Appeal No. 13-15000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

US AIRWAYS, INC.,
Appellant,

v.

DON ADDINGTON, et al.,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE
CASE NO. 10-1570-PHX-ROS

MOTION TO HOLD THE APPEAL IN ABEYANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant US Airways, Inc. is a wholly-owned subsidiary of US Airways Group, Inc., which is a publicly-traded company. At this time, no publicly-traded company owns more than 10% of US Airways Group, Inc.

April 19, 2013.

Respectfully submitted,

/s/ Chris A. Hollinger

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MOTION TO HOLD THE APPEAL IN ABEYANCE

Plaintiff-Appellant US Airways, Inc. ("US Airways") is moving to hold its appeal in abeyance because the issue on appeal will become moot if the recently-announced merger between US Airways and American Airlines, Inc. ("American") closes as anticipated during the third quarter of this year. The issue at the heart of this appeal arises from a seniority dispute between defendant-appellee US Airline Pilots Association ("USAPA") and defendants-appellees West Pilots. That issue will become moot if the merger closes as anticipated because the merger-related seniority issues will be resolved in accordance with a federal law, the McCaskill-Bond statute.

Accordingly, US Airways respectfully requests that the Court hold this appeal in abeyance pending the closing of the US Airways/American merger or a definitive determination that the merger will not be completed (in which case this appeal would be re-activated). The West Pilots do not oppose this motion. USAPA opposes this motion. (*See* Declaration of Chris A. Hollinger ("Hollinger Decl."), filed concurrently herewith, at ¶ 3.)

PROCEDURAL AND FACTUAL BACKGROUND

This appeal stems from a dispute between the defendants/appellees regarding how the seniority lists of two pilot groups would be integrated following the merger of US Airways and America West Airlines, Inc. in 2005. The pre-

merger America West pilots are commonly referred to as the "West Pilots," and were certified as the defendant "West Pilot Class" in the district court below. The pre-merger US Airways pilots are commonly referred to as the "East Pilots." The West Pilots contend that USAPA, which is the certified collective bargaining representative for the East Pilots and West Pilots, is impermissibly pursuing the East Pilots' interests in the seniority-integration dispute to the detriment of the West Pilots. The West Pilots allege that they have a right to have pilot seniority integrated pursuant to an arbitration decision known as the "Nicolau Award," whereas USAPA objects to the Nicolau Award and is opposed to its implementation.[1] US Airways is neutral as to the merits of this seniority dispute.

During its negotiations with USAPA for a joint collective bargaining agreement that would be applicable to all US Airways (East and West) pilots, US Airways was confronted with a Hobson's Choice: either accept USAPA's non-Nicolau seniority proposal, and get sued by the West Pilots for alleged assistance in USAPA's alleged breach of the duty of fair representation ("DFR") under the Railway Labor Act ("RLA"); or refuse to accept USAPA's seniority proposal, and

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[1] In prior litigation commenced in 2008, known as "*Addington I*," the West Pilots prevailed at trial on their claim that USAPA had breached its duty of fair representation under the Railway Labor Act by opposing seniority integration based on the Nicolau Award. In 2010, however, a panel of this Court, by a 2-1 vote, vacated the judgment in favor of the West Pilots, concluding that their claim against USAPA was not yet ripe. *See Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1180 (9th Cir. 2010). US Airways was not a party to this appeal, and its interests regarding ripeness were not directly presented to, nor decided by, the panel.

face a work stoppage initiated by USAPA. To extricate itself from this dilemma, US Airways filed the instant action (sometimes referred to as *Addington II*) against both the West Pilots and USAPA, seeking one of three alternative judicial declarations: (1) USAPA's seniority proposal violates its DFR to the West Pilots, and therefore US Airways could not lawfully accept it; (2) USAPA's seniority proposal does not violate its DFR, and therefore US Airways could lawfully accept it; or (3) whether or not USAPA's seniority proposal violates its DFR, US Airways would not be liable to the West Pilots if it accepted USAPA's proposal. The district court ruled that US Airways' claims were not ripe, relying on the principles articulated in this Court's decision in *Addington I*. (*See* Order (Doc. No. 193) in Case No. 2:10-cv-01570-ROS, at 7:20-8:7 (attached to Notice of Appeal as Ex. B).)

In February of this year, while this case was already on appeal, US Airways and American agreed to merge. (*See* Declaration of Counsel ("Szymanski Decl.") (Doc. No. 7-2), at ¶ 6 & Ex. 7.) In connection with the merger, US Airways, American, USAPA, and the union representing American's pilots, the Allied Pilots Association, entered into a Memorandum Of Understanding Regarding Contingent Collective Bargaining Agreement ("MOU"). The MOU, which will only become effective if and when the merger closes, sets the terms, and/or prescribes procedures for setting terms, of the collective bargaining agreement that would

become applicable to the American pilots and the US Airways (East and West) pilots for the period between the closing of the merger and January 1, 2019. (*See* Hollinger Decl. ¶ 2; Declaration by Andrew S. Jacob ("Jacob Decl.") (Doc. No. 8-2), at ¶ 4; Ex. 1.) While this collective bargaining agreement is in effect, the pilots of the combined airline, specifically including the pilots currently represented by USAPA, would be prohibited by the RLA from engaging in a work stoppage.

The MOU provides generally that the seniority of the American pilots and the US Airways (East and West) pilots shall be integrated in a manner consistent with the McCaskill-Bond amendment, a federal statute enacted in 2007. (*See* Jacob Decl. Ex. 1 at ¶¶ 10(a) & 10(c).) Pursuant to McCaskill-Bond, if the matter cannot be resolved through negotiations, a "final and binding" arbitration will be conducted to fashion a "fair and equitable" integration of the American and US Airways pilot seniority lists.

The American/US Airways merger is subject to certain conditions that are anticipated to occur during the third quarter of this year. (*See* Szymanski Decl. Ex. 7 at p. 2 of exhibit.)

ANALYSIS

The predicate for US Airways' claims for declaratory judgment on the record below is that it was unavoidably confronted with significant harm: either a lawsuit filed by the West Pilots or a work stoppage initiated by USAPA. However,

if the US Airways/American merger is completed, and the MOU takes effect, the material facts will change significantly. Seniority issues in connection with the merger will be resolved through a negotiation/arbitration procedure pursuant to the federal McCaskill-Bond statute. US Airways (and its successor) will no longer be faced with the possibility of a strike, the Hobson's Choice will disappear, and US Airways' claims for declaratory judgment would be rendered moot. If, on the other hand, the merger is not consummated, US Airways would continue to face the same dilemma as when it filed its Complaint.

It is unlikely that this Court will issue an opinion before the anticipated merger is consummated. Briefing will not be complete until on or about July 27, 2013 (if not later). If the merger closes during the third quarter of this year, as expected, proceeding with the briefing and decision will result in an unnecessary expenditure of resources for this Court and the parties because the issue raised by this appeal will be moot. US Airways thus respectfully requests that the Court hold briefing and all other aspects of this appeal in abeyance pending the closing of the US Airways/American merger or a definitive determination that the merger will not proceed. *See, e.g.*, *United States v. Outen*, 286 F.3d 622, 631 & n.6 (2d Cir. 2002) (court of appeals "unquestionably" has the authority to hold an appeal in abeyance under the Federal Rules of Appellate Procedure).

If this motion is granted, US Airways will keep the Court apprised of any significant changes in the expected timeframe for closing of the merger, and will also promptly inform the Court when the merger has closed or if a definitive determination has been made not to proceed with the merger. If the merger does not close, a new briefing schedule could be set.

CONCLUSION

For all of the foregoing reasons, the Court should grant US Airways' motion to hold this appeal in abeyance.

April 19, 2013.

Respectfully submitted,

/s/ Chris A. Hollinger

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Attorneys for Appellant US Airways, Inc.

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I electronically filed the foregoing Motion to Hold the Appeal in Abeyance with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, on April 19, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I have caused personal service of the within Motion to be effected on this same date on the following recipients:

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/s/ Chris A. Hollinger
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DECLARATION OF CHRIS A. HOLLINGER

I, Chris A. Hollinger, submit the following declaration in support of the Motion To Hold The Appeal In Abeyance filed by appellant US Airways, Inc. ("US Airways"):

1. I am an attorney licensed to practice law in the State of California, and a partner with the law firm of O'Melveny & Myers LLP. I am one of the attorneys principally responsible for the representation of US Airways in this matter. I have personal knowledge of the facts set forth below, and, if called as a witness, I could and would competently testify thereto.

2. The Memorandum Of Understanding Regarding Contingent Collective Bargaining Agreement ("MOU") sets the terms, and/or prescribes procedures for setting terms, of the collective bargaining agreement that will become applicable to the American Airlines, Inc. ("American") pilots and the US Airways (East and West) pilots if the US Airways/American merger closes. As set forth in the MOU (*see, e.g.*, ¶¶ 1, 4 (attached as Exhibit 1 to the Declaration by Andrew S. Jacob (Doc. No. 8-2))), those terms and conditions of employment are the 2012 Collective Bargaining Agreement ("CBA") between American and the Allied Pilots Association ("APA"), the union which represents American's pilots, as modified pursuant to the MOU. The amendable date of the 2012 American-APA CBA is January 1, 2019, and the amendable date will not be modified as part of the MOU process.

3. On April 18, 2013, counsel for US Airways advised counsel for appellees USAPA and the West Pilot Class of US Airways' intent to file the instant Motion To Hold The Appeal In Abeyance. On that same day, Marty Harper (counsel for the West Pilot Class) advised that the West Pilot Class do not oppose US Airways' motion, and Patrick Szymanski (counsel for USAPA) advised that USAPA would oppose the motion.

I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated: April 19, 2013.

/s/ Chris A. Hollinger
Chris A. Hollinger
Counsel for Appellant
US Airways, Inc.

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I electronically filed the foregoing Motion to Hold the Appeal in Abeyance with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, on April 19, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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