Docket No. 13-15000

In the
UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

US AIRWAYS, INC.,

Plaintiff-Appellant

vs.

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, Steve WARGOCKI, Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA, individually and representing a class of persons similarly situated (the "West Pilots"); and US AIRLINE PILOTS ASSOCIATION, an unincorporated association,

Defendants-Appellees.

On appeal from the United States District Court for the District of Arizona, No. 2:10-CV-1570-PHX-ROS, Honorable Roslyn O. Silver, United States District Judge

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WEST PILOTS' RESPONSE TO MOTION BY APPELLANT US AIRWAYS TO HOLD THE APPEAL IN ABEYANCE (Dkt. 12-1)

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Defendants-Appellees Addington, *et al.* (collectively, "West Pilots") respond to the motion by Appellant US Airways (Dkt. 12-1) to hold this appeal in abeyance. While the West Pilots do not object to the requested relief, they do object to the premise that US Airways offers to support its request.

A. Background[1]

In 2005, US Airways (a bankruptcy debtor) and America West Airlines merged to form a new airline also called US Airways. The pilots on both sides of that merger (the "East Pilots" from US Airways and the "West Pilots" from America West) agreed to an arbitrated merger of their separate seniority lists. That arbitration was conducted by a panel chaired by George Nicolau and an award creating a merged seniority list (the "Nicolau Award") was announced in May 2007. US Airways accepted the Nicolau Award in December 2007.

The East Pilots immediately repudiated their agreement to treat the Nicolau Award as final and binding. In mid 2007, they formed a

[1] Other than as noted, these background facts are recounted in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1177-79 (9th Cir. 2010); *see also* P. Jones, Letter to NMB (Nov. 28, 2012) (attached as Ex. "1" to Dkt. 7-2).

single-airline union, USAPA, to oust the multi-airline union that was representing these pilots, the Airline Pilots Association ("ALPA"). They did so because their majority status in the post-merger airline allowed them to control a single-airline union such as USAPA that only represented US Airways pilots. At the time, ALPA (which they could not control) was ordering them to use the Nicolau Award list.

USAPA succeeded ALPA as the bargaining representative. Under East Pilot control, USAPA also repudiated the agreement to honor the Nicolau Award. In September 2008, the West Pilots filed an action to compel USAPA to honor that agreement. *Addington v. US Airline Pilots Ass'n*, No. 2:08-CV-1633-PHX-NVW, 2009 WL 2169164, at *7 (D. Ariz. Jul. 17, 2009).

After a 10-day trial, a jury found that USAPA breached the duty of fair representation because its sole objective for repudiating the Nicolau Award was to benefit East Pilots at the expense of West Pilots, rather than to benefit the bargaining union as a whole. *Id.* The court ruled that "[t]he West Pilots remain entitled to a union that will not abrogate the Nicolau Award without a legitimate

purpose." *Id.* at *28. And it explained that "[a]ny waiver of that right must be 'consensual.'" *Id.*

USAPA appealed. This Court vacated the judgment on the basis of lack of ripeness. *Addington*, 606 F.3d at 1184. But in so doing, this Court cautioned USAPA that unless it "bargain[ed] in good faith pursuant to its DFR, with the interests of all members—both East and West—in mind," there would be "an unquestionably ripe DFR suit, once a contract is ratified." *Id.*, at 1180 n.1.

On July 27, 2010, US Airways filed a declaratory judgment action, claiming that it required guidance, *inter alia*, as to whether it would be liable if it entered into a collective bargaining agreement with USAPA that did not implement the Nicolau Award. *US Airways, Inc. v. Addington*, No. 2:10-CV-01570-PHX-ROS, Complaint (D. Ariz. Jul. 26, 2010) (Doc. 1). USAPA argued that the matter was still not ripe.

The District Court was constrained by the Ninth Circuit's ripeness ruling. It stated, for example, "Pursuant to the Ninth Circuit's decision, any claim for breach of the duty of fair representation will not be ripe until a collective bargaining agreement is finalized." *Id.*, Order at 7:20 to 7:23 (Oct. 11, 2012)

(Doc. 193). Nonetheless, the District Court provided additional guidance by ruling that USAPA's date-of-hire "seniority proposal" (a method of seniority integration that Mr. Nicolau found was neither fair nor equitable because it put more than a thousand East Pilots who were on furlough ahead of hundreds of active West Pilots) would "breach its duty of fair representation" unless it was "supported by a legitimate union purpose." *Id.*, Amended Judgment, 1 (Dec. 4, 2012) (Doc. 206). The Court stopped just short of ruling that USAPA did not and could never have such legitimate purpose.

US Airways appealed, seeking more concrete judicial guidance. Neither the West Pilots nor USAPA filed a notice of cross appeal.

B. Argument

Two months after the District Court entered final judgment, USAPA, Allied Pilots Association (the union representing the American pilots), US Airways and AMR (the parent of American Airlines) entered into an agreement called the "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement" (the "MOU") that sets the stage for a merger between US Airways and AMR. (Dkt. 8-3.) The MOU allows the airlines to merge and integrate pilot operations without providing further

opportunities for ratification or rejection by USAPA's members. (*Id.* at ¶ 27.) On February 8, 2013, 75% of USAPA's membership ratified the MOU. (Dkt. 8-1, at ¶ 5.)

It the motion at issue, US Airways argues that the outcome of the seniority integration in the merger of US Airways and American Airlines will resolve the dispute between the West Pilots and USAPA as to whether USAPA's duty of fair representation requires that it order pilot seniority according to the order established in 2007 by the Nicolau Arbitration. (Dkt. 12-1 at 7 (US Airways stating that "Seniority issues in connection with the merger will be resolved through a negotiation/arbitration procedure pursuant to the federal McCaskill-Bond statute.").

The West Pilots object to that statement. The West Pilots object because nothing that occurs in the course of the merger between US Airways and American Airlines will negate their right to insist that the Nicolau Award seniority order be treated as final and binding on US Airways, USAPA and their successors in the American Airlines merger.

The West Pilots, therefore, ask this Court to not find (as US Airways asks in its motion) that the outcome of the merger with

American Airlines will moot their duty of fair representation claim. The outcome of the merger between American Airlines and US Airways will neither moot the dispute between the West Pilots and USAPA nor will it relieve US Airways of liability if the airline (or its successor in the merger) implements a seniority order that does not follow the order established in the 2007 Nicolau Award.

That said, the outcome of a third round of litigation that the West Pilots filed on March 3, 2013, may well moot this appeal. In this litigation, the West Pilots assert that the DFR claim is fully ripe as a consequence of steps taken in furtherance of the US Airways / American Airlines merger. If that litigation establishes obtains an order mandating that US Airways and USAPA implement the Nicolau Award seniority order in the course of that merger, the question of whether the 2010 declaratory action was ripe would be moot.

C. Conclusion

The West Pilots do not object to the Court granting US Airways motion to hold this appeal in abeyance. But they do object to US Airways' premise that the outcome of its merger with American Airlines will moot the West Pilots' duty of fair representation claim.

DATED: May 1, 2013

Respectfully submitted,

/s/ Andrew S Jacob

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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 May 1, 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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