

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 09-16564

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Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR,  
Roger VELEZ, and Steve WARGOCKI, *individually and representing a  
class of persons similarly situated,*

Plaintiffs-Appellees

v.

US AIRLINE PILOTS ASSOCIATION, *an unincorporated association  
representing the pilots in the employment of US Airways Inc.,*

Defendant-Appellant

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Appeal from Permanent Injunction and Related Rulings Necessary Thereto  
by the United States District Court for the District of Arizona.

No. CV08-1633 and CV08-1728 (consolidated)

Honorable Neil V. Wake, United States District Judge

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**PLAINTIFFS-APPELLEES'  
RESPONSE IN OPPOSITION TO:**

**DEFENDANT-APPELLANT'S  
EMERGENCY MOTION UNDER 9TH CIR. RUL. 27-3  
FOR RENEWED MOTION TO STAY JUDGMENT**

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Marty Harper (SBN 003416)  
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This is an appeal of an injunction establishing that USAPA “must choose between the *status quo* and a single new CBA that incorporates the Nicolau Award with whatever improvements in wages and working conditions USAPA can negotiate for the East Pilots and the West Pilots alike.” Doc. #593 at 48:14 to 48:16. On August 28, 2009, USAPA filed a motion with this Court to stay this injunction. On November 18, 2009, the Court found that USAPA “will not suffer any irreparable harm pending oral argument on the merits on December 8, 2009.” A decision on those merits is pending.

Now, USAPA has filed a renewed motion for a stay, wherein it claims that there has been a material change in circumstances since the injunction issued. USAPA apparently wants to pursue a course of action that will put it in contempt. There is no other reason to seek a stay.

An argument for changed circumstances is inherently a request to consider evidence that did not exist at the time the injunction issued. USAPA, however, has neither presented such evidence nor made such argument to the district court. USAPA,

therefore, asks this Court to evaluate evidence that has never been presented to the district court. USAPA, in effect, asks this Court to ignore the role of the district court and hold that a change in circumstances justifies USAPA acting in contempt of the district court's injunction.

USAPA asks this Court to violate basic principles of federal court jurisprudence. “[A]ppellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). “[A]ppellate judges, . . . [therefore,] are not authorized to make findings of fact or weigh the evidence.” *United States v. Childs*, 944 F.2d 491, 495 (9th Cir. 1991). It is plainly wrong for USAPA to ask this Court to consider new evidence if that evidence was never presented to the district court.

There is no need for this Court to violate basic principles of federal court jurisprudence. The “district court has inherent authority to modify a preliminary injunction in consideration of new facts.” *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002). If the district court has authority to modify

an injunction “in consideration of new facts,” *id.*, it surely has authority to stay an injunction on appeal, based on the same considerations.

Because this Court does not have authority to consider evidence for the first time and because the district court does have such authority, USAPA should make this motion to the district court. No different rules apply because USAPA styles this an “emergency motion.” If USAPA believes that changed circumstances require a stay, it should make its arguments and present its evidence to the district court. This Court, therefore, should deny relief on USAPA’s present motion.

DATED: April 19, 2010

Respectfully submitted,

*/s/ Andrew S Jacob*

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Andrew S. Jacob  
Polisinelli Shughart, P.C.

**PROOF OF SERVICE**

I am over the age of eighteen years of age, not a party to this action, and employed by Polsinelli Shughart, P.C.

On April 19, 2010 I caused *Plaintiffs-Appellees' Response In Opposition To: Defendant-Appellant's Emergency Motion Under 9th Cir. Rul. 27-3 For Renewed Motion To Stay Judgment* to be electronically filed with the Clerk of the Ninth Circuit Court of Appeals. In addition, I properly served what was electronically filed by mail by causing a true and correct copy to be placed in a sealed envelope, with postage prepaid, deposited with the United States Postal Service on this day following ordinary business practices addressed to opposing counsel at the last address given, as follows:

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I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on April 19, 2010 at Phoenix, AZ.

*/s/ Andrew S. Jacob*

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