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

REPLY BRIEF FOR APPELLANT US AIRWAYS, INC.

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INTRODUCTION

This appeal presents a straightforward question: whether the district court erred in holding that plaintiff/appellant US Airways, Inc.'s ("US Airways'") claims under the Declaratory Judgment Act were not ripe.

As established in the record below, US Airways is required in its collective bargaining negotiations with defendant/appellee US Airline Pilots Association ("USAPA") to respond to USAPA's bargaining demand for an integrated pilot seniority list to be implemented as part of a new collective bargaining agreement. USAPA has insisted, upon threat of a strike, that US Airways adopt an integrated pilot seniority list that is inconsistent with a prior arbitration decision (the "Nicolau Award") while defendants/appellees West Pilots have threatened to bring a lawsuit against US Airways if the Nicolau Award is not adopted.

US Airways therefore filed a declaratory judgment action in the district court, seeking clarification of its legal rights and obligations in the collective bargaining process. It requested that the district court issue one of three alternative declarations: (1) USAPA's seniority demand, which is based on date-of-hire principles rather than the Nicolau Award, violates its duty of fair representation ("DFR") to the West Pilots, and therefore US Airways cannot accept such a proposal; (2) USAPA's date-of-hire seniority demand does not violate its DFR, and therefore US Airways may accept it; or (3) US Airways will not be liable to

the West Pilots regardless of which seniority list it accepts. The district court, having concluded that US Airways' claims for declaratory judgment were unripe because they implicated DFR issues previously considered by this Court in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), did not enter any of the declarations that US Airways had specifically requested. US Airways is now appealing that decision.

USAPA devotes a significant portion of its opposition brief to the arguments that it is not bound by the Nicolau Award and that it has not breached its DFR by pursuing an alternative seniority list, but these are the substantive issues the district court declined to resolve on account of its stated concerns about ripeness. Neither issue is relevant to the present appeal, which is limited to whether the district court correctly applied ripeness principles in this action for declaratory judgment.

USAPA's related argument that the district court granted the declaratory relief requested by US Airways, and that US Airways therefore has no standing to appeal, finds no support in the court's decision. The "relief" provided by the court fell far short of the relief requested by US Airways – as the court itself acknowledged in describing its ruling as "the best 'declaratory judgment' the Court can offer.'" Moreover, USAPA's argument is refuted by Judge Silver's subsequent observation in another lawsuit between the parties that the present case had been "dismissed as not ripe."

As to the ripeness issues that are actually presented by this appeal, both the West Pilots and USAPA have repeatedly asserted they will take drastic adverse action against US Airways unless it adopts their respective position. This creates a real and reasonable apprehension of harm to US Airways regardless of what course it takes in the statutorily-mandated collective bargaining process. USAPA's argument that the harm to US Airways is too speculative should be rejected. So long as USAPA remains steadfast in its rejection of the Nicolau Award as mandated by its constitution, and if US Airways is unable to obtain a judicial declaration regarding its legal obligations in the seniority dispute between USAPA and the West Pilots, USAPA will ultimately be released from its collective bargaining negotiations with US Airways and then will have the right to strike over the seniority issue – and USAPA has declared that it will do so. The West Pilots, on the other hand, have unambiguously asserted that if US Airways agrees to USAPA's non-Nicolau seniority demand, they will sue US Airways for facilitating and assisting USAPA's alleged breach of its DFR. This clear threat of a lawsuit is more than enough to support a finding of ripeness.

The ripeness inquiry here is not controlled by this Court's prior decision in *Addington*. The fact that US Airways will suffer harm is not subject to contingencies regarding the outcome of the collective bargaining process, as was the case for the plaintiffs in *Addington*. Rather, US Airways has a present and

existing obligation under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, to negotiate with USAPA for a collective bargaining agreement – a fully-ripened legal obligation that requires US Airways to respond to USAPA's non-Nicolau seniority demands. In doing so, US Airways will inescapably have to adopt one of two mutually-exclusive approaches to seniority (i.e., Nicolau or non-Nicolau), each advanced by a party that has consistently demonstrated that it will not consider any alternative to its desired approach and that has made credible threats to take adverse action against US Airways if it does not get its way. Moreover, the DFR claim at issue in *Addington* required a showing of causation and damages, which were the focal points of this Court's conclusions regarding lack of ripeness, whereas US Airways' claims for declaratory judgment do not.

US Airways' claims are ripe. The district court erred in concluding otherwise, and its decision should be reversed.

ARGUMENT

I. US AIRWAYS HAS STANDING TO BRING THIS APPEAL.

The district court dismissed this action as unripe, and did not enter any of the three alternative declaratory judgments specifically requested by US Airways. USAPA's opposition contends that US Airways received the declaratory judgment it sought and therefore has no standing to appeal. In making this argument,

however, USAPA mischaracterizes the district court's opinion and the relief sought by US Airways.

A. The District Court Dismissed This Case As Unripe.

USAPA's opposition excerpts language from the opinion below to create the incorrect impression that the district court resolved US Airways' request for declaratory judgment on the merits. Specifically, USAPA points to the district court's statement that "USAPA's seniority proposal does not automatically breach its duty of fair representation," ER 9, and argues, based on this snippet, that the court resolved US Airways' request for guidance because it provided US Airways with assurance that "it can accept a seniority proposal from USAPA that does not incorporate the Nicolau Award." Opp. at 13.

The language on which USAPA relies is taken out of context. Judge Silver preceded that statement with a crucial caveat:

> When the collective bargaining agreement is finalized, individuals will be able to determine whether USAPA's abandonment of the Nicolau Award was permissible, i.e. supported by a legitimate union purpose. Thus, the best 'declaratory judgment' the Court can offer is that USAPA's seniority proposal does not automatically breach its duty of fair representation.

ER 8-9. The district court, having concluded that the DFR issues were unripe based on this Court's prior decision in *Addington*, was merely articulating the controlling legal standard for determining if USAPA would be in breach of its DFR. But there was no dispute about the applicable legal standard, i.e., whether

USAPA's seniority proposal was supported by a legitimate union purpose. *See, e.g.*, *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 75-76 (1991). Simply put, the court's decision did not tell the parties anything they did not already know.

Read in its entirety, it is clear the district court's decision did not provide US Airways with the guidance it sought. A ruling that USAPA has not ***automatically*** breached its DFR through its seniority demand is not the same thing as a ruling that USAPA's unwavering commitment to a non-Nicolau seniority list ***does not*** breach that duty. The district court expressly recognized this distinction, stating that "it is not possible to determine the viability of any claim for breach of the duty of fair representation until a particular seniority regime is ratified." ER 9.

Judge Silver has since referred to her decision in this case in an order made in a subsequent case between the same litigants, wherein she explicitly stated that this action had been "dismissed as not ripe." *Addington v. USAPA* ("*Addington III*"), Case No. 2:13-cv-00471, Dkt. 122 at 1 (D. Ariz. July 19, 2013). Given the clear statements from the district court that US Airways' claims for declaratory judgment were dismissed on ripeness grounds, there is no reasonable basis for USAPA to argue that the claims were resolved on the merits.

B. The Declaratory Judgment Relief Requested By US Airways Has Not Changed.

USAPA's opposition next argues that US Airways "sought declaratory judgment only on whether USAPA's ***departure*** from the Nicolau Award would

violate its DFR, not on whether USAPA's then current ***proposal*** violated its DFR." Opp. at 14 (emphasis in original). In USAPA's view, US Airways received an answer to the first question (purportedly the only one it asked), but on appeal is now attempting to obtain an answer to an entirely different question.

This argument is unavailing. Even if US Airways asked only whether USAPA's departure from the Nicolau Award would, or would not, breach its DFR – and even if that is a meaningfully different question than whether the only, non-Nicolau seniority proposal USAPA was pursuing breached its DFR – US Airways did not receive an answer to that question. Instead, the district court ruled that "it is not possible to determine the viability of ***any*** claim for breach of the duty of fair representation until a particular seniority regime is ratified." ER 9 (emphasis added). Because the district court failed to issue a declaratory judgment stating whether or not USAPA's demand for a non-Nicolau seniority list breached its DFR, US Airways has standing to appeal.

II. US AIRWAYS HAS A RIPE CLAIM FOR A DECLARATORY JUDGMENT.

A. The Constitutional Ripeness Test Is Satisfied.

USAPA suggests that US Airways' claim is not ripe because, in the situation presented to the court below, US Airways is no different than "any employer negotiating for a collective bargaining agreement." Opp. at 23. That characterization is incorrect. Nearly five years have passed since USAPA made its

constitutionally-mandated, date-of-hire seniority proposal to US Airways and the West Pilots filed their initial lawsuit seeking implementation of the Nicolau Award. ER 4. In the intervening period, neither USAPA nor the West Pilots have retreated in the slightest from their respective, irreconcilable positions. To the contrary, each has repeatedly asserted that it will take severe adverse action unless US Airways adopts its respective position, thereby creating a real and reasonable apprehension of harm to US Airways regardless of what it does in the collective bargaining process. And in light of the entrenched positions of USAPA and the West Pilots, it is obvious that the material facts of this case will not change. A plaintiff need only establish that material changes are substantially unlikely to occur, not that they are impossible. *See, e.g.*, *Sierra Applied Scis. v. Advanced Energy Indus.*, 363 F.3d 1361, 1379 (Fed. Cir. 2004) (evidence that a product's design "was substantially fixed" is sufficient for an infringement action to be ripe).

USAPA's suggestion that the work stoppage it has threatened might never occur because its right to strike depends "upon the NMB releasing US Airways and USAPA from further negotiations," Opp. at 25, is unpersuasive. USAPA has already engaged in one illegal work slowdown in recent years, *see US Airways, Inc. v. US Airline Pilots Ass'n*, 813 F. Supp. 2d 710, 716 (W.D.N.C. 2011), and, while it may take a long time, USAPA will eventually be released from negotiations if it continues to reject the Nicolau Award, a position mandated by its

constitution, and US Airways is unable to obtain judicial guidance regarding its legal obligations with respect thereto.

USAPA also contends that it has not threatened a work stoppage if US Airways does not accept its non-Nicolau, date-of-hire seniority demand, but rather that "it would strike if it could not achieve a contract that met the Union's goal of an industry standard contract." Opp. at 19-20. This is a distinction without a difference, as USAPA has repeatedly said it believes that date-of-hire ***is*** the industry standard. ER 108, 145, 147. The district court recognized this, finding that "if it [i.e., the Nicolau Award] is accepted, USAPA has promised a work stoppage." ER 18.

In trying to diminish the certainty of adverse action by the West Pilots if US Airways were to agree to USAPA's seniority demand, USAPA argues that a "non-frivolous" claim by the West Pilots is contingent upon: "(1) a final agreement; (2) that the West Pilots disagree with; and (3) the existence of a good faith plausible claim that USAPA breached its DFR." Opp. at 25. But the West Pilots have unambiguously proclaimed that "[i]f the seniority integration provision in [an agreed-upon] CBA does not use the Nicolau Award, the West Pilots will challenge the CBA . . . as a breach of USAPA's DFR" and seek to invalidate the CBA as illegal. West Pilots' Ans. at 6. The West Pilots have, moreover, unequivocally stated that if US Airways were to agree to USAPA's seniority

proposal instead of implementing the Nicolau Award, they would consider that agreement to be facilitating or assisting USAPA's alleged breach of its DFR and they would sue US Airways therefor. ER 103, 136-37, 162. And, indeed, the West Pilots have already filed two separate lawsuits against US Airways and USAPA over the failure to adhere to and implement the Nicolau Award. *See Addington v. US Airline Pilots Ass'n*, No. CV 08-1633-NVW (D. Ariz.); *Addington v. US Airline Pilots Ass'n*, No. CV 08-1633-NVW (D. Ariz.).

This clear threat of litigation if US Airways were to agree to USAPA's non-Nicolau seniority demand is more than sufficient to support a finding of ripeness. Indeed, an actual threat of litigation is not even required. *See, e.g.*, *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 944 (9th Cir. 1981) ("an actual threat" of litigation is not necessary "for a case or controversy to exist for declaratory relief"); *see also Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, 609 F. Supp. 2d 1090, 1102 (E.D. Cal. 2009) (holding that "something less than an 'actual threat' of litigation is required to meet the 'case or controversy' requirement"). USAPA counters that it is possible that such a lawsuit might ultimately fail, Opp. at 21, but, even if true, that does not alleviate the harm that US Airways would suffer in being forced to defend the action even if it ultimately prevailed.

The authorities cited by USAPA, all of which merely support the duty of a carrier and its union representatives to bargain, is distinguishable from the present case. Courts can and do provide relief before the parties are forced to suffer harm; indeed, that is the express purpose of a declaratory judgment. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 134 (2007) ("The rule that a [declaratory judgment] plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III."); *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000) (finding declaratory judgment action ripe despite fact that triggering event would not take place for three years because "nary a scintilla of additional relevant evidence" was likely to materialize in the meantime).

B. The Prudential Ripeness Test Is Not Applicable Here, But In Any Event It Is Also Satisfied.

The prudential ripeness test, for the reasons explained in US Airways' opening brief, should not be applied to cases outside the administrative law context. *See* US Airways Br. at 34-37. This Court, when asked squarely to decide whether the prudential ripeness test was applicable to disputes between private parties, held that the test was "inappropriate" and that "the appropriate standard for determining ripeness of private party contract disputes is the traditional ripeness standard, namely, whether 'there is a substantial controversy, between parties

having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 671 (9th Cir. 2005) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). That conclusion was confirmed by the Supreme Court in *MedImmune*, where it ruled that a declaratory judgment action between private parties was ripe after applying only the constitutional – and ***not*** the prudential – test for ripeness. 549 U.S. at 127.

USAPA does not discuss this issue except to note in passing that this Court applied the prudential ripeness test in *Addington*. But the Court's decision in that case did not address – much less disavow – the holding of *Principal Life*. In fact, neither party in *Addington* raised the inapplicability of the prudential ripeness test in their briefing. In the present action, the district court believed it was bound to follow *Addington* on this point but expressed concern, noting that the "test of prudential ripeness appears to be ill-suited to the present controversy." ER 17. US Airways urges this Court to follow the sound reasoning of *Prudential Life* and reaffirm that prudential standing is not applicable to a private dispute of this nature.

But even if the prudential ripeness test were applicable, it is met here for the reasons explained at length in US Airways' opening brief. *See* US Airways Br. at 37-48. USAPA's response to those arguments relies primarily on its contention

that the harm US Airways will suffer is contingent on future events – an argument that fails here for the same reasons it fails to defeat constitutional ripeness. USAPA's only additional argument regarding prudential standing is based on its assertion that a "judicial declaration directing USAPA to propose one bargaining proposal or another would impermissibly interfere with the collective bargaining process." Opp. at 28. That statement, whether or not correct, is irrelevant because US Airways did not ask, and is not now asking, for a court to direct USAPA to make a specific proposal. Rather, US Airways is merely seeking a judicial declaration that will clarify its own legal obligations with respect to the collective bargaining process in which US Airways is required to "exert every reasonable effort" to reach agreement with USAPA. 45 U.S.C. § 152 (First).

III. *ADDINGTON* DOES NOT CONTROL BECAUSE THE FACTS AND CLAIMS IN THIS CASE ARE MEANINGFULLY DIFFERENT.

The district court incorrectly concluded that this Court's decision in *Addington* was controlling in this case, and that it required a finding that US Airways' claims were not ripe. USAPA's opposition presses this point, suggesting that any differences between the two cases are not meaningful and that *Addington* bars adjudication of any claim related to the collective bargaining process until a final and enforceable collective bargaining agreement has been produced.

But as US Airways' opening brief demonstrated, there are crucial differences between the two cases. The *Addington* plaintiffs contended that they would be damaged if the collective bargaining process resulted in a particular outcome (i.e., a non-Nicolau seniority list) and that outcome was then ratified by USAPA's membership. The harm to US Airways here, by contrast, is not subject to the occurrence of an outcome that is merely contingent, nor will that harm await the conclusion of the collective bargaining process. Rather, US Airways has an immediate and federally-mandated obligation to use all reasonable efforts to reach a collective bargaining agreement with USAPA. The RLA requires – in a definite and non-speculative way – that US Airways respond to USAPA's seniority demands, and, in so doing, US Airways will have no choice but to accept one of two mutually-exclusive approaches to seniority (i.e., Nicolau or non-Nicolau). Each approach is advanced by a party that for the past five years has consistently, unwaveringly, and aggressively maintained that it will not consider any alternative to its preferred approach, and each party has made repeated and credible threats to take adverse action against US Airways if it does not achieve its preferred seniority regime. *See* ER 28-30, 81-82, 192. Stated differently, the relief US Airways seeks is not an injunction to prohibit an outcome that might not even occur, but rather clarification of its permissible options in a situation where the law compels it to act.

Moreover, *Addington* is inapplicable here because the claims made by the *Addington* plaintiffs had different and additional elements relative to the claims at issue in this suit. To adjudicate the *Addington* plaintiffs' claims, it would have been necessary to rule not only on the question of whether USAPA had breached its DFR, but also on causation and damages – the two issues to which this Court's conclusions regarding prematurity were directed. *See* US Airways Br. at 41. Here, by contrast, US Airways' claims do not require a court to reach either of those issues. Its requests for declaratory judgment ask only whether there is a legitimate union purpose for USAPA's position and accordingly whether entry into a collective bargaining agreement with a non-Nicolau seniority list would or would not breach USAPA's DFR to the West Pilots.

IV. CONTRARY TO USAPA'S ASSERTIONS, THE DISTRICT COURT DID NOT REACH THE UNDERLYING QUESTION OF WHETHER USAPA IS BOUND BY THE NICOLAU AWARD.

USAPA makes the specious argument that because US Airways did not Appeal "the district court's ruling that USAPA is not bound by the Nicolau Award and is free to negotiate something other than the Nicolau Award," that "ruling" should be summarily affirmed. Opp. at 28 n.7.

This argument distorts the district court's opinion, which did not hold that USAPA is not bound by the Nicolau Award. To the contrary, the district court specifically concluded that "[w]hen the collective bargaining agreement is

finalized, individuals will be able to determine whether USAPA's abandonment of the Nicolau Award was permissible, i.e. supported by a legitimate union purpose." ER 8. The court, moreover, cautioned that "the West Pilot Defendants may have viable legal claims in the future should the collective bargaining agreement contain a seniority provision harmful to a subsection of the union." ER 2.

US Airways' opening brief challenged only the district court's ruling on ripeness, because the district court held that the threshold issue of ripeness ***prevented*** it from addressing whether the Nicolau Award is in fact binding on USAPA under the circumstances of this case. This appeal does not and cannot present the underlying question of whether USAPA breaches its DFR if it pursues a non-Nicolau seniority regime because the district court specifically declined to rule on that question.

CONCLUSION

For the reasons set forth above and in US Airways' opening brief, this Court should reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I, Robert A. Siegel, certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,754 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

Date: August 21, 2013

/s/ Robert A. Siegel
ROBERT A. SIEGEL

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing Reply Brief for Appellant US Airways, Inc. 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 August 21, 2013.

I further certify that some of the participants in the case appear not to be registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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