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 REPLY BRIEF IN SUPPORT OF ITS MOTION TO STAY JUDGMENT AND ALL OTHER PROCEEDINGS PENDING APPEAL (Fed. R. App. P. 8(a)(2))

Lee Seham
Nicholas P. Granath
Lucas K. Middlebrook
Stanley J. Silverstone
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Avenue, Suite 1204
White Plains, New York 10601
Tel: (914) 997-1346

Attorneys for Defendant-Appellant
US AIRLINE PILOTS ASSOCIATION

Defendant-Appellant, US Airline Pilots Association ("USAPA"), submits the following reply to Plaintiffs-Appellees' Response in Opposition to USAPA's Motion to Stay Judgment and All Other Proceedings Pending Appeal:

I. PLAINTIFFS' DEFERENCE ARGUMENT IS NOT SUPPORTED BY THE CASE LAW CITED IN THEIR RESPONSE.

Plaintiffs state that "[t]his Circuit generally gives substantial deference to a district court's analysis that denied an earlier motion to stay an injunction." (Plaintiffs' Response at 13). However, Plaintiffs cite no precedent of this Court that supports this statement.[1]

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 472 F.3d 1097 (9th Cir. 2006) (cited in Plaintiffs' Response at 13) does not support Plaintiffs' deference argument. In *Southeast Alaska*, this Court was asked to vacate an injunction that this Court had granted pending appeal. The motion for an injunction pending appeal was initially submitted to the district court, but the motion was withdrawn when this Court granted the injunction. *Id*. at 1101. As this Court noted, "[t]he district court did not actually consider the merits of SEACC's motion." *Id*. Thus, there was no decision of the district court to defer to.

[1] The Response is mostly an attack on counsel for the Appellant, which is both unjustified and utterly irrelevant to the motion.

Plaintiffs also cite *United States v. Kapp*, 564 F.3d 1103 (9th Cir. 2009); *U-Haul International, Inc. v. Lumbermens Mut Cas. Co.*, __ F.3d __, 2009 WL 2449804 (9th Cir. 2009); and *J.L. v. Mercer Island School District*, __ F.3d __, 2009 WL 2393323 (9th Cir. 2009) (Plaintiffs' Response at 14-16). However, none of these decisions support Plaintiffs' deference argument because none involved motions to stay injunctions pending appeal.

II. USAPA HAS SHOWN A POSSIBILITY OF IRREPARABLE INJURY.

Plaintiffs incorrectly assert that, "USAPA fails to show any causal nexus between the injunction and hardship." (Plaintiffs' Response at 17). But that nexus was clearly set forth in USAPA's motion:

> But *[collective bargaining] is now effectively paralyzed* until this case is finally resolved, as a result of the district court's permanent injunction. Two facts compel this: First, even if USAPA fully complies with the injunction, the company has openly declared to all its pilots its deep skepticism that any agreement can be reached, or if reached then ratified, until the case is resolved on appeal; Second, the parties at the table now know that any CBA possibly ratified before this case is resolved may have to be reopened depending on the outcome of this appeal.

(Motion to Stay at 14-15). A possibility of **irreparable harm exists because the injunction compels USAPA to negotiate to include the Nicolau seniority list while the appeal is pending yet if this Court reverses** – a distinct possibility given there has never been a case finding a DFR violation based on use of the date-

of-hire method of seniority integration until this case – **then the injunction-forced bargaining position or even resulting contract will be void**. At the same time, a stay would not mean, as the district court speculated, that USAPA would "abandon the Nicolau Award" while the appeal is pending. (Plaintiffs' Response at 18).

III. LITIGATION EXPENSES JUSTIFY A STAY OF FURTHER PROCEEDINGS IN THE DISTRICT COURT.

In addition to seeking a stay of the injunction, USAPA also seeks to stay all further proceedings in the district court, including the damages phase of the case and Plaintiffs' motion for attorneys' fees, pending resolution of the appeal. The justification for a stay of further district court proceedings is to allow USAPA to avoid using the dues and fees of the pilots whom it represents for litigation expenses that may prove to be unnecessary in the event that USAPA prevails in the appeal.

Plaintiffs do not claim that they would be prejudiced by a stay of the damages phase of the case and the motion for attorneys' fees. Their argument against the stay is twofold. First, they argue that a stay is merely a "convenience" and no party – not even a union which is primarily responsible for using the funds that it receives from its members and agency fee payers to carry out its core representation functions of collective bargaining and contract enforcement – should be entitled to the "convenience" of allowing an organization to make

responsible financial decisions on behalf of its members. But Plaintiffs' "mere convenience" argument, which reflects Plaintiffs' obvious intent to inflict punitive, financial harm on their Union, is not supported by the cases upon which they rely. *Poulos v. Caesars World, Inc*., 379 F.3d 654 (9th Cir. 2004) (cited in Plaintiffs' Response at 19) has nothing to do with stay motions at all – it only concerns a class certification motion. *Dependable Highway Express, Inc. v. Navigators Ins. Co*., 498 F.3d 1059 (9th Cir. 2007) (cited in Plaintiffs' Response at 19) is also distinguishable as it involved a motion to stay a California action pending resolution of separate legal proceedings in England. *Dependable* did not involve a motion to stay lower court proceedings pending resolution of an appeal.

USAPA's position is supported by common sense, by its obligation to make prudent financial decisions on behalf of its members, and by *Lowden v. T-Mobile USA, Inc*. 2006 U.S. Dist. LEXIS 46424, at *4-5 (W.D. Wash. July 10, 2006) (litigation expenses have been held to "constitute a significant hardship" so as to satisfy the second factor relevant to a request for a stay).

Plaintiffs' second argument in opposition to a stay of further lower court proceedings is that USAPA should not be allowed to save potentially unnecessary future litigation costs because of its past conduct, which Plaintiffs allege to have been "abusive" based on one example. (Plaintiffs' Response at 19). Clearly, the

alleged past conduct, even if true (which is denied), is irrelevant to USAPA's desire and need to avoid future litigation expenses that may be unnecessary.

The district court relied heavily on *Ramey v. Dist. 141, International Association of Machinists*, 378 F.3d 269 (2d Cir. 2004) in its Findings of Fact and Conclusions of Law. But contrary to Plaintiffs' position here, in *Ramey*, shortly after the Notice of Appeal was filed, the district court issued an order that, "the court defer *any further proceedings* until after an appellate decision has been rendered." (*Ramey v. Dist. 141 IAM*, E.D.N.Y. Case No. 99-4341)[2] (emphasis added). Thus, in *Ramey*, the Court stayed the damages and attorneys' fees phases of the case until after the Second Circuit decided the appeal. The same result should be reached in this case.

IV. USAPA DID NOT MISAPPLY THE ANALYSIS OF SERIOUS QUESTIONS OF LAW.

Plaintiffs mistakenly believe that USAPA is arguing that the existence of serious questions of law *alone* justifies a stay. (Plaintiffs' Response at 20-21). But that is not USAPA's argument. As USAPA explained in its motion, the standard

[2] Order dated 10/14/2003, Docket No. 142: "granting application that the court defer any further proceedings until after an appellate decision has been rendered. Signed by Judge Edward R. Korman on 10/9/03. C/m. *See* letter dated 10/6/03 from Jeffrey A. Bartos to USDJ Edward R. Korman. (Noh, Kenneth) (Entered: 10/14/2003)."

for determining whether to grant a stay pending appeal has been modified in the Ninth Circuit so that a moving party must demonstrate:

> *either* (1) a combination of probable success on the merits and the possibility of irreparable injury *or* (2) that serious questions are raised and the balance of hardships tips sharply in its favor.

Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988) (citation omitted). USAPA established in its motion that serious questions of law are raised *and* that the balance of hardships tips sharply in USAPA's favor. Noticeably, Plaintiffs have not claimed that they would suffer any hardship if a stay is granted. And there can be no doubt that serious questions are raised here because this case is unprecedented in holding that a date-of-hire seniority integration method violates the duty of fair representation – a result flatly contrary to precedent in this circuit:

> 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.

Laturner v. Burlington N., Inc., 501 F.2d 593, 599 n.14 (9th Cir. 1974), *cert denied*, 419 U.S. 1109, 95 S. Ct. 783 (1975).

CONCLUSION

For the foregoing reasons, USAPA respectfully requests that this Court grant its motion to stay the permanent injunction, stay the partial judgment, and in

addition or in the alternative, stay all further proceedings in the district court (including the damages trial and Plaintiffs' motion for attorneys' fees) pending resolution of this appeal.

Date: September 11, 2009 Respectfully submitted,

s/ Nicholas Paul Granath, Esq.
Seham, Seham, Meltz & Petersen, LLP
Nicholas Granath, Esq.
ngranath@ssmplaw.com
2915 Wayzata Blvd.
Minneapolis, MN 55405
Tel. (612) 341-9080
Fax (612) 341-9079

Lee Seham, Esq.
Stanley J. Silverstone, Esq
Lucas K. Middlebrook, Esq.
445 Hamilton Avenue, Suite 1204
White Plains, New York 10601
Tel. (914) 997-1346
Fax (914) 997-7125

Attorneys for Defendant-Appellant
US Airline Pilots Association (USAPA)