No. 09-16564

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI, representing themselves and as representatives of the class, and all others similarly situated in the class,

Plaintiffs-Appellees,

v.

US AIRLINE PILOTS ASSOCIATION,

Defendant-Appellant,

and

US AIRWAYS, INC.,

Defendant.

Appeal from the United States District Court District Of Arizona
No. C08-1633 & C08-1728 (consolidated) NVW

APPELLANT'S RESPONSE IN OPPOSITION TO MOTION TO STAY MANDATE

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SUMMARY.

Plaintiffs seek to delay the mandate in this matter for the purpose of extending an injunction issued by a district court that never had jurisdiction in the first place. This is "tantamount to extending [an] injunction ... which we have already held rests on an erroneous legal premise." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (denying stay). As this Court has already ruled, because no contract term had yet been executed and ratified, plaintiffs lacked *any injury*, and, therefore, no ripe case existed. Now, plaintiffs merely re-argue their case and continue to misrepresent the record in an unsubstantiated and frivolous attempt to impose delay. If successful, they risk the paralysis of collective bargaining at US Airways – which would effectively defeat any hope of negotiating a resolution of the underlying seniority issue – for nothing more than pursuit at the Supreme Court of a hopeless case.

ARGUMENT.

1) The Legal Standard to Obtain a Stay Requires Both Irreparable Injury and a Probability of Success at the Supreme Court.

Plaintiffs dodge any discussion of the applicable legal standard under FRAP 41, which provides that stays "will not be granted as a matter of course." (Circuit Rule 41-1). Nonetheless, any legal analysis of the stay application must commence with an explication of this standard.

FRAP 41 provides:

> A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion … must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

A request to stay issuance of the mandate pursuant to Fed. R. App. P. 41 is not "a matter of right but of sound judicial discretion." *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993). And, the "grant of a motion to stay the mandate 'is far from a foregone conclusion.'" *Brooks v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001).

The party seeking a stay "must establish that the petition for writ of certiorari will present a substantial question and that there is good cause for a stay." *Nanda v. Bd. of Trustees of the Univ. of Illinois*, 312 F.3d 852, 853 (7th Cir. 2002). But in order to satisfy this standard the party requesting the stay must demonstrate the following:

(1) A reasonable probability that the Supreme Court will grant certiorari;

(2) A significant possibility that at least five [Supreme Court] Justices would vote to reverse this Court's judgment; and

(3) A likelihood of irreparable injury absent a stay.

(4) In a close case, the movant should make a showing that, on balance, the interests of the parties and the public favor a stay.

See Barnes v. E-Systems, Inc. Group Hosp. Ins. Plan, 501 U.S. 1301, 1302 (1991)

("there must be a reasonable probability that certiorari will be granted ... a significant possibility that the judgment below will be reversed, and the likelihood of irreparable harm ... if the judgment is not stayed"); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007) (*citing Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *Bricklayers Local 21 v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004); *Doe v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005)).

A stay is not a matter of right, even if irreparable injury might otherwise result; it is instead an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *Indiana State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275 (2009); *Blum v. Caldwell*, 446 U.S. 1311, 1315 (1980).

Plaintiffs, with the filing of their three and a half page motion, failed to even address the factors set forth above, and therefore have utterly failed to satisfy their burden.

2) <u>Plaintiffs Cannot Demonstrate Any Potential Injury Let Alone Irreparable Injury.</u>

Plaintiffs fail to make any argument for irreparable harm. Indeed, they do not even assert such harm though this is an essential element. Instead, plaintiffs merely concede that:

> [I]if the mandate is not stayed ... USAPA will be completely unconstrained. It *might* put a date of hire seniority list in place ... that would be difficult to undo if the Supreme Court were to reverse this

Court on ripeness."

(DktEntry 52 at 4) (emphasis added). This not only fails to argue irreparable harm, it effectively admits no harm is even possible:

First and foremost, plaintiffs cannot explain, nor do they try, how irreparable injury follows from this Court's finding that there is *no injury* at all. As this Court already determined, because no seniority term exists, because it has yet to be negotiated, there is no harm, hence the case is not ripe. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, at *10 (9th Cir. 2010) ("We conclude that this case presents contingencies that could prevent effectuation of USAPA's proposal and the accompanying injury"). And, in making the lack of injury determination, this Court necessarily rejected plaintiffs' theory of their case that a failure to implement a predecessor union's proposal – one even the former union was free to drop – is somehow a violation of the duty of fair representation. *Id*. at *14, n.3 ("USAPA is at least as free to abandon the Nicolau Award as was its predecessor"). Hence, under the law of this case, that bare possibility cannot constitute injury now, or ever.

Second, plaintiffs admit that it is merely speculative ("it might") that the imagined harm, a date of hire seniority term, is ever negotiated, ratified, and executed. Stays may be denied even *with* a showing of irreparable harm, but without such showing denial is required. *Chrysler LLC*, 129 S. Ct. 2275 (2009)

(irreparable harm alone not sufficient).

Third, and more fundamentally, date of hire seniority terms in the context of corporate mergers cannot constitute harm at all because they have been specifically upheld by the Supreme Court, the precedent of this Court, and other circuits, as a fair and equitable exercise of a union's prerogative. Indeed, under controlling precedent in this circuit, date of hire (or "dovetailing") amounts to no less than the 'gold standard.' In *Laturner v. Burlington N., Inc*., 501 F.2d 593, 599 (9th Cir. 1974), this Court stated:

> It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs [citations omitted] ... we thus view the implementation of a date of hire consolidation to be well within the "wide range of reasonableness" [which] must be allowed a statutory bargaining representative in serving the unit it represents ...

See also Humphrey v. Moore, 375 U.S. 335, 348, n. 10 (1964) ("integration of seniority lists should ordinarily be accomplished on the basis of each employee's length of service with his original employer ..."); *De Boles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1014 (3d Cir. 1992) (dovetailing is valid even where it "disadvantage[s] the union members who ha[ve] been employed by the younger of the two consolidated companies."); *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992); *Ekas v. Carling Nat'l Breweries, Inc*., 602 F.2d 664 (4th Cir. 1979).

Fourth, plaintiffs ignore the fundamental point grasped by this Court that merely because USAPA negotiates a seniority term that is other than the specific and self-serving term (Nicolau) demanded by plaintiffs – and hence is finally capable of securing a ratification by a majority of all pilots – there will *never* be any actionable injury:

> USAPA's final proposal *may yet be one that does not work the disadvantages* Plaintiffs fear, even if that proposal is not the Nicolau Award

Id. at *14 (emphasis added). Consequently, a stay that prevents negotiation of a new seniority term impedes progress for all pilots (as well as the company, still trying to complete a merger now five years old) at the behest of but a small, litigious faction.

3) <u>There Is Little to No Chance that the Supreme Court Would Disturb this Court's Ruling.</u>

In order to show a reasonable probability of success on the merits, plaintiffs must demonstrate a "reasonable probability" that four Supreme Court Justices will vote to grant certiorari and a "significant possibility" that five Supreme Court Justices will vote to reverse the judgment. *Barnes*, 501 U.S. at 1302. Plaintiffs have fallen woefully short of satisfying this standard.

a. Plaintiffs Have Failed to Demonstrate a Reasonable Probability that Certiorari Will Be Granted.

Plaintiffs have advanced no cogent argument that certiorari will be granted. To the contrary, the factors surrounding this matter weigh heavily *against* a grant of certiorari. Plaintiffs petitioned the Ninth Circuit for an en banc rehearing, and their request was denied on July 8th with this Court noting that the "full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing." (DktEntry 51 at 2). The fact that not one single judge of the court requested a vote most certainly militates against a finding that there is a reasonable probability of the Supreme Court granting certiorari. *See Coalition for Economic Equity*, 122 F.3d at 719 (denying motion to stay mandate noting that "the active judges of this court voted to leave that judgment undisturbed in rejecting the suggestion for rehearing").

Plaintiffs seem to point to the dissenting opinion as a reason why the Supreme Court would grant certiorari. In making this argument, plaintiffs again make the blatant misrepresentation that there was some sort of two-two split. The district court incorrectly determined that the case was ripe for adjudication, and USAPA appealed that decision to this Court. The panel in this case determined that plaintiffs' action was not ripe, with one member dissenting. Thereafter, not one active judge in this Circuit felt that the decision warranted even a vote for en banc rehearing. Plaintiffs' continued misrepresentation of a two-two split is an

affront to the appellate process and demonstrates a lack of respect for the panel and the Ninth Circuit. Notwithstanding plaintiffs' misrepresentations, in the context of this motion to stay the mandate, "to the extent [they] rely on division in the panel to show a likelihood of further review … the argument is of little persuasive value." *Doe v. Miller*, 418 F.3d at 951.

Plaintiffs attempt to generate a baseless argument that somehow there is a conflict of authority between this Court's decision and other Circuits, and that therefore the Supreme Court is likely to grant certiorari. This under-developed argument must fail for a number of reasons:

First, this contradicts plaintiffs' position in their en banc petition in which they argued that "the Opinion decides a matter of first impression for all federal circuits." (DktEntry 47-1 at 1). If, as plaintiffs argued in their en banc petition, the case presented an issue of first impression it "means that there is no conflict in authority among the courts of appeals that might prompt the [Supreme] Court to grant certiorari." *Doe v. Miller*, 418 F.3d at 952. Furthermore, "that the case presents issues of first impression does not really suggest a probability of further review." *Id.* Hence, plaintiffs' en banc arguments made one month ago are not merely contradictory, but actually undermine their present contentions advanced in their motion to stay the issuance of this Court's mandate.

Even when considering plaintiffs' conflict argument on its face, it fails because there simply is no conflict among the courts of appeals on the issue decided in this case. Plaintiffs contend that this Court's decision conflicts with the Second Circuit's decision in *Ramey*, 378 F.3d 269 (2d Cir. 2004). However, this Court's decision explained, at length, why there is no conflict with *Ramey*:

> Notably, even in the cases on which Plaintiffs rely most heavily, the policy that the plaintiffs claimed injured them had already been effectuated when the plaintiffs brought the claim. *See Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 275-76 (2d Cir. 2004) … *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 611 (1st Cir. 1987) …
>
> We also note in these cases the apparent absence of contingencies that stood between the union's advocating to the employer a position on a certain policy and the implementation of that policy. Neither Ramey nor Teamsters references a ratification requirement, and in both cases the employer seemed predisposed to follow the union's proposal. … Because of these distinctions, we are not convinced that these cases, even if they were binding on us, would require a finding of ripeness in the circumstances of the case at bench.

Addington, 606 F.3d 1174, at **19-23. Plaintiffs cite two additional cases, which they mistakenly contend create a circuit conflict. (DktEntry 52 at 3).[1] However, neither case creates any conflict with this Court's reasoned decision:

First, the *Air Wisconsin* dicta relied upon by plaintiffs to contrive a circuit split, which questioned the propriety of re-visiting an implemented seniority

[1] Nowhere in plaintiffs' appellate brief is there a single citation to the *Santos* decision that they now claim creates a conflict and they only made a single passing reference to *Air Wisconsin* to support their flawed definition of bad faith in the DFR context. (*See* Resp. Br. at 58).

integration, was clearly rejected by the Seventh Circuit's subsequent decision in *Rakestraw*, 981 F.2d 1524.

Second, the Second Circuit's 1980 *Santos* decision, cited by plaintiffs for the first time in their stay motion, does not discuss ripeness; rather it analyzes claim accrual for statute of limitations purposes. This Court has already opined in this case that it was, "hesitant to transplant a rule from cases analyzing claim accrual for statute of limitations purposes to the ripeness context." *Addington*, 606 F.3d 1174, at *21, n. 6. Furthermore, *Santos* bears absolutely no factual resemblance to this case. It discussed statute of limitations in the context of judicial enforcement of an arbitral award under the Labor Management Relations Act, and had absolutely nothing to do with an unripe claim brought over a seniority term not yet written, not yet negotiated, and not yet ratified.

A true conflict among the circuits is an accepted basis for the granting of a writ of certiorari. *See* Supr. Ct. R. 10(a). A contrived conflict, similar to the one presented by plaintiffs, does not demonstrate a reasonable probability that certiorari will be granted – rather it smacks of desperation and the motion should be denied. *Holland*, 1 F.3d at 457 (denying motion with recognition that "no division among the circuits" existed); *Coalition for Economic Equality*, 122 F.3d at 719 (denying motion specifically noting "no inter-Circuit conflict on the law governing this case").

b. Plaintiffs Failed to Demonstrate a Significant Possibility that this Court's Decision Will Be Reversed.

There is no "significant" or even a fair prospect that the Supreme Court would reverse. In addition to the reasons why it would not grant certiorari, the disposition of this Court is entirely in accord with settled principles of labor law with respect to protecting a union's ability to negotiate issues rather than allowing disgruntled factions to litigate them. As explained above herein, it is also in line with precedent upholding date of hire. Moreover, as explained below herein it is in accord with the basic rule requiring a final product of bargaining before any suit challenging the outcome of bargaining:

> Our conclusion that Plaintiffs' claim is not ripe is consistent with our DFR decisions, which have found DFR violations based on contract negotiation only after a contract has been agreed upon.

Addington, 606 F.3d 1174, at *16.[2] And, as this Court also recognized, this is entirely consistent with respect to DFR suits brought "outside the contract negotiation process" as well. *Id*.

The thrust of plaintiffs' case, as this Court recognized, would impose judicial solutions in place of collective bargaining and render union self-governance an illusion, yet these are the bedrocks of national labor policy. Ignoring this, plaintiffs continue to misrepresent the facts already found by this

[2] Which even the dissent concedes is the general rule. *Addington*, 606 F.3d 1174, at *26.

Court. They claim that the Supreme Court would reverse because, "this case will encourage other unions to refuse, in bad faith, to implement an arbitrated seniority integration" (DktEntry 52 at 1-2), when this Court has already found the Nicolau arbitration was merely "the product of the internal rules and processes of ALPA." *Addington*, 606 F.3d 1174, at *15, n.3. But there is no arbitration that USAPA was ever a party to anywhere in this record. And the district court properly dismissed (and plaintiffs did not appeal) the removed state claim, which asserted the pilots themselves were a party. There not only is no 'federally mandated' arbitration, there is no arbitration at all, merely a predecessor union's bargaining proposal.

Plaintiffs also claim that this Court's disposition would "thwart important federal labor policy – evidenced by the 2007 passage of the McCaskill-Bond bill" (DktEntry 52 at 2).[3] But there is no dispute, let alone any claim, that McCaskill is not applicable, nor could it be for several reasons, procedural as well as substantive. Even if McCaskill were applicable, arbitration is not mandatory, rather, as plaintiffs concede, only utilized, 'if necessary.' Plaintiffs' McCaskill argument is a red-herring.

4) <u>The Grant of a Stay Would Impose Irreparable Harm.</u>

Although plaintiffs' motion by no means presents a close question, because a stay would have a dramatic and injurious impact on all pilots, their union, and the

[3] For good reason, this argument was never raised below.

company, who are now engaged in the later stages of federally mediated bargaining (DiOrio Decl. ¶ 4), this Court should consider the irreparable harm resulting from a stay that extends the district court's injunction.

Plaintiffs claim that a stay would not cause any "cognizable hardship to USAPA" (DktEntry 52 at 3) because, they say, bargaining could continue "leaving seniority provisions for later" (*Id*. at 4) and "if by some chance" all terms but seniority were completed then USAPA "can move the district court to stay the injunction" (*Id*.). This claim is both unsupported and false:

First, a stay could last well beyond 90 days, it could last as long as it might take the Supreme Court to rule. (FRAP 41(d)(2)(B), "In that case, the stay continues until the Supreme Court's final disposition.").

Second, no new contract that accomplishes the final merger of pilots between US Airways and America West Airlines, begun in 2005, is possible without a seniority integration term that *can be ratified*. (DiOrio Decl. ¶ 5). *See also Addington*, 606 F.3d 1174, at *12 ("It is, however, at best, speculative that a single CBA incorporating the Nicolau Award would be ratified if presented to the union's membership").

Third, were the district court's injunction to continue as a result of a stay of the mandate then USAPA will be deprived of the ability to negotiate over seniority, and without the ability to negotiate seniority related issues, it will be

difficult if not impossible to conclude a Tentative Agreement. (DiOrio Decl. ¶ 6). Staying the mandate would therefore risk bringing meaningful bargaining progress to an end, notwithstanding federal mediation.

Fourth, were a stay granted, all the hardship would be born by the pilots as a whole who would continue to suffer bottom of the industry pay when wage improvements are now possible. (DiOrio Decl. ¶¶ 7-8). The carrier now pays US Airway pilots at the bottom-end of the industry largely as a result of two bankruptcies. In the current round of bargaining the company has already proposed higher wages, but no new contract is possible without agreement on all terms that can be, and is, ratified. Indeed, notwithstanding that the district court lacked jurisdiction in imposing its injunction, it consciously sought to coerce a predecessor term upon the parties by wielding this very weapon. (Docket No. 593, p. 51:14, "The pilots 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"; *Id*. 31:10). To now stay would be to impose this economic deprivation when it would be "tantamount to extending [an] injunction ... already held [to] rest on an erroneous legal premise." *Coalition for Economic Equity*, 122 F.3d at 719.

5) <u>Plaintiffs' Motion Is Frivolous and Calculated to Impose Delay</u>.

Circuit Rule 41-1 provides not only that stays "will not be granted as a

matter of course" but that they "will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." In addition to lacking any merit, it is apparent that plaintiffs' motion crosses the line into frivolity and was filed only to delay.

First, it is patently frivolous to argue to the same court in the same case diametrically opposite positions, but plaintiffs have done so with this motion. Plaintiffs now claim that this Court's disposition creates a conflict with other circuits. But only one month ago plaintiffs argued in their en banc petition that, "the Opinion decides a matter of first impression for all federal circuits – the issue of when it is ripe to decide a duty of fair representation claim (DFR claim) in the context of a union refusing to implement an arbitrated seniority integration method." (DktEntry: 47-1, p. 2). This Court's ruling cannot, at the same time, be both one of "first impression," as plaintiffs claimed when it was convenient for them to do so, and now in conflict with other decisions. It is a waste of this Court's time to entertain such frivolity – the motion is a mere delay tactic.

Second, plaintiffs now blithely concede that *ALPA v. O'Neil* 499 U.S. 65, 78 (1991) "requires a final product of bargaining to prove breach of DFR" just as this Court held it did. *Addington*, 606 F.3d 1174, at *18. They argue that this requirement is limited to the arbitrary prong, but *O'Neil* does not so limit the final product rule, and to create an exception for bad faith claims would hopelessly

undermine the rule in the first place. But what amounts to frivolity is that until this pending motion, plaintiffs have taken a position just the opposite of their latest admission, i.e. that:

> No published decision has held, as USAPA argues, that a claim for such conduct cannot be ripe before the union completes CBA negotiations. Rather, a convincing line of cases holds to the contrary.

(DktEntry 7108691, p. 30). And though plaintiffs cited *O'Neill* in their Response brief, they made no admission that it requires a final product (hence they did not try to distinguish when the rule applied). And, in oral argument, plaintiffs' counsel took the position that no final product was necessary and did not try to distinguish *O'Neill* in the slightest. In response to determined questioning by Justice Tashima concerning *Ramey*, and then Justice Graber, plaintiffs took the position that injury arose well before a final product, indeed *before the union was even certified* on April 18, 2008 and had yet to even begin to bargain, let alone make any seniority proposal:

> JUSTICE TASHIMA: What do you make of this statement in Ramey? Page 279, for these reasons, we do not require or even permit union members to bring a suit against a union simply because the union has announced its future intention to breach its duty. We do not require or even permit? (Tr. 22:9) ...
>
> JUSTICE GRABER: What -- what in this case did the defendant do that was unequivocal that caused not only the statute of limitations to begin to run but ripeness to occur? What did they do? (Tr. 23:8)
>
> MR. JACOB: What the defendant did is they -- they stayed on their

> very clearly defined course of promising before the election that they would disregard the Nicolau arbitration. They drafted their constitution before April 18, but it was their constitution on April 18 that might as well have said we will disregard the Nicolau. They appointed a committee of East Pilots directing them to come up with a seniority proposal that would be distinctly different than the Nicolau ... (Tr. 23:13)

Plaintiffs' latter-day admission that the final product rule bars their arbitrary DFR claim, and lack of any basis to suggest it does not bar any DFR claim targeting the substantive terms of contract, thus constitutes a reversal that now makes their motion frivolous.

CONCLUSION.

For the foregoing reasons, USAPA respectfully requests that the Court deny plaintiffs' motion to stay the mandate and direct the Clerk to issue the mandate forthwith.

If, however, the Court does grant the motion, then it should also require security pursuant to FRAP 41(d)(2)(c) in the form of a bond in the amount of $30,000,000.00 (to reflect differential pay for the pilot group for a period of 90 days). (DiOrio Decl. ¶ 7).

DATED: July 16, 2010 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

__**X**__Proportionately spaced, has a typeface of 14 points (Times New Roman) and contains 4182 words (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _ words or __ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

Date: July 16, 2010

s/ Nicholas Granath, Esq.
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US Airline Pilots Association