will be recorded by a third-party certified court reporter. The Board shall maintain a complete record of all matters submitted to it for its consideration, and all findings made by it.

L. Expenses

1. The Association and the Company shall equally share the expenses incurred by the Arbitrator except as otherwise set forth in this section.

2. Each of the parties shall equally share the expenses incurred by the court reporter in preparing the transcript of the hearing.

3. Each of the parties shall equally share expenses incurred to secure meeting rooms to hear arbitrations at locations other than at the headquarters of the Association or the Company.

4. Each of the parties will assume the compensation, travel expense, and other expenses of the Board members selected by the respective parties. Either party causing a postponement or cancellation of any part of an arbitration session will bear all Arbitrator costs associated with