Cook v. Pan American World Airways Inc.

771 F.2d 635 (1985) | Cited 61 times | Second Circuit | August 22, 1985

Before MANSFIELD, NEWMAN and KEARSE, Circuit Judges.

MANSFIELD, Circuit Judge:

John C. Cook and more than 400 other current or former Pan American Pilot-Flight Engineers, all over age 40, appeal from a judgment of the Southern District of New York, Robert J. Ward, Judge, dismissing their complaint against Pan American World Airways, Inc. ("Pan Am") and four union defendants-Air Line Pilots Association ("ALPA"), International; ALPA, Pan Am Chapter; Flight Engineers' International Association ("FEIA"); FEIA, Pan Am Chapter-for lack of subject matter jurisdiction. Their complaint alleged that, by adopting and implementing a 1981 seniority list integrating the pilots and flight engineers of two merged airlines, Pan Am and National, the defendants had violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623-31 (1982), and New York Human Rights Law ("NYHRL"), N.Y. Exec. Law §§ 290, et al. (McKinney 1982 & Supp. 1984-85), and that defendant unions had in addition violated the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (1982) Finding that plaintiffs' action constituted an impermissible collateral attack on a final order of the Civil Aeronautics Board ("CAB"), not appealed in accordance with the provisions of § 1006 of the Federal Aviation Act, 49 U.S.C. § 1486(a), Judge Ward dismissed their complaint for lack of subject matter jurisdiction. We affirm in part, reverse in part, and remand fur further proceedings.

This case arises out of Pan Am's acquisition of control of and merger with National Airlines, effective January 19, 1980. The merger was approved by the CAB pursuant to 49 U.S.C. § 1378(b), which empowers it to determine whether mergers are "consistent with the public interest" and to approve them "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe". The CAB conditioned its approval of the merger upon compliance with its labor protection provisions ("LPPS"), see Flying Tiger-Slick Merger Case, 18 C.A.B. 326 (1954) (approving airline merger but imposing labor protective conditions and retaining jurisdiction), and retained jurisdiction "to make such amendments, modifications, and additions to the labor protective conditions as the circumstances may require. . . ." CAB Order 79-12-164, at 1. Two of the LPPs are central to this case:

"Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

"Section 13(a). In the event that any dispute or controversy * * * arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator * * * . The decision of the arbitrator shall be final and binding on the parties."

On March 19, 1980, the four unions involved-the ALPA Master Executive Council ("MEC") for the Pan Am pilots, ALPA's MEC for the National Pilots, FEIA's Pan Am Chapter, and FEIA's National Chapter-agreed on a procedure for determining how to integrate the seniority lists. In the event that agreement on seniority integration should not be reached within a limited period arbitration was to be "mandatory," and "the Award of the Arbitrator shall be final and binding as to all flight deck operating crew members and shall be defended by the parties." March 19, 1980, Agreement P8(j).

After unsuccessful inter-union negotiation and mediation on seniority integration, arbitration took place before Lewis M. Gill, whom the parties had designated as their first choice. The four union representatives participated fully in the arbitration hearing, which lasted approximately 35 days and closed on January 14, 1981. Arbitrator Gill subsequently held 15 days of executive session with the union parties. The final record contained over 4,700 transcript pages and hundreds of exhibits. Arbitrator Gill issued his Award on March 12, 1981.

In his lengthy opinion explaining the award Gill identified several issues. First, the "cross-bidding" arrangements between pilots and flight engineers at Pan Am were entirely different from those at National. Althougth both airlines required three crewmen in the cockpit, Pan Am used a pilot/flight engineer ("PFE") as the third crewman, while National used an engineer who was not qualified as a pilot. Pan Am accordingly maintained a single seniority list, with PFEs to avoid furlough. National, however, maintained two independent seniority lists, one for its pilots and one for its flight engineers, and did not permit cross-bidding or displacement between the groups.

Having decided not to disturb the premerger cross-bidding situation, Gill constructed two integrated lists. One, the "Pilot List," contained National pilots and all Pan Am airmen; the other, the "Engineer List," contained National engineers and all Pan Am airmen. Gill then directed that cross-bidding be

"as before on each airline. Pam(Pan)irmen continue cross-bidding practices vis-a-vis each other, but Pan Am Pilots cannot bump National Engineers. National Pilots cannot bid Engineer positions, National Engineers cannot bid Pilot positions. National Engineers to have same rights as [a small class of Pan Am engineers who did not qualify as pilots] against being displaced from Engineer seats by Pilots." (Award at IV.C.)

A second issue, labelled "explosive" by Gill, concerned the manner in which approximately 400 Pan Am pilots on furlough at the time of the merger were to be integrated. This large number of furloughees resulted from Pan Am's switch from smaller planes to B747s, the largest wide-bodied aircraft, and Pan Am's poor financial health in the preceding few years. Gill stated that this Furlough

situation created

"a head-on clash over the relative equities as between large numbers of National airmen hired between 1968 and 1978 and actively employed at the time of the merger, and large numbers of these Pan Am furloughees with earlier dates of hire who still have recall rights but who brought no active jobs to the merger." (Gill Op. at 8).

Gill's solution was to calculate the Pan Am furloughees' length of service at the time of their recall, and to slot them into the list by comparing their length of service with that of the active airmen at that time. (An exception was made for about 34 furloughed Pan Am pilots who had received notice of recall before January 19, 1980). He indicated a willingness, had the parties (or the "JANUS" group, representing the furloughees) submitted a proposal estimating the likely dates of recall of the furloughees and the likely length of service of the active pilots at those dates, to integrate the furloughees on that basis. However, no such proposal was forthcoming "perhaps because of the difficulties in fashioning projections of that nature." Id. at 41. While noting that his solution to the furloughee problem might seem novel, Gill observed that

"the problem itself is novel-there has not been any previous merger case called to my attention where such massive numbers of furloughees, with such long periods of being off the property, were pitted against active airmen from the other airline who brought current jobs to the merger." Id at 40.

Finally, differences between Pan Am and National created further conflicts between the interests of the various union groups. While Pan Am's fleet consisted primarily of B747s, National mostly used the smaller B727s. Although National was in "a healthy financial condition at the time of the merger," Pan Am had been in financial difficulties over the preceding few years. Because of these and other differences, the parties before Gill advocated three different methods for integrating the seniority lists: (1) the National pilots and engineers advocated "ratio" methods; (2) the Pan Am pilots a mixed length of service ("LOS") and date of hire ("DOH") method; and (3) the Pan Am engineers a straight DOH method. Under a ratio method, a certain number of identified airmen from one airline are listed followed by a similar listing of specified number of airmen from the other airline (e.g., 1 National pilot followed by 3 Pan Am pilots). The ratios can form all or part of a master list. In the latter case the balance of the list can name on a LOS and/or DOH basis.

Gill concluded that a "fair and equitable" solution required that two integrated seniority list be constructed by different methods. He constructed the entire Engineer List, and the top and bottom of the Pilot list, by a straight LOS/DOH method. However, for the middle portion of the Pilot list he used a mixed-ratio method, which distributed Pan Am and National pilots in a ratio of approximately 3.25 Pan Am pilots for every one National pilot.

On March 15, 1981, ALPA mailed copies of the arbitrator's award to all the pilots and on March 25, 1981, FEIA mailed copies to the flight-engineers. On June 26, 1981 Pan American accepted the Gill

award and agreed to implement it without change.

Two groups of airmen petitioned the CAB to set aside the Gill award. The Janus Group, formed at the time of approval proceedings before the CAB and representing 510 Pan Am crewmen who had been furloughed before the merger, maintained that the Gill award failed adequately to consider the interests of its members and that it was not "fair and equitable" within the meaning of the labor protection provision of CAB Order 79-12-164, as 1. The Janus Group sought a new arbitration in which it would be granted full party status.

Pan American Pilots Fighting ("PAPF"), a group of Pan American crewmen who had been employed form dates before the merger, which was formed after the arbitration award to oppose it, argued that the Gill award must be set aside because it used a ratio method to integrate the middle portion of the Pilot List. PAPF maintained that only a "time served" method of integration, either LOS or DOH, was fair and equitable" and that use of a ratio method was inconsistent with the labor protective provisions that the CAB had imposed in approving the merger. PAPF sought a CAB order integrating the seniority list on a time served basis or renegotiation of the integration with PAPF and the Janus Group as parties.

The CAB rejected the two petitions in an order dated April 15, 1982, noting:

"The carrier's action is wholly consistent with our long-held, and judicially approved, view that 'absent a showing of bad faith, the adoption by a carrier of an integrated seniority list proposed by the collective bargaining representatives of the employees involved amounts to the carrier having made "provisions* * * for the integration of seniority lists in a fair and equitable manner" within the meaning of section 3 of the Board's labor protective provisions.'[13] It follows, therefore, that we also dismiss Janus Group's and PAPF's petitions to set aside the award.

CAB Order 82-4-75 at 11.[1] Having concluded that resolution of the seniority integration was reached in a fair and equitable manner, the Board declined to review "the intrinsic nature of the integration system established by the award." Id.

The CAB further found that the Janus Group was not entitled to full party status at a new arbitration since its members' interests were adequately represented both by its own statements at several points during the arbitration and by union representation at all stages. It also rejected PAPF's claim that only a "time-served," i.e., LOS or DOH, method of integration was "fair and equitable", finding that Arbitrator Gill acted within his prerogative in using a ratio method to integrate the middle portion of the Pilot List. In making this finding, the Board again confirmed the propriety of its refusing "to look behind the freely negotiated list.'" Id. at 12 (quoting Northeast Master Executive Council v. C.A.B., 165 U.S. App. D.C. 36, 506 F.2d 97, 105 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110, 42 L. Ed. 2d 806, 95 S. Ct. 783 (1975). No appeal was taken from the CAB's denial of the two petitions, even though an appeal was available under 49 U.S.C. § 1486, which provides in relevant part that "any" order of the

Board "shall be subject to review by the courts of appeals of the United States" which "shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. . . ." 49 U.S.C. §§ 1486(a), (d). The statute further provides that the Board's findings, if supported by substantial evidence, shall be conclusive, 49 U.S.C. § 1486(e).[2]

The complaint in the present action, which was filed on March 7, 1984, alleged that plaintiffs were all over age 40 and that many had, in the period April 12, 1983 to September 2, 1983, filed in various federal and state equal employment offices charges containing some or all of the allegations stated in the complaint. The complaint charged that he pilot seniority list resulting from the Gill arbitration award, which used a ratio formula "to insert large numbers of former National pilots under age 40 ahead of older and more experienced Pan Am pilots over the age of 40," P 11, was first implemented on a system wide basis on March 28, 1983, and that it had been and would continue indefinitely to be implemented. Further, the complaint maintained that on June 15, 1983, Pan Am had caused to be furloughed, under the Gill seniority integration, three of the plaintiffs.

The complaint further alleged that "by using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions" defendant Pan Am has engaged in "willful and continuous violation" of both § 4(a) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a), and § 296 of the New York Human Rights Law, N.Y. Exec. Law § 296; and that the four defendant unions, "by actively supporting and/or acquiescing in, and by indefinitely continuing to actively support and/or acquiesce in, the above-described seniority system," had engaged in "willful and continuous violation" of § 4(c) of the ADEA, 29 U.S.C. § 623(c), and § 296 of the New York Human Rights Law, and that they had thereby breached their duty under the Railway Labor Act, 45 U.S.C. §§ 151, et seq., to fairly represent the interests of the plaintiff. Plaintiffs sought injunctive relief, including an order directing defendants to construct and implement a seniority system which eradicated the effects of the allegedly unlawful employment practices described; damages to make them whole; liquidated damages; and attorneys' fees and costs.

Pan Am sought dismissal of the complaint on the ground that the ADEA cause of action was time-barred and that the pendent claim should be dismissed for lack of jurisdiction. ALPA and FEIA also moved for dismissal on the grounds that plaintiffs' ADEA and duty of fair representation claims were time-barred and that the complaint constituted an impermissible collateral attack on a final order of the CAB.

At the end of a hearing held on October 31, 1984, Judge Ward issued an oral opinion and an order dismissing plaintiffs' complaint on the ground that it constituted an impermissible collateral attack on a final order of the CAB that had not been appealed in accordance with the provisions of § 1006 of the Federal Aviation Act, 49 U.S.C. § 1486(a). This appeal followed.

DiscussionTThe principal issue is whether the integrated seniority list formulated by the parties'

mutually-selected arbitrator pursuant to the CAB's labor protection provisions may, notwithstanding the CAB decision, be challenged through the present lawsuit on the ground that it violated plaintiffs' rights under the ADEA and the New York Human Rights Law. The starting point for consideration of that issue lies in Supreme Court decisions upholding de novo judicial determination of claims asserted under similar federal statutes, McDonald v. City of West Branch, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984) (civil rights claim under 42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981) (Minimum wage provisions of Fair Labor Standards Act); Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974) (Title VII action). Gardner-Denver has particular relevance for the reason that the prohibitions of the ADEA, enacted only a few years after Title VII, are in terms almost identical to those of Title VII, Hodgson v. First Fed. Sav. & Loan Ass'n 455 F.2d 818, 820 (5th Cir. 1972), and both laws have received parallel interpretations. Aronsen v. Crown Zellerbach, 662 F.2d 584, 589 (9th Cir. 1981), cert. denied, 459 U.S. 1200, 75 L. Ed. 2d 431, 103 S. Ct. 1183 (1983). See also Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756-58, 60 L. Ed. 2d 609, 99 S. Ct. 2066 (1979).

In Gardner-Denver, supra, the Supreme Court unanimously held that, since Congress intended to give federal courts parallel jurisdiction over a de novo proceeding, an employee's statutory right under Title VII to obtain judicial relief from discrimination in his employment is absolute and not barred or waived by his resort to the grievance-arbitration machinery of a collective- bargaining agreement. Congress, said the Court, intended

"to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is the Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective- bargaining agreement." Id., 415 U.S. at 48-49, 94 S. Ct. at 1019-1020.

The Court noted, as reasons for its decision, that the arbitrator's role was "to effectuate the intent of the parties rather than the requirements of enacted legislation," id. at 56-57, that the arbitrator's competence "pertains primarily to the law of the shop, not the law of the land," id. at 57, that the record of arbitration is usually not as complete as that of a court proceeding, that the rights and procedures common to civil trials are often limited or unavailable and that arbitrators have no obligation to give their reasons for an award. These reasons were echoed and adopted in McDonald in support of the Court's holding that a federal court may not, in a civil rights action under 42 U.S.C. § 1983, give preclusive effect to an arbitration is not the equivalent of a "judicial proceeding" within the meaning of 28 U.S.C. § 1738. 104 S. Ct. at 1804.

Some of the Supreme Court's reasoning may not be as fully applicable to the arbitration proceeding in the present case as it was in Gardner-Denver and McDonald. For instance, the fairness of integrated seniority may have been resolved by the arbitrator consistently with the aims of ADEA.

But we are persuaded that the difference in shading is not of sufficient significance to outweigh the statutory entitlement to the de novo determination provided for by Congress in its enactment of ADEA.

There remains, therefore, the question of whether, since Arbitrator Gill's order was appealed as of right to the CAB by way of a motion to set it aside and the CAB's resulting order was in turn appealable to a court of appeals, vested by statute with "exclusive jurisdiction" to hear such appeals, the principles of Gardner-Denver and McDonald still apply or whether the order of the CAB must be given collateral estoppel or preclusive effect. The answers turns largely on whether the issue before the administrative agency, in this case the CAB, was the same as that raised in the later court proceedings and whether the administrative agency had the authority to decide that issue. In City of Tacoma v. Taxpayers, 357 U.S. 320, 2 L. Ed. 2d 1345, 78 S. Ct. 1209 (1959), relied on by the district court, collateral attack was barred when the issue raised by the State of Washington in a proceeding before the state court, the legality and effect of a license issued by the Federal Power Commission, was the same as that raised by it earlier before the Commission itself, which was fully competent to resolve the issue, and was decided upon appeal by the Court of Appeals, which had "exclusive jurisdiction" to review the Commission's order. In Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co., 258 U.S. 377, 66 L. Ed. 671, 42 S. Ct. 349 (1922), also cited by the district court, collateral attack upon an order of the Interstate Commerce Commission was barred since the issue raised in the later court proceeding was one which the ICC was explicitly empowered to decide.

On the other hand, when the administrative agency is neither authorized nor required to decide the issue later raised in a separate action, the court has jurisdiction to entertain the latter claim. In Beins v. United States, 224 U.S. App. D.C. 397, 695 F.2d 591 (D.C. Cir. 1982), for instance, the court upheld the district court's jurisdiction to entertain a pilot's claim under the Federal Tort Claims Act against the government for damages based on alleged negligence of the Federal Aviation Commission. The government's contention that the plaintiff's sole remedy was an appeal to a court of appeals of the FAA's denial of medical certification was rejected on the ground that the determinations made by a court of appeals "are distinct conceptually from a finding of negligence." Id. at 598.

Applying these principles here, the record does not reveal any CAB ruling on the question now raised by the plaintiffs of whether the integrated seniority lists formulated by Arbitrator Gill were unfair as age-discriminatory. The CAB mad no independent inquiry into possible age discrimination and held no evidentiary hearing. Indeed, none of the parties presented an issue based on age discrimination to the Board. In opposition to a motion by National Flight Engineers to confirm the award and in support of motions to set it aside, the Janus Group and PAPF argued only that their interests had not been adequately considered by the arbitrator, and that the ratio method used for part of the arbitrator's integrated seniority lists, in contrast to "time served" methods (DOH and LOS), was not a fair and equitable basis for integration.

Nor did the CAB indicate that it would have considered itself authorized to rule upon such an issue

(unfairness based on age discrimination) if it had been raised. On the contrary, although it reviewed in detail Arbitrator Gill's 59-page decision, it repeatedly made clear that it considered its authority limited to deciding whether the arbitration had been conducted "in a fair and equitable manner " (LPP § 3; emphasis added), i.e., as a procedural matter, rather than whether the terms of the award were substantively equitable. In short, if focused its attention on the procedures used by the parties to negotiate the seniority integration issue, to arrive at terms for arbitration of the issue when the negotiation failed, and to assure fair representation of union members in the arbitration itself.

"Our authority, however, over arbitration voluntarily undertaken by employee representatives in connection with a Board-approved acquisition or merger is confined to examining whether the arbitration was fairly and equitably conducted." CAB Order 82-4-75, at 3.

The Board's limited review of the merger (of seniority lists) claimed to have violated § 3 of the LPPs is consistent with the limited jurisdiction over labor matters conferred upon it by 49 U.S.C. § 1378(b) and with the Board's won interpretation of the scope of that jurisdiction, which entitled to considerable weight. See. e.g., Youakim v. Miller, 425 U.S. 231, 235, 47 L. Ed. 2d 701, 96 S. Ct. 1399 (1976) ("The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute."); Manchester Environmental Coalition v. E.P.A., 612 F.2d 56, 59 (2d Cir. 1974). AS the Board has noted, despite its imposition of the LPPs,

"it has been the Board's long-standing policy that the matters encompassed herein should be resolved by voluntary agreement between the carrier and the labor groups or employees involved or, failing agreement, by arbitration. This policy with respect to seniority integration is reflected in sections 3 and 13 of the labor protective conditions." American-Trans Caribbean Merger, 57 C.A.B. 581, 585 (1971), aff'd sub nom. American Airlines v. C.A.B., 445 F.2d 891 (2d Cir. 1971), cert. denied, 404 U.S. 1015, 30 L. Ed. 2d 663, 92 S. Ct. 674 (1972). (Footnotes omitted).

The purpose and scope of the LPPs is extremely limited:

"[W]e have characterized LPP's as 'an extraordinary intervention...into the employer-employee relationship' ....[W]e have repeatedly refused to become entangled in carrier-employee labor disputes, because our jurisdiction is limited, we lack expertise in labor relations, and there are better equipped, more competent forums available to handle labor disputes. Moreover, it is important to recognize that the primary intent of the Board's LLP's historically has been to prevent disruptions in the national air transportation system. Their purpose has not been to benefit carrier employees directly, or to avoid labor unrest with particular air carriers." Texas International- Continental Acquisition Case, CAB Order 81-10-66, at 11 (footnotes omitted).

In implementation of its limited authority the Board will scrutinize a freely-negotiated integrated seniority list "only on a showing of bad faith, or deliberate attempt to subvert the Board's order, or other compelling circumstances," Delta-C&S Seniority List, 29 C.A.B. 1347, 1349 (1959), aff'd sub

nom. Outland v. C.A.B.., 109 U.S. App. D.C. 90, 284 F.2d 224 (D.C. Cir. 1960). The Board will not find § 3 of the LPP's satisfied unless it determines that the groups of employees affected have been adequately represented in formulating the list.

With these exceptions, which go to the "manner" in which the arbitration was conducted, the CAB leaves the resolution of all other issues to the parties or their mutually-selected arbitrator. Indeed, the CAB has acknowledged that a finding by it that seniority lists have been integrated "in a fair and equitable manner" does not necessarily bar petitioners from challenging the legality of the lists themselves in court. In Delta-C&S Seniority List, supra, C.A.B. at 1350, it stated (after rejecting petitioners' claim that the merged list was not fair and equitable), "we take not position on whether petitioners have a cause of action cognizable by the courts." See also Pan Am TWA Route Exchange Agreement, CAB Order No. 80-6-95, at 4 ("We will not ...review the merits of a challenged [seniority integration list] award, the merits including questions of law and questions of fact."). In a case in which petitioner charged that he had been subjected to age discrimination and sought damages, the CAB explicitly stated that "age discrimination is outside the scope of the LPP's" Caribbean-Atlantic Airlines, Inc.- Eastern Air Lines, Inc., Acquisition Case, CAB Order 80-10-65, at 2.

Thus, because of the ADEA's statutory grant of de novo review and the CAB's lack of authority to adjudicate the age discrimination issue later raised in the present action, this action is not barred by reason of the collateral attack doctrine. Our conclusion that the district court has jurisdiction to consider the ADEA claims is not inconsistent with the principal authorities relied on by Judge Ward. For reasons already noted, City of Tacoma, supra, and Lambert Run Coal Co., supra, are clearly distinguishable. No ADEA, Title VII or similar claims were asserted in Kesinger v. Universal Airlines, Inc., 474 F.2d 1127 (6th Cir. 1973), and Oling v. Air Line Pilots Ass'n, 346 F.2d 270 (7th Cir.), cert. denied, 382 U.S. 926, 86 S. Ct. 313, 15 L. Ed. 2d 339 (1965). Those two decisions did not rule upon the substantive fairness of integrated seniority lists but on whether the unions had breached their duty of fair representation before the CAB, an issue over which the CAB has jurisdiction because it bears directly on whether the lists were arrived at in a fair and equitable "manner" as provided for LPP § 3. But even if the CAB's authority were enlarged to permit it to rule on the substantive fairness of the integrated seniority lists, we believe, for the reason already stated, that plaintiffs would not be precluded from obtaining a de novo federal court review of that issue. Gardner-Denver, supra; McDonald, supra.

We find ourselves unable, for the reasons already indicated, to follow the District of Columbia Circuit's decision in Carey v. O'Donnell, 165 U.S. App. D.C. 46, 506 F.2d 107 (D.C Cir. 1974), cert. denied, 419 U.S. 1110, 42 L. Ed. 2d 806, 95 S. Ct. 783 (1975), upon which Judge Ward relied. The court there held that the district court lacked jurisdiction over plaintiff's claim that the defendants had violated the ADEA, in view of the court's approval on the same day, in Northeast Master Executive Council v. C.A.B., 165 U.S. App. D.C. 36, 506 F.2d 97, cert. denied, 419 U.S. 1110, 42 L. Ed. 2d 806, 95 S. Ct. 783 (1975), of the Board's dismissal of petitions alleging that the underlying integration of seniority lists had not been arrived at in a "fair and equitable manner." The D.C. Circuit purported to

rely on the rationales expressed in Kesinger, supra, and Oling, supra, which are clearly distinguishable for the reasons we have noted above. Moreover, it did not analyze the claims before the district court, the limited authority of the CAB, and the right to a de novo trial of ADEA claims, but merely stated in conclusory fashion that the action amounted to a collateral attack on the seniority lists approved by the Board.

Our holding that federal jurisdiction exists over plaintiffs' ADEA claims is not intended to imply that the claims have merit or that plaintiffs will have the right to reopen the integrated seniority lists formulated by the parties' mutually selected arbitrator. Although the complaint's allegations of "willful and continuous violation of Section 4(a) of the ADEA" (Compl. PP14, 16) at first blush appear to sound in terms of discriminatory intent with respect to each of the plaintiffs, this case is governed by § 4(f) (2) of the ADEA, 29 U.S.C. § 623(f) (2). That section insulates an employer or labor organization from ADEA liability for observing the terms of a "bona fide seniority system ... which is not a subterfuge to evade the purposes" of the ADEA.

The criterion for determining whether a seniority system is a "bona fide" one is stated in the pertinent regulation issued under the Act, 29 C.F.R. § 1625.9(a) (1984), which provides that "though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion...". Since the merged list uses length of service at the top and bottom ends of the list and uses length of service combined with a ratio between the two former lists for the middle of the merged list, it would appear to satisfy the test that length of service by the "primary criterion."

With respect to the requirement that a seniority system not be a "subterfuge," a term that implies discriminatory or evasive intent, as in § 703(h) of the Civil Rights Act, 42 U.S.C. § 2000(e)-2(h), see American Tobacco v. Patterson, 456 U.S. 63, 64-65, 71 L. Ed. 2d 748, 102 S. Ct. 1534 (1982), the same regulation states that "a purported seniority system which gives those with longer service lesser rights ... may, depending on the circumstances, be a 'subterfuge to evade the purposes' of the Act." Id. at § 1625.8(b). Among the circumstances to be considered in this case are the validity of the reasons advanced by the unions for the use of a ratio method in the middle of the list, as sell as the validity of plaintiffs' claim that defendants have engaged in "willful" discrimination.

The mere fact that plaintiffs would have fared better under a different scheme does not show that the merged seniority list is a "subterfuge" to evade the ADEA, especially in view of the distinction that must be drawn between age and seniority, in the absence of any evidence in the present record that the union representatives acted in bad faith or with an age-discriminatory motive in arriving at a compromise, or that Pan Am so acted in accepting and implementing it. That compromise recognized that a straight "time served" method would discriminate unfairly in favor of a large number of furloughed Pan Am pilots against actively employed National pilots bringing jobs with them to the merger, and it therefore adopted a ratio method for the middle portion of the integrated seniority list. As the CAB observed:

"Arbitrator Gill was faced with totally opposed positions for the integration of the seniority lists, and the parties were fully permitted to develop their cases supporting their separate positions in a record involving over 4,700 transcript pages and hundreds of exhibits. In the end the arbitrator did what most arbitrators do-he picked parts of the different positions and made compromises to arrive at what he believed was an equitable result. There is no way, given the sharply divergent and contested positions of the parties, that the arbitrator could ever reach a result that was fully acceptable to all parties-to say nothing of the individual pilots and flight engineers whose interests were represented in the proceeding. That is an inevitable result of arbitration. The fact that dissatisfaction remains is no basis for requiring another seniority integration." CAB Order 82-4-75, at 13.

Plaintiffs' claim that the defendant unions violated their duty of fair representation in the CAB proceeding stands on an entirely different footing from plaintiffs' ADEA claim. To make out this claim plaintiffs must prove that the "union's conduct toward a member of the collective bargaining unit [was] arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967). Subsequent interpretations have established that proof of mere negligence or errors of judgment on the part of the union is insufficient.

"To succeed[in a suit for violation of the duty of fair representation] under § 301 [of the Labor Management Act, 29 U.S.C. § 185], an employee must show 'substantial evidence of fraud, deceitful action or dishonest conduct,' . . .'hostile discrimination,' . . .arbitrariness or irrationality,. . ., or conduct in bad faith. . . .

"As long as the union acts in good faith, courts cannot intercede on behalf of employees who may be prejudiced by rationally founded decisions which operate to their particular advantage." (Citations omitted). Capobianco v. Brink's Inc., 543 F. Supp. 971, 975 (E.D.N.Y. 1982), aff'd mem., 722 F.2d 727 (2d Cir. 1983).

The CAB's statutory authority under 49 U.S.C. § 1486(a), as amplified by § 3 of the LPP's requires it, in order to rule upon whether seniority lists have been integrated in a "fair and equitable manner," to determine whether the unions involved have fairly represented their members in the negotiations and ensuing arbitration proceedings. Moreover, the CAB did just that in the present case. The Board found, as had Arbitrator Gill, that the interest of all the employee groups had been vigorously represented throughout the proceedings and that neither the Janus Group nor PAPF had shown a violation of the unions' duty of fair representation:

"Neither group, both formed to forward the views of some Pan Am furloughees and pilots, respectively, who were otherwise represented in the intra-union arbitration by Pan Am Engineers and Pan Am pilots, has shown that these union representatives breached their duty of fair representation. The record before us amply demonstrates that all union parties vigorously advocated positions on seniority integration advantageous to their members. Janus Group, in addition, appeared in the arbitration to express, directly to Arbitrator Gill, its position for furloughees. To the

extent that some of the parties failed to prevail in the substance of their views, and hence occasioned disappointment for certain furloughees and pilots, that is not grounds for our review of the intrinsic nature of the integration system established by the award. It is well-settled that Board properly 'declines to review and to enter judgment on the merits of * * * [union representatives'] negotiated resolution of * * * [an internal union] seniority dispute arising out of a merger' if satisfied "that the resolution was reached in a fair and equitable manner.' Here, the record shows that the labor parties adopted fair and equitable procedures-four-way negotiation, mediation, and final and binding arbitration-to resolve their differences on merged seniority; and that the procedures were faithfully carried out-even to the unanimous selection of an eminent arbitrator in airline seniority matters." CAB Order 82-4-75, at 11 (footnote omitted).

Since the CAB is empowered to and did resolve the fair representation claim, and since plaintiffs are not entitled to de novo adjudication by a district court of that claim, the district court's dismissal of the claim as an impermissible collateral attack on the CAB's final order is affirmed.

Appellees next contend that the district court's dismissal of the action should be affirmed on the ground that appellants' ADEA claim is time-barred for failure to file charges with the EEOC within the required 300 days after "the alleged unlawful employment practice occurred". 29 U.S.C. § 626(d)(2). This requires us to "identify precisely the 'unlawful employment practice' of which [the plaintiff] complains." Delaware State College v. Ricks, 449 U.S. 250, 257, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980). Appellees argue that the unlawful practice here occurred in September 1981 when the Gill arbitration award was filed and published by Pan Am, more than 300 days before plaintiffs' filing of their ADEA charges with EEOC. Plaintiffs, on the other hand, contend that the crucial event for ADEA time-bar purposes did not occur until March 28, 1983, when Pan Am first implemented the alleged discriminatory seniority lists by making assignments in accordance with them, as alleged in Par. 12 of their complaint, and that their claim did not accrue until that time, which was within 300 days prior to the filing of their ADEA charges with the EEOC. Moreover, plaintiffs argue, even assuming their claim first accrued in 1981, the violation was a continuing one, thereby making timely their filing of EEOC charges, and the implementation of the seniority system was not a mere consequence or manifestation of the earlier conduct. See Chardon v. Fernandez, 454 U.S. 6, 8, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981).

We have recently held that "when employees are hired or refused employment pursuant to a continuous practice and policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it, Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 274 (2d Cir. 1981), cert. denied, 455 U.S. 988, 102 S. Ct. 1611, 71 L. Ed. 2d 847 (1982), provided such a continuing violation is clearly asserted both in the EEOC filing an in the complaint."[3] Miller v. I.T.&T., 755 F.2d 20, 25 (2d Cir. 1985). In Morelock v. NCR Corp., 586 F.2d 1096, 1103 (6th Cir. 1978), cert. denied, 441 U.S. 906, 99 S. Ct. 1995, 60 L. Ed. 2d 375 (1979), for instance, the court held that "adoption of a seniority system, if discriminatory as to age, constitutes a continuing violation of the ADEA as long as that system is

maintained by the employer." See also E.E.O.C. V. Home Ins. Co., 553 F. Supp. 704 (S.D.N.Y. 1982); but cf. Bronze Shields, Inc. v. N.J. Dept. of Civil Service, 667 F.2d 1074 (3d Cir. 1981), cert. denied, 458 U.S. 1122, 73 L. Ed. 2d 1384, 102 S. Ct. 3510 (1982). Applying these principles here, we hold that the alleged discriminatory violations in the present case must be classified as continuous ones, giving rise to claims accruing in favor of each plaintiff on each occasion when the merged seniority list was applied to him, provided he filed such charges with the EEOC, which he would be required to establish on remand, Miller v. I.T.T., supra, 755 F.2d at 25.

Appellants' final contention, that appellees should be estopped from asserting the ADEA time-bar defense, needs little discussion. In Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982), the court refused to find estoppel in the absence of a finding that the failure to make a timely filing was in consequence "either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." Accord Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 359 (8th Cir.), cert. denied, 469 U.S. 1036, 105 S. Ct. 512, 83 L. Ed. 2d 402 (1984). See also Pfister v. Allied Corp., 539 F. Supp. 224, 227 (S.D.N.Y. 1982) (no estoppel where "no allegation that he defendant acted in bad faith or deceitfully lured the plaintiff into settlement discussions, or that it attempted in any way to cause the plaintiff to miss the appropriate filling date").

Appellants here have not satisfied their burden on this issue. They make no estoppel argument against Pan Am. Against the defendant unions, they fail to allege detrimental reliance on any union representations. Nor could they do so, in view of Pan Am's posting of the seniority lists in March 1981 and the retention by PAPF in May 1981 of the same law firm that currently represents plaintiffs.

The order of the district court is affirmed in part and reversed in part. the case is remanded fur further proceedings consistent with this opinion.

APPENDIX A

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Cook v. Pan American World Airways Inc.

771 F.2d 635 (1985) | Cited 61 times | Second Circuit | August 22, 1985

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APPENDIX B

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WOOLSEY SD 14 Creekwood Ct. Danville CA 94526

WREN RP RFD 1, Box 516C Heber City UT 84032

YELTON RW 680 Miller Dr. 205W Miami Springs FL 33166

YOUNG GF P.O. Box 76 Stanfordville NY 12581

ZIPRIS M 7411 S.W. 9th St. Plantation FL 33317

TAYLOR GG 10840 Nollwood Dr. Chardon OH 44024

THOMAS HS Unter Den Eichen 114 1000 Berlin 45

THOMPSON JP 22763 A Voss Ave. Cupertino CA 95014

THORNE ED 10467 Plum Tree Lane Cupertino CA 95014

VOGEL RK 1740 Donner Dr. Santa Rosa CA 95404

VAN GORDINER SB 2503 Bethaway Orlando FL 32806

WARE PN 8201 N.W. 37th St. Coral Springs FL 33065

WENTZ RL Box 137 Hope NJ 07844

WHITE RS 15825 S.W. 87th Ave. Miami FL 33157

WILLIAMS DD Hotswig 20 1 Berlin 37

AUSTIN RF 120 Candlewood Hgts. New Milford CT 06776

BARNES PD 35 Mistletoe Dr. Covington LA 70433

BEAN WS Beeren Str. 32-34 1000 Berlin 37 W. Germany

BENTLEY TR 3809 Wooded Creek Dr. Farmers Branch TX 75234

BOMBACH LA 547 W. Shore Tr. Sparta NJ 07871

BROWN RC 16750 S.W. 90 Ave. Miami FL 33157

DOUGHERTY DM RD 7, Box 7544 Stroudsburg PA 18360

ETHERSON JT 428 Norwood Court Fort Myers FL 33907

FENTNER CJ 5322 SW 118 Ave. Cooper City FL 33330

FOSTER MB 246 2nd Ave. Santa Cruz CA 95062

GILKES DE 917 Smith Dr. Metairie LA 70005Z

HANLEY MD 20400 SW 50th Pl Ft. Lauderdale FL 33330

HASELBY JW Tegel Flughaven 1000 Berlin 51 W. Germany

HERRERA FM Ten Rod Rd., RR 1,

Box 472 Exeter RI 02882

HYMAS HV 32492 RD 168 Visalia CA 93291

JENKINS DW 8753 Wimbledon Dr. Knoxville TN 37923

KERREY TW 2100 Country Club Rd. Eustis FL 32726

KOSS DC P.O. Drawer D Miami Springs FL 33266

KYLE AM Blood St. Lyme CT 06371

LANGE RO 1099 31st Ave. San Mateo CA 94403

MARSHALL JF 5 Cove Lane Eustis FL 32726

McCABE JR 1001 Crescent Dr. Greencastle IN 46135

O'CONNOR JH 101 Gray Rock Rd. Trumbull CT 06611

O'DELL T 307 Kent Dr. Cocoa Beach FL 32931

OVERBY WC 7802 Cherry Place Ct. Humble TX 77346

RICH RA 1205 W. Dunne Ave. Morgan Hill CA 95037

SAVOIE JC 6544 Harbour Rd. N. Lauderdale FL 33068

SAXON BF 1092 Serena Way San Marco CA 92069

SCHLOTE FE 20 Roton Ave. Rowayton CT 06853

SCROGGIN GC 5325 SW 63d Ave. Miami FL 33155

SMITH DP Rt. 1, Box 975B99 Pensacola FL 32507

STULL FP 885 N.W. 6th Dr. Boca Raton FL 33432

TAYLOR JR 5116 S.W. 72nd Ave. Miami FL 33155

WATERS DR 411 S.E. 13th Ave. Pompano Beach FL 33060

DOSS WW 14211 SW 104th Ave. Miami FL 33176

CRAHEN RR 3533 4th Lane, SW Vero Beach FL 32962

GAY HM RD #1, Box 1329 Bangor PA 18013

O'BRIEN SA P.O. Box 1104 Hollister CA 95024

STABENAU HM 20439 Interlachen Ln. Troutdale OR 97060

WOLF WA Box 3016 Stateline NV 89449

ZIESMER RA 501 29th Ave. Ct. Pyallup WA 98371

ALMQUIST GN SR #1, Box 127-M Hawley PA 18428

ANDERSON AR Wareneck P.O. Wareneck VA 23178

ACKINSON WP Hohenzollern 1B 1000 Berlin 39

BACON RN 348 Velma Dr. Largo FL 33540

BAILEY C RR #5, Echo Valley Rd. Newtown CT 06420

BISH LW 752 Ridge Dr. McLean VA 22101

BROOKS RS 7440 NW 6th ST. Plantation FL 33317

BURGER JJ 5 Woodsvale Rd. Madison CT 06443

BURROUGHS WJ, Jr. 9 Maple Ln. Madison CT 06443

CRAIG DC 1955 NW 108 Ln. Coral Springs FL 33065

COBB JP Berlin Pilot Mail PAA

Hanger 17 MR Jamaica NY 11430

CROSS RL 2225 Colusa Hwy. Yuba City CA 95991

FREDERIC GC Box 6152 Incline Vlg. NE 89450

FULLER BB 5072 Country Club Way Pt. Orchard WA 98366

GOELTZ FS 2168 Candelero Sana Fe NM 87505

HUMBLE RA 5770 SW 114th Ter. Miami FL 33156

HAWES LJ 1407 Ball Road Eagle Pt. OR 97527

KANE M Johannisburgeralle 3 1 Berlin 19

KELLEY R 295 Dayton Rd. S. Glastonbury CT 06073

KLEIN RL Box 322 Rowayton CT 06853

KELLEY EG 14300 Clayton Rd. San Jose CA 95127

LAMP RJ 6300 Rogers Circle Lincoln NE 68506

LEINBACH SP, Jr. 317 Fairmont Ave. Winchester VA 22601

LEWIS JW Box 43 Star Rt. Pleasant Mt. PA 18453

LITTLEPAGE MJ 186 Vineyard Rd. Huntington NY 11743

LONG TE 1530 Alabama Dr. Winter Park FL 32789

MEFFERT MD Gelding Hill Rd. Sandy Hook CT 06482

McKAY DI Teel Rd. Fairfield NY 13336

MERCIER RD 8 Gina Dr. Centerport NY 11721

NEUWALD EJ Box 4074 Tequesta FL 33458

NEWSTROM HM Box 787 Somis CA 93066

PANZER DA Beergnstrasse Fa 1 Berlin 37

PARRAGA WA Box 3753 Incline Village NY 89450

PENWELL GS 24290 Sailview Dr. Elmira OR 97437

PHILLIPS CM Fechnerstr. 16 1 Berlin 31

REMELY B 518 N 17th Ave. Bozeman MT 59715

RHODES SS 1956 Port Cardiff Pl. Newport Bch. CA 92660

SMITH LW Rt. 1, Box 420 White Salmon WA 98672

SMITH W Box 962 San Mateo CA 94403

13. Delta-Northeast Merger Case, Order 73-1-24 at 5, aff'd Northeast Master Executive Council v. CAB, 165 U.S. App. D.C. 36, 506 F.2d 97 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110, 42 L. Ed. 2d 806, 95 S. Ct. 783 ."

1. The CAB also dismissed a "Motion for Confirmation and Enforcement of [the] Arbitration Award," filed by flight engineers formerly employed by National, as moot.

2. We have held that for purposes of review under 29 U.S.C. § 1486 (a) the word "order" should be construed liberally. State of New York v. F.A.A., 712 806, 808 (2d Cir. 1983). Although only final orders are reviewable, McManus v. C.A.B., 286 F.2d 414, 417 (2d Cir.), cert. denied, 366 U.S. 928, 81 S. Ct. 1649, 6 L. Ed. 2d 388 (1961), we have defined a final order as one which "imposes an obligation, denies a right, or fixes some legal relationship." Rombough v. F.A.A., 594 F.2d 893, 895-96 n.4 (2d Cir. 1979) (citing Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 112-13, 92 L. Ed. 568, 68 S. Ct. 431 (1948)). The order in the instant case meets this criterion. Our conclusion that the CAB order denying the petitions to set aside (rather than the original CAB order approving the merger but retaining jurisdiction to ensure that the LPPs are complied with) is appealable, see e.g., Northeast Master Executive Council v. C.A.B., supra 506 F.2d at 100, and consistent with cases in which we have held orders approving a merger to be non-reviewable, Overseas National Airways, inc. v. C.A.B., 426 F.2d 725, 727 (2d Cir. 1970) (CAB orders refusing to expand scope of hearing non-reviewable as merely "threshold determinations," "interlocutory in nature"); McManus v. C.A.B.., supra, (CAB orders "relating to various procedural details" not subject to review).

3. At the request of the court, plaintiffs have submitted copies of charges filed with the EEOC in which plaintiffs clearly assert ongoing violations of the ADEA. The complaint also alleges ongoing violations. See PP 14-18.