IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMERGENCY MOTION UNDER 9th CIR. R. 27-3

US AIRLINE PILOTS ASSOCIATION,	)	
Defendant-Petitioner,	)	
v.	)	**No. 09-80051**
DON ADDINGTON, *et al*.,	)	
Plaintiffs-Respondents.	)	

PETITIONER'S REPLY BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The Defendant-Petitioner, US Airline Pilots Association ("USAPA"), submits this brief in reply to the Plaintiffs-Respondents' Response in Opposition to Emergency Motion for Stay Pending Appeal. Respondents argue that, despite the fact that trial is scheduled to commence in a mere 20 days, USAPA's stay motion is premature. Respondents also contend that their DFR claim is ripe, but rely only on a case that has nothing to do with ripeness. More telling is what Respondents did not argue. They do not dispute that a stay will not injure the plaintiffs, and they do not dispute that a stay will further the public interest. Thus, Respondents effectively concede that a stay is appropriate in these circumstances.

ARGUMENT

A. The Court May Issue a Stay Pending a Decision on the Petition

Trial in this class action has been scheduled to commence on April 28, 2009. Petitioner filed a Petition for Permission to Appeal pursuant to Fed. R. Civ. P. 23(f) and, in order to allow sufficient time for a decision on the Petition, Petitioner also filed an Emergency Motion for a Stay Pending Appeal following the denial of Petitioner's stay motion in the District Court.

The Emergency Motion seeks an order staying all further proceedings in the District Court until the later of either the (1) denial of USAPA's Petition for

Permission to Appeal; or (2) the Ninth Circuit's entry of its mandate following disposition of USAPA's appeal, if accepted.

Respondents first argue in opposition to the Emergency Motion that "[t]he question of whether to stay the litigation does not arise until permission to appeal is granted and there is an appeal." (Response in Opp. at 5). This argument lacks support in both logic and law.

First, the necessity of granting a stay now is reflected in the recognition by the Respondents in their opposition to the Petition that "[b]efore this Court could possibly review the class certification order here there will be a trial and final judgment." (Dkt. Entry: 6856118, at 2). Thus, whether the stay is requested with respect to the Petition for Permission to Appeal, or the appeal itself, the purpose and necessity of the stay is the same – to ensure that USAPA is not put to the harm and hardship of trial while a request for leave to appeal is pending, which could result in the dismissal of the case and/or the reversal of the class certification.

Contrary to the Plaintiffs' theory, a court may grant a stay pending the disposition of a Rule 23(f) Petition for Permission to Appeal. For example, in *Kelley v. Microsoft Corporation*, Case No. C07-475 (W.D. Wash. Apr. 3, 2007), the district court granted Microsoft's motion for an order staying the action pending the outcome of Microsoft's petition for permission to appeal, and appeal of, the court's order granting plaintiffs' motion for class certification. (Exhibit A).

In that case, the court ordered that all further proceedings, including discovery, were stayed until the later of the (1) denial of Microsoft's petition for permission to appeal or (2) the Ninth Circuit's entry of its mandate following disposition of Microsoft's appeal, if accepted. USAPA requests the same relief in its Emergency Motion.

USAPA's motion is not premature. Trial is 20 days away, and USAPA submits that important issues of subject matter jurisdiction and class certification should be resolved before trial.

B. <u>This Case is Appropriate for Rule 23(f) Review</u>

Respondents argue that this case is not suitable for Rule 23(f) review. However, as USAPA argued in its Emergency Motion, an appeal is appropriate in order to review not only the District Court's class certification order, but also to determine whether the District Court has subject matter jurisdiction.

USAPA submits that subject matter jurisdiction does not exist because this matter is not ripe for adjudication for the reason that the Respondents' duty of fair representation claim is not based on a **final product** of negotiations. The District Court rejected this argument solely because of its conclusion that USAPA was "deliberately delaying the single collective bargaining agreement." *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1062 (D. Ariz. 2008) (Dkt. No. 84 at 13). However, as USAPA showed, the Plaintiffs-Respondents have disavowed

any pleading that USAPA was deliberately delaying negotiations. Since filing its Emergency Motion, US Airways' Vice President of Labor Relations, E. Allen Hemenway, has been deposed and also disagreed with the "deliberately delaying" theory:

> I don't define good faith based on who's proposing what, I define good faith as whether the parties are honestly working hard to make an agreement. I think that the Company is honestly working hard to make an agreement. **I don't see any evidence that USAPA is not working hard to make an agreement.**

(Hemenway Tr. 173:15-20) (emphasis added). Since there can be no dispute that USAPA is negotiating in good faith to reach a single collective bargaining agreement, this case is not ripe for adjudication.

While avoiding subject matter jurisdiction, Respondents argue that this case is not suitable for Rule 23(f) review because USAPA's "death knell" argument disregards its purpose – "to mitigate the harm where a class certification order prevents reaching the merits of the underlying dispute." (Response in Opp. at 9).

However, as USAPA has argued in its Petition and Emergency Motion, the class certification order does prevent USAPA from reaching the merits of the underlying seniority dispute by paralyzing the collective bargaining process. (Emergency Motion at 10-11).

C. Respondents' DFR Claim is not Ripe.

Plaintiffs-Respondents' ripeness argument is based on a case that does not

concern the issue of ripeness. The issue in *Bertulli v. Independent Ass'n of Continental Pilots*, 242 F.3d 290 (5th Cir. 2001), was whether the plaintiffs lacked standing, not whether the claim was ripe.

Bertulli is further distinguishable because the facts show that the plaintiffs' claims in that case were ripe. The *Bertulli* Plaintiffs claimed that:

> they were injured when they lost seniority after the Pilots' Association and Continental Airlines agreed to restore the seniority of eleven pilots who had lost their seniority when they participated in a strike in 1983-85. The plaintiff class is composed of all Continental pilots whose seniority fell as a result of the action by the Pilots' Association … Each class member's seniority rank fell by between one and eleven.

Id. at 294. Thus, in *Bertulli*, the alleged loss of seniority actually occurred before the claim was brought. That is not the case here. In this case, there is no "case or controversy" because negotiations on a single collective bargaining agreement have not yet concluded, and a contract has not been ratified by the pilots. Unlike *Bertulli*, in which a seniority-related agreement had been entered into and implemented, in this case, Plaintiffs-Respondents have not suffered a loss of seniority because there is no final product of bargaining.

Respondents also argue that the loss of fair representation is itself an injury without any requirement of a showing of further injury. (Response in Opp. at 11). However, Plaintiffs' "loss of fair representation" claim is in fact their complaint that USAPA refuses to implement the Nicolau Award, which claim is not ripe

because negotiations have not yet produced a final product.

D. The System Board Has Exclusive Jurisdiction

Respondents state that "[i]t is hardly worth responding" to USAPA's System Board argument. However, by not responding, Respondents have missed the point. What the Respondents do not attempt to address is USAPA's argument that, as a result of the overlap between Plaintiffs' Count Three DFR claim and their Counts One and Two claims of contractual breach, USAPA anticipates that the System Board will address several issues that could have a dispositive impact on the Plaintiffs' Count Three DFR claim, including whether the Transition Agreement created any contractual obligation for continued adherence to the failed ALPA Merger Policy. (Exhibit B).

The System Board hearings will commence on May 27, 2009, and should be permitted to go forward before any trial in this matter.

E. The NMB Has Exclusive Jurisdiction Over All Election-Related Disputes.

Respondents argue that the National Mediation Board ("NMB") does not have jurisdiction because the NMB's jurisdiction is limited to the question of "who is the employees' representative?" (Response in Opp. at 12).

However, the issue here is not "who is the employees' representative?" The issue, not addressed by the Respondents, is that if this case arose no later than USAPA's adoption of its Constitution, which contains USAPA's seniority

objective, then the only relevant time period is the pre-certification period. The NMB has exclusive jurisdiction under the Railway Labor Act ("RLA") to determine union representation disputes arising from alleged pre-certification misconduct. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1170, n.1 (9th Cir. 2002).

F. Respondents Agree that Litigation Expenses Constitute a Hardship.

Respondents concede that "[l]itigation expenses are a cognizable hardship," and then qualify the statement with "but only where, with success of the appeal, litigation expenses would be avoided altogether." (Response in Opp. at 14). Even if Respondents' statement of the law is correct – it is based on *U.S. Rubber Co. v. Wright*, 359 F.2d 784 (9th Cir. 1966), which is not a Rule 23(f) case – in this case, litigation expenses would be avoided if this Court agrees that the case is not ripe and that the District Court does not have subject matter jurisdiction.

Litigation expenses may also be avoided or saved if trial is stayed to permit the System Board hearing to proceed first and possibly narrow or eliminate triable issues.

It is not correct that, as Respondents claim, "[a]ll that USAPA would achieve is delay…" (Response in Opp. at 14). The avoidance of trial would allow USAPA to complete the collective bargaining process, and obtain a single

collective bargaining agreement that would contain improved pay, benefits, and working conditions for all US Airways pilots.

CONCLUSION

As stated in the introduction, the Plaintiffs-Respondents do not contest USAPA's arguments that (i) a stay will not injure the Plaintiffs, and (ii) a stay will further the public interest. Thus, it is clear that the hardship to USAPA if the stay is not granted far outweighs the interest of class members whose requested injunctive remedy, even if granted, will not take immediate effect (because negotiation and ratification of a single collective bargaining agreement must occur first) and whose wage-related claims will be heard in May by a Railway Labor Act System Board.

USAPA therefore respectfully requests that the Emergency Motion be granted, and that this Court stay all further proceedings in the District Court until the later of either the (1) denial of USAPA's Petition for Permission to Appeal; or (2) the Ninth Circuit's entry of its mandate following disposition of USAPA's appeal, if accepted.

Respectfully Submitted,

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