

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 09-16564

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 Permanent Injunction Order By The United States District Court For
The District Of Arizona,
No. C08-1633 & C08-1728 (consolidated) NVW
Honorable Neil V. Wake, United States District Judge

**DEFENDANT-APPELLANT'S
MOTION TO EXPEDITE BRIEFING AND ORAL ARGUMENT
(CIRCUIT RULE 27-12)**

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I. INTRODUCTION.

Defendant-Appellant, the US Airline Pilots Association (“USAPA” or “Appellant”), represents approximately 5,000 commercial pilots at US Airways Inc. (US Airways). In this motion USAPA seeks to expedite briefing and oral argument and thereby consideration of its appeal from the United States District Court for the District of Arizona’s Partial Judgment And Permanent Injunction entered on July 17, 2009. Good cause warrants expediting because the injunction effectively paralyzes efforts to conclude on-going collective bargaining at a major US carrier to the detriment of all parties including the public. Bargaining has been on-going since a corporate merger in 2005 between US Airways and America West Airlines. The injunction, however, dictates substantive terms of a final contract by requiring USAPA to adopt, with no discretion to negotiate, as its proposal to merge seniority lists a specific proposal favored by a minority of pilots whom Appellees represent but which has long been rejected by the majority. Top management at US Airways has now publicly expressed that until this case is ‘finally resolved’ it is unlikely that any agreement can be reached in bargaining and even if it could in the ‘real world’ it will not get ratified. As a practical matter, until the case is resolved, the injunction is an impediment to reaching any agreement because of the risk faced by all that, depending on how the appeal is resolved, the contract would suddenly be voidable yet freshly executed.

II. BACKGROUND.

This appeal arises out of a lawsuit over substantive terms in a collective bargaining agreement (CBA) that has yet to be negotiated or ratified. The dispute centers on pilot seniority at US Airways. In early 2005, commercial airline carriers US Airways, Inc. and America West Airlines, Inc. merged. At the time of the merger another union, the Air Line Pilots Association (“ALPA”), represented both the US Airways pilots (“East”) and the America West pilots (“West”). Under ALPA, the two pilot groups had separate CBAs that were administered by their respective Master Executive Councils (MEC’s), both of which were subordinate political bodies of ALPA. Numerically, the East pilots are a larger group than the West, and in terms of seniority the East pilots are relatively senior to the West.

Operational merger between carriers raised the issue of the seniority integration of the two airlines’ respective employee groups. Non-pilot employee groups – including flight attendants, mechanics, baggage handlers and dispatchers – uniformly agreed to seniority integration based on a classic date-of-hire basis. By contrast, ALPA Merger Policy provided for its two MEC’s to designate “Merger Representatives” to attempt to jointly negotiate a seniority integration proposal to be presented to the employer. In the event the Merger Representatives failed to agree, then ALPA Merger Policy provided that its seniority proposal would be determined by an ALPA-approved arbitrator who would render his

decision pursuant to ALPA-determined criteria. Whereas these criteria had historically placed special emphasis on date-of-hire seniority, by 1991, however, ALPA Merger Policy had been amended to eliminate any reference to date-of-hire seniority.

In this case, the ALPA arbitration culminated in a May, 2007 decision referred to as the “Nicolau Award.” The Nicolau Award disregarded date-of-hire seniority principles in favor of granting super seniority to more junior West pilots, ostensibly based on a snapshot approach of the respective airlines’ economic status (that has since changed). The impact of the award, at the time it was issued, was dramatic; for example it included the placement of West pilots with as few as two *months* seniority above East pilots who had more than seventeen *years* seniority. A majority of pilots immediately expressed deep objection.

Under both ALPA Merger Policy and the terms of a Transition Agreement (“TA”) negotiated between ALPA and the airlines, ALPA’s seniority integration bargaining proposal could only be implemented as part of a new, single collective bargaining agreement merging the pilot operations of the two airlines. Adoption of a single CBA, however, required prior approval of both the East and West MEC’s as well as a majority ratification vote by their respective pilot groups. ALPA and the company did not reach agreement on a new, single CBA before the pilots elected new union representation.

On April 18, 2008, ALPA was de-certified and replaced by USAPA in a democratic vote under the auspices of the National Mediation Board (NMB), the federal agency responsible for conducting union elections in the airline and railroad industries. *US Airways*, 35 NMB 135 (2008).

This case arose on September 4, 2008 when the six named Appellees, financed by a private corporation, brought suit in federal court against US Airways and USAPA. At the time, contract negotiations were ongoing and USAPA had not yet made any proposal to the company on seniority. Nevertheless, Appellees alleged in Counts One and Two that US Airways had unlawfully furloughed West pilots in violation of the Transition Agreement and demanded implementation of the seniority list embodied in the Nicolau Award. *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1058 (D. Ariz. 2008). Plaintiffs alleged in Count Three that USAPA had violated its duty of fair representation (“DFR”) by, *inter alia*, inducing the contractual breaches alleged in Counts One and Two and by its failure to adopt the Nicolau Award as its bargaining proposal.

On September 30, 2008, USAPA presented its first seniority integration proposal to US Airways. The seniority integration proposal provided for a combined seniority list based on date-of-hire but, consistent with USAPA’s constitutional objective, with reasonable conditions and restrictions to preserve each pilot’s un-merged career expectations. USAPA’s proposal has neither been

agreed to, nor implemented by, the company. To date, the two pilot groups remain in separate operations just as they had under ALPA.

The district court dismissed all claims against the company on the grounds that they involved issues of contractual interpretation that were within the exclusive jurisdiction of an arbitral forum known as the System Board of Adjustment. *Id.* at 1063-64. Despite the district court's finding that "Count 2 is inseparable from Count 3" (Oct. 28 Tr., Dkt. # 80 at p. 43, line 2), the court retained jurisdiction of all of the Count Three claims against USAPA. *Addington*, 588 F. Supp. 2d at 1068.

After certifying a class of all former America West pilots, the district court proceeded on an expedited basis (over USAPA's objections) to a jury trial in late April on the issue of USAPA's DFR liability. The jury returned a general verdict in favor of Plaintiffs-Appellees on May 13, 2009. On July 17, 2009, the district court denied USAPA's renewed motion for judgment as a matter of law and motion for new trial, and entered partial judgment and an injunction in favor of Plaintiffs-Appellees. The injunction ordered USAPA to:

- A. Immediately, and in good faith, make all reasonable efforts to negotiate and implement a single collective bargaining agreement with US Airways that will implement the Nicolau Award seniority proposal unmodified, according to its terms;
- B. Make all reasonable efforts to support and defend the seniority rights provided by or arising from the Nicolau Award in negotiations with US Airways; and

- C. Not negotiate for separate collective bargaining agreements for the separate pilot groups, but rather negotiate for a single collective bargaining agreement for both pilot groups that incorporates the Nicolau Award. This injunction does not restrain USAPA from pursuing its rights under Section 6 of the Railway Labor Act, consistent with the previous sentence.

(Partial Judgment & Permanent Injunction at 2-3; See Attachment A).

On July 23, 2009, USAPA appealed the district court's July 17th injunction and judgment. Also on July 23, USAPA filed a motion with the district court to suspend and stay the injunction and any further proceedings pending appeal.¹ USAPA now seeks expedited consideration of its appeal by this Court.

III. ARGUMENT.

A. There Is Good Cause To Expedite Because The District Court's Injunction Has Effectively Paralyzed On-Going Collective Bargaining, Threatening Irreparable Harm To All Parties, And Because Expedited Review Will Protect All Parties On Appeal Including The Flying Public.

Ninth Circuit Rule 27-12 allows this Court to expedite briefing and hearing of appeals "upon a showing of good cause." Cir. R. 27-12. "Good Cause" includes situations where, "in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot" *Id.* Good cause exists in this case because:

First, ongoing collective bargaining, and hence completion of the corporate

¹ If the district court denies USAPA's request to stay the injunction and any further proceedings pending the outcome of this appeal, USAPA intends to immediately move this Court for similar relief.

merger, is effectively paralyzed until this case is finally resolved. This results from two facts. The first is that even if USAPA fully complies with the injunction, nevertheless the company has openly declared to its pilots its deep skepticism that any agreement can be reached, or if reached then ratified, until the case is resolved. The second fact is that the parties know that any CBA possibly ratified before this case is resolved may have to be reopened depending on the outcome of the case.²

Senior management at US Airways has indicated that it is “unlikely that anything [i.e., a pilot contract] is going to get done” until the district court’s judgment and injunction dictating seniority is reviewed and ruled upon by this Court. (*See* Declaration of Paul DiOrio). Scott Kirby, President of US Airways, speaking to a group of its pilots in Phoenix on May 27, 2009, commented directly on this appeal. The airline’s President then noted that the pilot negotiating process “can’t finish until you get all the way through the appeal” and that it was “unlikely” that any agreement could be reached or if reached would not likely get ratified. (DiOrio Decl.). From the carrier’s perspective, then, there is little prospect of reaching an agreement; from the union’s perspective there is likewise little reason to expect that the company, regardless of what it might yet say during the pendency of the

² Under the Railway Labor Act, 45 U.S.C. § 151 *et seq*, which applies here, the prospect of re-opening and of renewed bargaining is problematic because airline CBA’s typically include provisions that restrict the commencement of formal bargaining to a designated period that is usually close to the contract’s amendable date. THE RAILWAY LABOR ACT (American Bar Association 1995), at 211.

appeal, will be motivated to reach an agreement. And from *both* parties' perspective, any agreement reached before this Court determines the merits of this appeal is highly problematic because it may have to be effectively 'un-done' soon after having concluded, depending on the results of the appeal. In this context of continuing collective bargaining following a corporate merger, expedited treatment is appropriate as this Court has held previously. *See, International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Western Airlines, Inc.*, 813 F.2d 1359 (9th Cir. 1987), *vacated on other grounds sub nom. Delta Airlines, Inc. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 484 U.S. 806, 108 S. Ct. 53, 98 L. Ed. 2d 18 (1987); *See also, United Airlines vs. Airline Pilots Asc.*, 2009 U.S. App. LEXIS 5142; 185 L.R.R.M. 3317 (7th Cir. 2009) (expedited appeal granted in labor dispute); *Federal Labor Relations Authority v. Office of Personnel Management*, 778 F.2d 844, 845 (D.C. Cir. 1985) (expedited negotiability appeal); *American Federation of Government Employees v. Federal Labor Relations Authority*, 778 F.2d 850, 853 (D.C. Cir. 1985) (union in negotiation granted expedited review under FLRA); *United Mine Workers Of America 1974 Pension Trust v. Pittston*, 793 F. Supp. 339 (D. D. C. 1992) (expedited appeal warranted by far reaching consequences to federal labor law).

Second, expediting the appeal protects all parties – the Appellant, Appellees, the company, and the flying public. *See generally, Coalition for Economic Equity v. Wilson*, 107 F.3d 704 (9th Cir. 1997) (expediting appeal where all parties protected); *see also, Half Moon Bay Fisherman’s Mktg. Ass’n v. Carlucci*, 857 F.2d 505 (9th Cir. 1988); *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977). All have an interest in a stable US Airways and the sooner the case is resolved on the merits, the sooner a new collective bargaining agreement can be reached and the sooner the company will be able to complete its merger. In particular, it is a matter of public record that US Airways has not once but twice recently emerged from Chapter 11 bankruptcy and continues to face stressful times in the midst of recession and ongoing turmoil in the aviation industry. Hard times for the carrier have translated into desperation and individual bankruptcies for its employees while long-awaited economic gains for pilots are tied to ongoing bargaining. (DiOrio Decl.).

B. Opposing Counsel Do Not Oppose The Proposed Expedited Schedule.

Appellant conferred with counsel for Appellees by an exchange of e-mail prior to filing this motion. Appellees’ counsel indicated that they do not oppose expedited briefing and oral argument and further that they do not oppose the specific schedule proposed herein below.

C. Transcript Preparation Is Completed.

During the trial Appellant ordered and purchased a complete transcript. All pre-trial, trial and post-trial hearings have been fully transcribed and are available.

D. Status Of Stay Motion In District Court.

The same day it perfected this appeal, on July 23, 2009, Appellant also filed with the district court a motion to suspend and stay the permanent injunction and to stay any proceedings to enforce the judgment. In addition, Appellant also moved the district court for an order staying all remaining litigation (over damages and attorneys' fees) pending the outcome of this appeal to the Ninth Circuit. In response, on July 24, the district court ordered Appellees to respond. At this time Appellees have not yet responded and the motion to stay remains pending with the district court.

E. Proposed Schedule.

Appellant respectfully requests that the current Time Schedule Order in this case (Docket Entry 7002819, dated July 24) be modified as follows:

- | | |
|---------------------------------|---|
| Fri., September 25, 2009 | Appellant/petitioner's opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1; |
| Mon., October 26, 2009 | The brief of appellee/respondent shall be filed and served, pursuant to FRAP 32 and 9th Cir. R. 32-1; |
| By December 11, 2009 | Oral argument. |

The time to file a reply brief and all other dates should remain the same.

IV. CONCLUSION.

For the foregoing reasons, Defendant-Appellant requests that this Court grant its motion for expedited treatment, including expedited briefing and oral argument, according to the herein proposed schedule.

Date: July 29, 2009

Respectfully submitted,

/s/ Nicholas Paul Granath, Esq.

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CERTIFICATE OF SERVICE

Docket No. 09-16564

When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing 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: July 29, 2009

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Nicholas Paul Granath, Esq.

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Attachment A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargoeki,

Plaintiffs,

vs.

US Airline Pilots Association; US Airways, Inc.,

Defendants.

No. CV 08-1633-PHX-NVW
(consolidated)

**PARTIAL JUDGMENT
and
PERMANENT INJUNCTION**

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargoeki, et al.,

Plaintiffs,

vs.

Steven Bradford; Paul Diorio; Robert Frear; Mark King; Douglas Mowery; John Stephan, et al.,

Defendants.

CV08-1728-PHX-NVW

The Court has entered previous orders adjudicating all claims in No. CV 08-1728-PHX-NVW and all claims in No. CV 08-1633 PHX-NVW except the named Plaintiffs' claims for damages other than for refund of union dues and fees and except for any claims for attorney fees. The jury has returned a verdict in No. CV 08-1633 PHX-NVW finding

1 Defendant US Airline Pilots Association liable to the Plaintiffs and the class they represent
2 of all pilots employed by US Airways, Inc., in September 2008 who were on the America
3 West seniority list on September 20, 2005. The Court expressly finds there is no just reason
4 for delay in entry of this Partial Judgment and Permanent Injunction on all those matters
5 previously adjudicated, and the Court expressly directs its immediate entry.

6 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that all claims in
7 CV08-1728-PHX-NVW are dismissed with prejudice for failure to state a claim upon which
8 relief can be granted. (Doc. # 118.)

9 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs' claims
10 against Defendant US Airways, Inc., in No. CV 08-1633 PHX-NVW are dismissed for lack
11 of subject matter jurisdiction.

12 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED in No. CV 08-1633
13 PHX-NVW that the claims of the Plaintiffs and the class of all pilots employed by US
14 Airways, Inc., in September 2008 who were on the America West seniority list on September
15 20, 2005, against Defendant US Airline Pilots Association for refund of payments of union
16 dues and fees are dismissed with prejudice for failure to state a claim upon which relief can
17 be granted. (Doc. # 287.)

18 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED in No. CV 08-1633
19 PHX-NVW in favor of the Plaintiffs and the class of all pilots employed by US Airways,
20 Inc., in September 2008 who were on the America West seniority list on September 20, 2005,
21 that Defendant US Airline Pilots Association and its officers, committees, representatives,
22 agents, and all persons in active concert and participation with them are permanently
23 enjoined and ordered to:

- 24 A. Immediately, and in good faith, make all reasonable efforts to negotiate and
25 implement a single collective bargaining agreement with US Airways that will
26 implement the Nicolau Award seniority proposal unmodified, according to its terms;
- 27 B. Make all reasonable efforts to support and defend the seniority rights provided
28 by or arising from the Nicolau Award in negotiations with US Airways; and

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C. Not negotiate for separate collective bargaining agreements for the separate pilot groups, but rather negotiate for a single collective bargaining agreement for both pilot groups that incorporates the Nicolau Award. This injunction does not restrain USAPA from pursuing its rights under Section 6 of the Railway Labor Act, consistent with the previous sentence.

The Court retains jurisdiction to enforce, modify, or dissolve the permanent injunction portion of this order. The Court retains jurisdiction to adjudicate the named Plaintiffs' unadjudicated claims for damages and any claims for attorney fees.

DATED this 17th day of July 2009.



Neil V. Wake
United States District Judge

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
12 VELEZ; and Steve WARGOCKI,

Case No. 2:08-cv-1633-PHX-NVW
(Consolidated)

13 Plaintiffs,

**DECLARATION OF
PAUL DIORIO**

14 vs.

15 US AIRLINE PILOTS ASSOCIATION,
US AIRWAYS, INC.,
16 Defendants,

17 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
18 VELEZ; and Steve WARGOCKI,

Case No. 2:08-cv-1728-PHX-NVW

19 Plaintiffs,

20 vs.

21 Steven H. BRADFORD, Paul J. DIORIO,
Robert, A. FREAR, Mark. W. KING,
22 Douglas L. MOWERY, and John A.
STEPHAN,
23

Defendants.

1 I, Paul DiOrio., declare as follows:

2 1. I make this Declaration of my own free will and based on my personal,
3 first-hand knowledge, unless otherwise specifically indicated.

4 2. I am a commercial airline pilot and have been employed by US Airways
5 Inc. since 1989, a member of the US Airline Pilots Association (USAPA), and currently
6 the Chairman of the USAPA Negotiating Advisory Committee.

7 3. I have held the position of Chairman since May 2009 and am familiar with
8 the current round of bargaining between the pilots represented by USAPA and US
9 Airways Inc.
10

11 4. The objective of the USAPA Negotiating Advisory Committee is to
12 negotiate a new, single collective bargaining agreement with the merged pilots groups at
13 US Airways, an agreement covering both “East” and “West” pilots.

14 5. Pursuant to my duties I am familiar with senior management at US Airways
15 and I monitor company issued statements that might effect bargaining.

16 6. On May 27, 2009, US Airways Inc. President Scott Kirby spoke to a group
17 of pilots in Phoenix, Arizona. His comments were video-taped and later publicly posted
18 on various web sites. I have reviewed the video tape of President Kirby on May 27.

19 7. In the May 27 meeting, President Kirby noted that the pilot negotiating
20 process “can’t finish until you get all the way through the appeal” and that it was “unlikely” that
21 any agreement could be reached or if reached would not likely get ratified. This was stated in
22 opening remarks and in response to questions from the audience.

23 8. President Kirby’s comments reflect those of other senior management.

1 9. US Airways Inc. has twice emerged from Chapter 11. In both instances pilots
2 employed by US Airways have suffered often severe economic loss. Comparatively, US
3 Airways pilots are now on the bottom end of industry pay.

4 10. In the current round of bargaining, the company has expressed its position that
5 economic gains for pilots will be tied to reaching agreement on a new, single contract covering
6 both East and West pilots groups.

7 Further your Declarant sayeth not.

8 Pursuant to 29 USC § 1746, I declare under penalty of perjury that the foregoing is
9 true and correct.

10 Executed on: July 29, 2009

11 */s/ Paul DiOrio*