UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-80051

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

Plaintiffs-Respondents

v.

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

Defendant-Petitioner

RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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OVERVIEW OF RESPONSE

Class certification rulings are interlocutory, and generally not immediately appealable. Pursuant to 28 U.S.C. § 1292(e), Federal Rules of Civil Procedure Rule 23(f) permits a petition for leave to appeal certification of a class and, in the event permission is granted, the Rule provides discretion to stay the district court proceedings during the appeal. Rule 23(f), however, does not provide a basis to stay proceedings while this Court merely considers whether it will grant leave to file an appeal. Given that the Court so rarely grants such leave, it would be unreasonable to grant a stay before granting leave to appeal. Moreover, as demonstrated in Respondents' *Answer to Petition for Permission to Appeal* (March 23, 2009), no appeal is warranted.

When America West and US Airways merged in 2005, the pilots agreed to arbitrate a final and binding integration of their seniority lists. Dissatisfied with the outcome of this arbitration (which is referred to as the "Nicolau Arbitration"), the US Airways pilots formed Petitioner, US Airline Pilots Association

("USAPA"). USAPA claims, because it is a new union, that the Nicolau Arbitration is a nullity and it refuses to take any steps to implement the seniority list resulting from the arbitration.

Respondents, representing the America West pilots ("West Pilots"), filed the underlying action. In this action, Respondents assert, among other things, that they have a procedural right to fair representation and that USAPA is in breach of its duty to provide that right. Hence, they state a ripe claim for injunctive relief-both in their own right and on behalf of a West Pilot (b)(2) class.

USAPA moved to dismiss, arguing that the West Pilots brought their claim both too early and too late. These arguments and others were rejected by the district court. *Addington v. US Airline Pilots Assn.*, 588 F.Supp.2d 1051, 1062 (D. Ariz. 2008) ("In effect, USAPA argues that the Plaintiff West Pilots have sued too early and too late. Both arguments fail."). USAPA also argued that the System Board had exclusive jurisdiction. These arguments too were rejected. *See id.* at 1065 (noting this Circuit has held that "[t]he Railway Labor Act provides no [extrajudicial]

remedy for grievances between employees and unions where the allegation is that the union breached its duty of fair representation"). It now reasserts all those arguments and adds a specious argument that the National Mediation Board ("NMB") has exclusive jurisdiction over this unfair representation claim.

On March 14, 2008, the district court certified a Rule 23(b)(2) class and scheduled a jury trial for April 28, 2009. On March 26, 2009, the district court denied USAPA's premature motion to stay proceedings in light of its petition for leave to file an interlocutory appeal, explaining that "a stay would pose grave harm to the interests of the litigants and the public." (*Order* at 2:1-2 (Mar. 26, 2009) (doc. 288).) The district court, recognizing that there is going to be a trial here with or without class certification, strongly suggested that USAPA's entire use of Rule 23(f) was improper:

> If the Court of Appeals permits an appeal and reverses the class certification, it would not change the issues at trial or the scope of relief except to limit USAPA's own privilege of res judicata in the event of a defense verdict.
>
> * * *
>
> Thus, if there were any error in the class certification, it is utterly without consequence for the April 28, 2009 trial.

> A stay of the trial cannot serve any purpose of remedying an erroneous class certification order.

(Id. at 2:14-16 & 2:24-26.)

USAPA now seeks an "emergency" stay of the trial from this Court. Unquestionably, USAPA does so only in hopes of delaying the district court. Its motion must, therefore, be denied.

ARGUMENT

A. The Court Should Summarily Deny This Motion for a Stay Because, as yet, There is no Appeal.

1. There is no basis to even ask for a stay now.

USAPA styles its motion as seeking a stay pending appeal. There is no "pending appeal," however. There is only a petition for permission to file an appeal. The mere"[f]iling a request for permission to appeal does not stop the litigation." *Newberg on Class Actions* § 7:38 (4th ed. 2008). The question of whether to stay the litigation does not arise until permission to appeal is granted and there is an appeal. That has not happened here. USAPA, therefore, has no basis to ask for a stay.

If there were an appeal, the Court would decide whether to stay the litigation in large part by analyzing the likelihood that it would reverse the certification order. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (holding that in Rule 23(f) appeals, "a stay will not issue unless the likelihood of error on

the part of the district court tips the balance of hardships in favor of the party seeking the stay").[1]

There cannot be any likelihood at all that the Court will reverse class certification unless it first grants permission to file an appeal. As shown below, in the usual case the Court is highly unlikely to grant such permission and in this case it surely ought not do so. Hence, we find no instance where a court of appeals granted a Rule 23(f) stay before it granted permission to appeal the class certification order. USAPA does not cite any such cases.

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[1] The full analysis is closely analogous to that used to decide whether to grant a preliminary injunction. *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 3 (D.D.C. 2002) ("[W]hether or not a stay should be granted in the context of a pending Rule 23(f) petition is a discretionary matter to be informed by a flexible application of the well-established, … test employed to consider preliminary injunctive relief."); *Sumitomo*, 262 F.3d at 140 ("[S]tay will not issue unless the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay."); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) ("[S]tay would depend on a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting.").

To grant a stay without first taking the appeal would allow USAPA to use Rule 23(f) as a "vehicle to delay proceedings in the district court." *Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd*, 262 F.3d 134, 140 (2d Cir. 2001). That would clearly be a misuse of the rule. Rather, "appeals under Rule 23(f) should not unduly retard the pace of litigation." *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

Quite simply, USAPA makes a premature motion. It has no basis to move for a stay unless and until this Court determines that this is an unusual case meriting Rule 23(f) review. The Court should, therefore, reject this motion summarily.

2. Rule 23(f) reviews are very rare.

There should be a strong presumption that the Court will deny any Rule 23(f) petition. There are "too many class actions filed each year for federal appeals courts practicably to adjudicate class certification decisions on an interlocutory basis as a matter of course." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000). If freely allowed, such appeals would "add to the heavy workload of the appellate courts, require

consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Chamberlan*, 402 F.3d at 959. Hence, "petitions for Rule 23(f) review should be granted sparingly." *Id.* "[I]nterlocutory review of class rulings and of most class-related orders has become the exception rather than the rule." *Newberg on Class Actions* § 7:38.

3. This case is not suitable for Rule 23(f) review.

This Circuit permits Rule 23(f) appeals only where the matter satisfies one of three standards. *Chamberlan*, 402 F.3d at 959. These three standards are as follows:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. at 959. *See 2 McLaughlin on Class Actions* § 7:11 (5th ed.) (noting that the Ninth Circuit has never deviated from the *Chamberlan* factors).

USAPA addresses only the so-called "death knell" standard. It completely distorts the standard by disregarding its purpose—to mitigate the harm where a class certification order prevents reaching the merits of the underlying dispute. Where certification would so intimidate the defendant that it would be compelled to settle, the order sounds the death-knell for the defendant. *See Sumitomo*, 262 F.3d at 140 (recognizing death-knell in cases where "class certification will effectively terminate the litigation because it will force [defendants] to settle the case rather than risk trial"). Where denial of certification would make an individual action far too expensive compared to the possible recovery, the order sounds the death knell for the plaintiff. *Blair*, 181 F.3d at 834 (recognizing death-knell where "the denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation").

Neither definition of "death-knell" applies here. Indeed, USAPA's concern is not that it wants an opportunity to litigate the merits. No, USAPA appeals because it wants to avoid

litigating the merits. USAPA wants to use the artifice of a Rule 23(f) appeal to cause delay in hopes that with more delay it would become more difficult to fashion an acceptable remedy.

B. There is no question that the district court has jurisdiction.

USAPA's contention that there is no subject matter jurisdiction is a flawed attempt at distraction. Each of its arguments—lack of ripeness, exclusive System Board jurisdiction, and exclusive National Mediation Board ("NMB") jurisdiction—are contrary to well-established law.

1. A DFR claim is ripe without actual concrete injury.

The Fifth Circuit rejected a very similar ripeness argument in an early Rule 23(f) case where a Railway Labor Act union defendant (just like USAPA) argued lack of injury in fact in the context of a seniority dispute. In that matter, the union defendant argued:

> that the named plaintiffs have not suffered any injury … [because] the challenged seniority changes did not affect the named plaintiffs' abilities to get the work assignments they desired; each plaintiff has received the assignments bid for. Thus, defendants argue, plaintiffs have demonstrated no monetary loss and lack standing.

Bertulli v. Independent Assn. of Continental Pilots, 242 F.3d 290, 295 (5th Cir. 2001) (footnotes omitted). As here, "[t]his cramped view misunderstands standing." *Id.*

> Loss of seniority is an injury within a commonsense understanding of the term, and one that is suffered by the plaintiffs themselves. It carries with it the possibility of several forms of concrete injury, such as slower promotion, greater likelihood of being laid off, and lower benefits.

Id. (footnotes omitted). Furthermore, a claim for "loss of 'fair representation' under the RLA" asserts "'procedural rights' protected by statute, the loss of which is itself an injury without any requirement of a showing of further injury." *Id.*

It simply does not matter here, therefore, that Respondents might suffer more concrete injury if USAPA is allowed to proceed further with its unfair representation. The deprivation of fair representation alone is sufficient to give standing.

2. The System Board does not have jurisdiction.

It is hardly worth responding to USAPA's argument that the System Board has exclusive jurisdiction over Respondents' duty of fair representation claim. In fact, the System Board only has jurisdiction over "disputes between an employee or group of

employees and a carrier or carriers." *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324, 328 (1969). Indeed, the System Board has no jurisdiction because it has "no power to order the kind of relief necessary." Hence, "[t]he federal courts may therefore properly exercise jurisdiction over both the union and [where necessary] the carrier" in an unfair representation case. *Id.*

3. The NMB does not have jurisdiction.

Finally, there is no question that the NMB lacks jurisdiction. NMB jurisdiction is limited to determine "who is the employees' representative." *Air Line Pilots Assn, Intl. v. Transamerica Airlines, Inc.*, 817 F.2d 510, 515 n.3 (9th Cir. 1987). Respondents neither allege that USAPA is not the representative nor seek a remedy inconsistent with it being the representative. Rather, Respondents assert that USAPA is violating its duty as the representative and seek no different remedy than has been upheld in similar cases. *See Bernard v. Air Line Pilots Assn., Intl.,* 873 F.2d 213, 215 (9th Cir. 1989). The remedy provided in *Bernard* was as follows:

> By way of remedy, the district court: (1) directed ALPA to apply its current merger policy providing for negotiation,

> mediation and arbitration in order to resolve merger and seniority integration disputes between the two groups of pilots; (2) directed ALPA to treat the former Jet America pilots as a separate ALPA-represented group for purposes of implementing this policy and to appoint three Jet America pilot merger representatives; (3) vacated and set aside the October 6, 1987, seniority integration agreement between ALPA and Alaska Airlines; and (4) specified the basis by which pilots would be furloughed, promoted and given flying assignments in the interim period until a new agreement could be reached.

Id. Surely, the district court has jurisdiction to provide similar remedy in this matter.

C. The Expense of Litigation is a Cognizeable Hardship if it Can be Avoided, Not if it Can Only be Delayed.

Ordinarily, this Court denies a stay unless it makes a favorable consideration of likelihood of success and balance of hardships. *Lopez v. Heckler*, 713 F.2d 1432,1435 (9th Cir. 1983) (the standard "is similar to that employed by district courts in deciding whether to grant a preliminary injunction"). In this situation, the Court must analyze likelihood of success on two levels. First, the Court must consider the likelihood that it will permit USAPA to even file an appeal. Second, the Court must consider, if it did permit an appeal, the likelihood that USAPA

would prevail. For each of these considerations, the likelihood is very small. For both together, the likelihood is miniscule.

The Court must also balance the hardships and here, USAPA fails to identify a cognizable hardship. Litigation expenses are a cognizable hardship, but only where, with success of the appeal, litigation expenses would be avoided altogether. *U. S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (cognizable hardship where "interlocutory appeal might avoid protracted and expensive litigation"). In this instance, litigation expenses would only be delayed.

All that USAPA would attain if successful on its Rule 23(f) appeal of class certification is de-certification of the class. Because this is a (b)(2) class, if it was decertified it would only affect USAPA's right to assert *res judicata*. The expense of litigating would be the same. The only difference would be when the trial occurs. All that USAPA would achieve is delay and delay by itself cannot justify a stay.

CONCLUSION

Unquestionably, USAPA is using Rule 23(f) only in hope of delaying the trial. This Court should reject this misuse summarily and deny USAPA's "emergency" motion for a stay.

CERTIFICATION OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-80051

I CERTIFY THAT:

The attached Response to Emergency Motion for Stay Pending Appeal is proportionally spaced, has a typeface of 14 points, and contains 2,578 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance and statement of related cases.

DATED: April 6, 2009

Respectfully submitted,

/s/ Andrew S Jacob

_____

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PROOF OF SERVICE BY MAIL

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 6, 2009 I served the attached *Response to Emergency Motion for Stay Pending Appeal* 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 6, 2009 at Phoenix, AZ.

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