No. 13-15000

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

DEFENDANT-APPELLEE US AIRLINE PILOTS ASSOCIATION'S OPPOSITION TO MOTION TO HOLD THE APPEAL IN ABEYANCE

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Defendant-Appellee US Airline Pilots Association ("USAPA") opposes the Motion by Plaintiff-Appellant US Airways to hold this appeal in abeyance pending the merger between US Airways and American Airlines, Inc. ("American"). The merger will not render the appeal moot, and the delay in disposition of this appeal will adversely affect the rights of USAPA and the pilots it represents.

The decision at issue in this appeal arises from a declaratory judgment action filed by US Airways seeking one of three alternative judicial declarations on separate counts enumerated in the complaint: Count I: USAPA's seniority proposal violates its duty of fair representation ("DFR") to the West Pilots, and therefore US Airways could not lawfully accept it; Count II: USAPA's seniority proposal does not violate its DFR, and therefore US Airways could lawfully accept it; or Count III: 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 dismissed Counts I and III and granted USAPA's motion for summary judgment on Count II. In so doing, the District Court ruled that "USAPA's seniority proposal does not automatically breach its duty of fair representation" and that "Defendant US Airline Pilots Association ("USAPA") is free to pursue any seniority position it wishes during the collective bargaining negotiations." Order (Doc. 193) in Case No. 2:10-cv-01570-ROS, at 1, 8. As parties to the Declaratory Judgment action, the members of the West Pilot Class, (consisting of all current US Airways pilots who were employed by America West

before the merger between US Airways and America West that took place in 2005), are bound by the District Court's Judgment. Order (Doc. 205) and Amended Judgment (Doc. 206) in Case No. 2:10-cv-01570-ROS.

Contrary to US Airways' assertion, the issues at the heart of the Declaratory Judgment action will not be moot if the merger closes. The District Court's decision upholds the authority of USAPA, as the exclusive bargaining representative of all the pilots at US Airways, to negotiate for a different seniority proposal than the seniority proposal that was formulated by the Air Line Pilots Association (ALPA), which previously represented the pilots at US Airways and America West until it was decertified and replaced by USAPA. This affirmance of USAPA's authority is critical because USAPA will remain the certified bargaining representative for the US Airways pilots even if the merger closes and, in particular, will remain their representative with respect to the seniority merger integration proceeding mandated by the McCaskill-Bond Amendment to the Federal Aviation Act, 42 U.S.C. §42112.

The importance of ruling on this appeal is highlighted by the recent filing of yet a third action arising out of the ongoing seniority dispute resulting from the merger of US Airways and America West. *Addington v. USAPA*, Case No. 2:13-cv-00471-ROS (D. Ariz.). This new action, initiated by several individual pilots formerly employed by America West on behalf of themselves and a putative class

of former America West Pilots,[1] alleges the same duty of fair representation claim against USAPA that was at issue in *Addington v. US Airlines Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010) and this case. In addition, the plaintiffs in the new action have asked the District Court to grant a preliminary injunction directing USAPA to use only the seniority proposal formulated by the prior bargaining representative in the potentially upcoming McCaskill-Bond proceeding. The new complaint and the preliminary injunction motion demonstrate the continuing importance of the central issue in the instant appeal even if the merger closes. In fact, USAPA has argued in its motion to dismiss the newly filed action (*Addington v. USAPA*, Case No. 2:13-cv-00471-ROS, at Doc. 44 (D. Ariz.)) and in opposition to the West Pilots' motion for preliminary injunction (*id*., at Doc. 48) that the holding of the District Court at issue on this appeal is *res judicata* with respect to the new complaint and the claims underlying the preliminary injunction request.

While the District Court's judgment continues in force and effect unless this Court overturns it, USAPA is prejudiced by permitting the parties to continue to attempt to reargue the issues presented on this appeal in collateral proceedings, including in the newly filed action and in proceedings pursuant to the McCaskill-Bond amendment following completion of the merger. For example, in direct contravention of the District Court's ruling in this case, US Airways has now

[1] As such, the plaintiffs in that action are members of the West Pilot Class in this appeal and in the case below.

suggested that the merits of the West Pilots' underlying DFR claim that prompted the proceeding below and that was also dismissed on ripeness grounds by this Court,[2] can somehow be litigated prior to integrating seniority. *Id.*, at Doc. 49. US Airways makes this claim despite the continued absence of a fully integrated seniority list and despite the fact that under McCaskill-Bond, post-merger seniority integration must be determined by a panel of arbitrators in the absence of agreement by the Unions and carrier of the merged airline. Nor does US Airways ever explain why the seniority dispute, which it characterizes as the "issue at the heart of this appeal," (Plaintiff-Appellant's Motion p. 1), would somehow disappear in the event of a merger, why the lower court's ruling would not be equally germane to proposals USAPA will make in the seniority proceedings under the merged carrier or why it would then be immune from suit by the West Pilots, the threat of which it cited as a basis for filing the instant action and arguing below that this action is not governed by this Court's decision in *Addington.*

In fact, the central holdings of the court below- that USAPA is not bound to pursue any particular seniority regime and that it is free to pursue any seniority regime it wishes- have just as much bearing in the post-merger context as they do in the absence of the merger. This matter therefore will not be moot if the merger closes. Further, putting this appeal on hold allows U.S. Airways an unfair advantage. It can continue to attempt to collaterally attack the ruling below and it

[2] *Addington,* 606 F.3d 1174 (9th Cir. 2010).

can continue to attempt to leverage the pendency of this matter in its dealings with USAPA now and in the future. Moreover, US Airways' motion makes no representation that if the merger is approved by the bankruptcy court, it will consent to an immediate order dismissing this appeal. It speaks only about "closing" of the merger under unspecified terms. Apparently, it is suggesting that if the bankruptcy court order is appealed, then this matter could be stayed indefinitely and for a period of several years, while the American Airlines bankruptcy appeals took their course. Keeping this matter in limbo for such an indefinite and potentially protracted period of time, especially in light of the collateral proceedings described here, is not reasonable.

USAPA has no objection if US Airways determines to withdraw its appeal. But holding the appeal in abeyance when the issues presented are not moot and, as US Airways acknowledges (Plaintiff-Appellant's Motion p. 5), will not become moot, is prejudicial to USAPA. Whether or not the merger closes, this case will not be moot. In either event (merger or no merger), the delay requested by US Airways is not reasonable and will prejudice USAPA.

CONCLUSION

For the foregoing reasons and those stated in USAPA's previous Motion to Expedite Proceedings (Doc. 7-1), the Motion should be denied.

Respectfully submitted this 29th day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 29, 2013.

I certify that the following 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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