Docket 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 a Decision of the United States District Court for the District of Arizona, Nos. 2:08-CV-01633-NVW, 2:08-CV-01728-NVW (Consolidated) · Honorable Neil V. Wake

REPLY BRIEF OF APPELLANT

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LIST OF ABBREVIATIONS

Add. ..... Addendum

ALPA ..... Air Line Pilots Association

DOH ..... Date-of-Hire

CBA ..... Collective Bargaining Agreement

DFR ..... Duty of Fair Representation

ER ..... Excerpt of Record

FER ..... Further Excerpt of Record

MEC ..... Master Executive Council

NMB ..... National Mediation Board

Opng. ..... USAPA's Opening Brief

Resp. ..... Plaintiffs' Answering Brief

RLA ..... Railway Labor Act

SBOA ..... System Board of Adjustment

TA ..... Transition Agreement

USAPA ..... US Airline Pilots Association

REPLY TO JURISDICTIONAL STATEMENT

Plaintiffs' response brief (hereinafter "Resp.") erroneously asserts that this Court lacks 28 U.S.C. § 1291 jurisdiction and may only review the "permanent injunction ... and related rulings." (Resp. 1, 69).[1]

The Notice of Appeal comprehensively appealed: the "Partial Judgment And Permanent Injunction," entry of the same, and the supporting "Findings of Fact and Conclusions of Law And Order." (2ER58).

The district court drafted its rulings to be a final, partial judgment, which satisfies Fed. R. Civ. P. 54(b). ((1ER2:1) (1ER55:20)). It did so with the stated intent of issuing an appealable judgment on the merits now. It does not matter that the district court did not expressly cite Rule 54(b) because its intent was clear. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1981).

Appeal from a partial final judgment under Rule 54(b) gives this Court 28 U.S.C. § 1291 final-judgment jurisdiction. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 3 (1980); *Santa Monica Culinary Welfare Fund. v. Miramar Hotel Corp.*, 920 F.2d 1491, 1493 (9th Cir. 1990). Moreover, the Ninth Circuit takes a "pragmatic approach" to the scope of review of Rule 54(b) judgments. *Cadillac Fairveiw/Cal., Inc. v. United States*, 41 F.3d 562, 564, n. 1 (9th Cir. 1991).

[1] Page number references are internal to the document cited.

Finally, even if review were confined to the injunction, the nature and scope of the combined judgment coupled with its companion order make any examination of the injunction factually and legally "inextricably bound up" with all rulings. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 837 (9th Cir. 1986). Here, review is also appropriate because "[t]he district court has completed its consideration of the liability issue, retaining jurisdiction only for an accounting of damages." *Marathon Oil Co. v. United States*, 807 F.2d 759, 764 (9th Cir. 1986).

REPLY TO COUNTERSTATEMENT OF THE CASE

Due to space limitations, USAPA limits itself to some of the more significant misrepresentations contained in the plaintiffs' Counterstatement of the Case.

A. Nicolau Employed an Unfair Process and Produced an Unfair Result.

The district court forbade the admission of any evidence that would "challenge the process, procedure, or decision of the Nicolau Award." (3ER358:1-2). Thus, it did not matter: how pre-determined the result was, whether evidence was improperly suppressed or ignored, the extent to which the award deviated from industry standards, or ALPA's own potential DFR violations – all of which, in fact, apply to the Nicolau process. (Opng. 10-11). For plaintiffs, this was a signal evidentiary victory.

Nevertheless, on appeal, plaintiffs feel compelled to assert that the Nicolau Award was fair. Thus, for example, plaintiffs assert that Nicolau rejected USAPA's seniority integration approach as "inequitable." (Resp. 3). Plaintiffs also insert an entire paragraph from the district court's findings justifying Nicolau's decision based on economic analysis and relative furlough levels. (Resp. 5).

USAPA's ability to respond is severely handicapped by the district court's evidentiary rulings. Nevertheless, even the four corners of the award confirm the untruth of plaintiffs' fairness representations.

Plaintiffs' assertion that Nicolau determined that USAPA's seniority integration approach would be "inequitable" is starkly untrue in two respects. First, neither USAPA nor its complex proposal existed at the time of the Nicolau decision. Nicolau found only that a pure date-of-hire approach was inconsistent with the "stated criteria" of ALPA Merger Policy. (4ER655). By contrast, USAPA's proposal was designed defensively to preserve positions generated by East pilot retirements for East pilots while barring East pilots from bidding into West positions for ten years – except to the extent senior West pilots first bid into East positions. (Opng. 14, 27-28).

Second – and the more universal point – is that Nicolau had no mandate to be fair. To the contrary, his job was to create a list that achieved "the objectives of ALPA Merger Policy in this case." (4ER659). Nicolau actually invokes ALPA Merger Policy to *reject* a fairness argument.

Pilot Neutral Captain Brucia protested that Nicolau should have "better balanced the equities that each pilot group brought to this merger." (4ER666).

Nicolau based his decision to strip all furloughees of their seniority[2] on a static pre-merger economic snapshot that he *knew at the time of his decision* no longer reflected operational realities:

> The Board did not adequately take into account the realities of the 'new' airline, the return of furloughees that has already taken place and the much greater rate of age-based attrition at US Airways as compared to the rate at America West. … During the hearings we learned that additional recalls were taking place and there was testimony that stated at the current pace it was possible that all US Airways pilots would receive recall notices before the end of 2007.
>
> At minimum, it is my opinion that US Airways pilots, who had already received notice of their opportunity to return to work from furlough, should have received some consideration for the substantial time they have already invested in their airline.

(4ER665). Nicolau rejected Brucia's appeals to economic fairness and traditional labor union values because it was "contrary to what ALPA Merger Policy foresees." (4ER657).

The West Merger Representatives' post-Nicolau brief neatly traces the cynical ALPA political process that effectively forbade Nicolau from considering date-of-hire seniority. (5ER994-995; Opng. 8). USAPA had witnesses available to testify concerning the clandestine, undemocratic nature in which ALPA Merger Policy was transformed. (2ER305). The district court even barred evidence

[2] The adverse effect of Nicolau ripples up the seniority list so that East pilots with nearly twenty years of service that had *never been furloughed* were slotted below younger West pilots with only six years of service at the time of the merger. (6ER1216:20-24).

relating to USAPA's interest in remedying a viable DFR claim that has been filed against ALPA in federal court. *Infra*. at 30.

B. Plaintiffs Misidentify the Parties to the Nicolau Process.

Plaintiffs insist on describing the parties to the Nicolau process as the "East Pilots" and the "West Pilots" (Resp. 7, 9), even though the facts and plaintiffs' own stipulations establish otherwise. (2ER273:7-8).

The disempowerment of rank-and-file pilots regarding the seniority integration process is almost total. East pilots:

- Never agreed that ALPA should represent them as a union;
- Never got to vote on ALPA's Constitution and Bylaws;
- Never got to vote on ALPA Merger Policy;
- Never got to vote on the anti-seniority amendments to ALPA Merger Policy;
- Never got to vote on the Transition Agreement; and
- Never got to vote on who their Merger Representatives should be.

(Opng. 43-44). Significantly, plaintiffs *stipulated* and the district court found that it was not the East and West pilots en masse, but unelected Merger Representatives who were the "parties" to the Nicolau process. (1ER10:18-23). Indeed, the state court litigation over whether Nicolau had complied with ALPA Merger Policy was terminated due to the fact that the parties no longer existed. (Opng. 10-11).

The small measure of democratic participation permitted under the ALPA structure came at the tail end – the ratification process. It was at this point in the process that the East and West pilots could, respectively, reject the contract for whatever reason they deemed appropriate.

What is striking about plaintiffs' response is their endorsement of ratification as a basic right:

- Recognizing that an integrated list must be memorialized in a CBA and that "any single CBA negotiated with the union [is] subject to membership ratification." (Resp. 7).

- Characterizing each pilot group's right to ratification as a "separate veto power." (Resp. 12-13).

- Defining the "West Pilots' interest" to include the right "to a ratification vote." (Resp. 23).

- Describing the district court's injunction as mandating that a single CBA using the Nicolau Award be presented "for a membership ratification vote." (Resp. 63).

That an enduring impasse arose due to the exercise of these ratification rights has been stipulated to. (2ER273:10-18). Moreover, plaintiffs acknowledged that ALPA had been frustrated in its efforts to "broker a compromise between the two pilot groups." (Resp. 9).

Nevertheless, both the plaintiffs' lawsuit and the district court's injunction constitute an undisguised effort to condemn the East pilots for the exercise of their

ratification vote and USAPA for its response to that political reality. In truth, this case is not a DFR action, it is one of pure political interference.[3]

C. Plaintiffs Misclassify the Nicolau Award as an "Arbitration" Rather than a Proposal.

Despite their determination to champion ratification rights in their response, plaintiffs persist in describing the Nicolau Award as a "'final and binding' arbitration." (Resp. 7). However, the *West* MEC's legal counsel rejected the characterization of the process as an "arbitration," and instead more appropriately termed it a "proposal." (*See infra.* at 29). The West MEC's recognition of the list as a mere "proposal" is consistent with plaintiffs' own concession that, in order to be effective, the Nicolau list needed to be "accepted by the Airline for use in any single CBA negotiated with the union, subject to membership ratification." (Resp. 7).

D. Plaintiffs Erroneously Treat the Pilot Groups as Political Monoliths.

Throughout its Counterstatement, the plaintiffs refer to East and West pilots as if they were two political monoliths. As discussed at greater length, *infra.* at 17-18, nothing could be further from the truth.

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[3] The district court explained that the effect of the injunction was to punish East pilots for exercising their "unregulatable" right to a ratification vote by condemning them to the "lowest pay scale in the industry." (Opng. 39-40).

This is not a case such as *Barton Brands v. NLRB*, 529 F.2d 793 (7th Cir. 1976), in which one group is endtailed to another in derogation of traditional seniority principles. Here, USAPA began with a traditional seniority list, but limited the exercise of East pilot seniority-based bidding to positions vacated by West pilots who first bid into East operations. (Opng. 14, 27-28). The district court recognized that hundreds of East pilots were "not affected one way or another by anything that happens in this case." (FER1:8-12). To the contrary, a large number of these senior East pilots would have been better off under Nicolau than USAPA's seniority proposal. ((FER2-FER3) (6ER1265-1266)). As Captain Chesley Sullenberger testified, his opposition to the Nicolau list was not based on self-interest, but on "integrity," which he defined as "doing the right thing even if it's not convenient." (FER4:24-FER6:4).

E. The Formation of USAPA.

Plaintiffs assert that USAPA was formed to "abrogate" the Nicolau Award. (Resp. 10). However, the jury instructions forbade consideration of other reasons for USAPA's formation. (Opng. 8). Although the court acknowledged that "USAPA's campaign purported to address other areas of pilot discontent" (1ER13:13, Resp. 11), the jury was forbidden from considering these motives. (2ER198:8-9).

ARGUMENT.

I. THE CASE SHOULD BE DISMISSED DUE TO LACK OF RIPENESS.

Plaintiffs' treatment of the ripeness question simultaneously narrows and confuses the issue. On the one hand, they concede that ripeness requires the absence of contingent events that may or may not occur as anticipated. (Resp. 19-20). Plaintiffs also concede the continuing existence of several contingencies that prevent implementation of a final seniority integration agreement, including: US Airways' bargaining position, pilot board approval, membership ratification, and/or the resumption of ALPA's strategy of obviating the seniority dispute through a dual, versus single, contract approach. (Opng. 20-21; Resp. 23).

Nevertheless, in order to establish the requisite absence of contingencies, plaintiffs present two conflicting arguments.

A. Plaintiffs' Assertion of Ripeness Based on USAPA's "Adoption" of a Policy is Contrary to Law.

Plaintiffs first assert that USAPA's DFR violation arose "when it committed itself to date-of-hire integration, without proper motive." (Resp. 19). As plaintiffs further explain:

> A union's adoption and announcement of a seniority policy can be an unequivocal expression of intention to implement that policy.

(Resp. 23). Nevertheless, plaintiffs have always alleged that USAPA's adoption of its seniority policy coincided with its formation "in or about the middle of 2007." (3ER506:4-20).

As a basis for ripeness, the "policy adoption" thesis would require dismissal on two grounds. First, as previously briefed, USAPA's pre-certification adoption of a seniority integration policy cannot serve as the basis for DFR liability. (Opng. 36) *(*citing cases). Nor can a union's mere failure to disavow its pre-certification actions in the post-certification period serve to revivify a moribund claim. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants,* 275 F.3d 1165, 1169-70 (9th Cir. 2002) (union's post-certification DFR obligation to merged flight attendants not violated by implementation of a pre-certification determination to endtail the same flight attendants).

Second, plaintiffs assert ripeness on the basis of "policy adoption" for the first time on appeal. Thus, it is appropriate for this Court to either reject their "policy adoption" argument as improperly raised, or, if accepted as the basis for ripeness, to remand for dismissal because the action is time-barred. The complaint alleges that USAPA's seniority integration policy was adopted in 2007 and the complaint was not filed until September 4, 2008; thus, the six-month limitations period has been exceeded. *DelCostello v. Teamsters*, 462 U.S. 151 (1983); *Kelly v. Burlington N. R.R. Co.*, 896 F.2d 1194 (9th Cir. 1990).

B. In the Absence of an Injury-in-Fact, Ripeness Cannot be Based on the Alleged Violation of a "Procedural" Right.

Under a separate heading entitled – "The injury can be denial of a procedural right" –plaintiffs argue in the alternative that: "The allegation is that USAPA is wrongfully negotiating with the Airline, in violation of the DFR." (Resp. 25). Nevertheless, even if plaintiffs could be said to have properly alleged a procedural harm, this does not nullify the requirement that the improper procedure actually caused an injury-in-fact:

> There is nothing talismanic about the phrase "procedural harm." A party claiming under that rubric is not relieved from compliance with the actual injury requirement ... Put bluntly, a party must set forth a sufficient panoply of facts to show that his injury is real as opposed to being theoretical or abstract.

United States v. AVX Corp., 962 F.2d 108, 119 (1st Cir. 1992); *Dolan v. Ass'n of Flight Attendants*, 1996 U.S. Dist LEXIS 3342, at *10 (N.D. Ill. Mar. 20, 1996).

The cases cited by the plaintiffs simply do not support the contention that a procedural objection to collective bargaining presents a ripe case where significant contingencies still exist. For example, plaintiffs misrepresent *Truck Drivers & Helpers v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967), as a DFR case based on the improper adoption of a seniority integration policy. (Resp. 23). In fact, *Truck Drivers* was *not* a DFR claim, but rather a case alleging election violations related to a *consummated* NLRB-supervised election. The remedy for the actual injury of a flawed election was a re-run election.

Ironically, plaintiffs cite *Bertulli v. Independent Ass'n of Continental Pilots*, 242 F.3d 290, 295 (5th Cir. 2001), to support the contention that a procedural objection to bargaining may proceed to litigation in the absence of injury. (Resp. 25). In fact, *Bertulli* involved a claim for "lost seniority" *following* a labor-management agreement to raise the seniority position of the plaintiffs' co-workers. *Id.* at 293. Plaintiffs sought back pay and injunctive relief to "undo the change in seniority." *Id*. at 294. Similarly, in the older case of *Mount v. Grand Int'l Bhd. of Locomotive Engrs*., 226 F.2d 604 (6th Cir. 1955), the complaint alleged that the employer "will accept" the proposed seniority change with the "immediate result" of depriving the plaintiffs of seniority and employment. *Id*. at 606. The Second Circuit's *Ramey* decision has previously been distinguished on its facts. (Opng. 20, n.3). Nevertheless, it is important to note, contrary to plaintiffs' representations (Resp. 27), the Second Circuit explained:

> We have *never held* that a breach occurs when a union *announces an intention*, even if it does so unequivocally, to advocate against the interests of its members in the future. … To hold otherwise would invite plaintiffs to sue whenever a union official announces a position with which they disagree. This runs counter to our general policy favoring internal resolution of labor disputes . . . and would needlessly clog our court system with litigation over whether a union's position is "final enough" to establish a cause of action. …

Ramey v. Int'l Ass'n of Machinists, 378 F.3d 269, 279 (2d Cir. 2004) (emphasis added). In *Ramey*, as in *Mount*, the employer had signaled its acceptance of the union's seniority proposal, thereby eliminating a monumental contingency that

exists in the instant case.

None of the cases cited by the plaintiffs involve the stubborn contingencies that have defeated the pilot seniority integration process at US Airways from 2005 until the present day, including: labor-management negotiations, approval of the USAPA Board of Pilot Representatives, ratification by the rank-and-file pilots, and/or the option of pursuing ALPA's dual contract approach as a means of obviating the bitter seniority dispute. (Opng. 20-21). Significantly, plaintiffs tacitly acknowledge all but the last of these contingencies when they define their "concrete interest" as:

> *a fully negotiated CBA* using the Nicolau Award that is *put to a ratification vote.*

(Resp. 23) (emphasis added).

USAPA has previously discussed decisions that have referenced the Supreme Court's holding that negotiation-related DFR claims must be based on "the final product of the bargaining process." (Opng. 18) (*citing Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991)). The plaintiffs' efforts to distinguish these cases are ill-founded.

Plaintiffs claim that *Galindo v. Stoody Co*., 793 F.2d 1502 (9th Cir. 1986) "does not apply to the issue of ripeness because it addresses limitations." (Resp. 27). Nonetheless, the Ninth Circuit has held that a claim accrues for purposes of ripeness *at the same time* it accrues for limitation purposes. *Levald Inc. v. City of*

Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993) ("determining when the cause of action accrues is merely the corollary to the ripeness inquiry").

Understandably, plaintiffs anxiously seek to distinguish *Breeger v. USAPA*, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009), but cannot because it was a DFR claim based on the same *un*implemented USAPA proposal that is the subject of the instant case. Plaintiffs curiously claim *Breeger* is flawed because it "fails to reconcile the holding in *United Independent Flight Officers v. United Air Lines, Inc*., 756 F.2d 1262 (7th Cir. 1985)." (Resp. 30). But, *Flight Officers*, in addressing the flip-side issue of accrual, holds that "[c]auses of action based on entry into collective bargaining agreements accrue . . . when the contract is *signed*." 756 F.2d at 1273.

Here, the contract is not negotiated, signed, or ratified. A claim is not ripe when there is potential for further negotiations to resolve the underlying issue. *Colwell v. Dep't of Health & Human Services*, 558 F.3d 1112 (9th Cir. 2009); *Good v. United States*, 39 Fed. Cl. 81, 103 (Fed. Cl. 1997). To find otherwise would open the floodgates and "require this court to judge whether each and every bargaining position adopted by the union is an arbitrary, discriminatory, or bad faith action." *Dolan*, 1996 U.S. Dist. LEXIS, at *13.

C. The Undisputed Contingency of Ratification.

As stated above, plaintiffs acknowledge the existence of the ratification contingency and even go so far as defining it as part of their "concrete interest." (Resp. 23). Nevertheless, without citing a single DFR case or labor-management case of any kind, they plaintively protest that USAPA's identification of ratification as a significant contingency "cannot be right." (Resp. 28).

In the DFR context, however, it is right. *Huff v. Int'l Union of Security Officers*, 2002 U.S. Dist. LEXIS 2003, at *17-18 (N.D. Cal. Jan. 31, 2002) (DFR claim based on proposed union affiliation "not yet ripe," because "the affiliation may not be ratified" by union members); *Dolan*, 1996 U.S. Dist. LEXIS 3342 (DFR challenge to union negotiating position not ripe even after tentative agreement reached because membership had not yet ratified the contract). In the non-labor context, the requirement of treaty "ratification" has been found to render a claim unripe. *Edwards v. Carter*, 445 F. Supp. 1279, 1286 (D.D.C. 1978).

In further protest, plaintiffs cite the *Restatement (Third) of Agency* provision that "ratification extinguishes claims" and complain:

> USAPA's argument that the possibility of future ratification negated ripeness, *Op. Br.* at 20 cannot be right. If it was, no claim by principal against agent would be ripe. That cannot be.

(Resp. 28). Unlike a typical principal-agent relationship, however, membership ratification is not a potential occurrence, it is a mandatory contingency which the

plaintiffs acknowledge to form part of their "concrete interest" as a democratic "veto."

Indeed, the plaintiffs' observation that "ratification extinguishes claims" confirms just how critical the ratification contingency is. Put simply, if USAPA's internal political process can generate a compromise which is acceptable to a majority of West pilots, there would be no cause of action. *Gullickson v. Southwest Airlines Pilots Ass'n*, 931 F. Supp. 1534, 1541 (D. Utah 1995) ("ratification of a seniority arrangement is a valid defense to complaints about a union's actions in making that arrangement."); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1534 (7th Cir. 1992).

Plaintiffs have sought to portray the East and West pilot groups as two monolithic entities. In fact, each pilot group is a complex mosaic of shifting factions and interests with corresponding potential for political compromise. A few of the relevant factions include:

- The senior 517 East Pilots: The district court recognized that because of the "super seniority" of these pilots, they were "not affected one way or another by anything that happens in this case." (FER1:8-12). In fact these senior East pilots would be better off under the Nicolau Award because the USAPA proposal restricts their ability to bid into West domiciles. ((FER2-FER3) (6ER1265-1266));

- New hire East pilots: possessed a superior right of recall over pre-merger West pilots under currently existing Separate Operations; however, under USAPA's proposals these West pilots would have the first right of recall. ((FER7:18-FER9:5) (FER10:16-FER11:8));

- West pilots with geographic preference: West pilots with a preference for remaining in West domiciles would be better protected from displacement under USAPA's conditions and restrictions. ((6ER1266) (Opng. 27, 55));

- Junior East pilots: threatened litigation against USAPA due to the severe restrictions on the use of their seniority in West domiciles imposed by USAPA's conditions and restrictions. ((6ER1255) (5ER913-914)).

Both the need and potential for political compromise inherent in the ratification process confirms that the judiciary's involvement in this matter has been premature.

II. PLAINTIFFS' RESPONSE CONFIRMS FAILURE TO STATE A CLAIM.

A. Plaintiffs Failed to Properly Plead a Claim for Bad Faith.

Plaintiffs respond to USAPA's no-claim contention by pointing out that there are three "distinctive" prongs to a DFR violation, and end by suggesting that the proper focus of this Court is "USAPA's actual motives." (Resp. 33). But the threshold issue is whether plaintiffs ever *stated a bad faith claim*. As pled and tried, the theory of plaintiffs' bad faith claim was simple and oft repeated: that USAPA had an inherited a contractual obligation (3ER513:4-9) to implement its predecessor's seniority integration proposal, and that merely because USAPA "intend[ed]" (3ER507:22-25) not to do so amounted to bad faith because "a deal is a deal." (2ER79). In short, bad faith was defined in terms of USAPA's efforts to "evade contract obligations." (3ER513:4-6). The pleading conflicts with plaintiffs' more recent concession that: "on April 18, 2008, USAPA acquired statutory power and contractual rights to renegotiate seniority integration." ((Resp. 36, 41) (Opng. 38-41)).

As pled, plaintiffs' claim crashes into the solid wall of precedent that holds date-of-hire to be the gold standard of seniority integration even without consideration of the potent conditions and restrictions designed for the exclusive benefit of junior West pilots. (Opng. 25-28). Moreover, USAPA's new approach indisputably arose in the context of, and sought to resolve, an enduring impasse

engendered by ALPA's policy and political structure – an impasse that caused economic harm to *all* US Airways pilots. ((Opng. 12, 39, 44) (Resp. 9)).

Under settled law, bad faith requires more than a subjective intent to, in effect, displease some members; bad faith requires a showing of fraud, deceit or dishonesty. (Opng. 42). The district court refused to so instruct the jury despite its prior acknowledgment of the applicable standard: "you know, for bad faith you need deception and deceitfulness." (6ER1116:11-12). Wholly aside from plaintiffs' failure to submit evidence of bad faith, the requisite elements of bad faith were never even pled. USAPA's conceded desire to re-visit ALPA's seniority proposal does not suffice as a matter of law.

B. There Is No Dispute that the Arbitrary Prong Was Waived.

Plaintiffs' response establishes there is no dispute that they waived the arbitrary prong they once pled, and did so for the good reason they could not meet it: "the objective-arbitrary analysis is quite forgiving" and plaintiffs "do not make that kind of claim." (Resp. 34).

C. Plaintiffs Never Pled Discrimination.

Plaintiffs never once pled discrimination either in their original or amended complaint. (3ER512:11-13). In briefing and on the record, they affirmatively renounced any such claim (3ER424:14; 6ER1116:16-1117:5), going so far as to

say it would harm their case if they had to try to prove it (3ER424:1). Notwithstanding this waiver, they now suggest that a discrimination claim was stated because the court insisted on instructing on it. (Resp. 36). But an objected-to jury instruction cannot preserve what was never pled. *Smith v. Aztec Well Servicing*, 462 F.3d 1274, 1284 (10th Cir. 2006). Moreover, not even the jury instruction "pled" the necessary element of discrimination, i.e. an "invidious" distinction not based on seniority. *Ford Motor v. Huffman*, 345 U.S. 330, 337 (1953); *Considine v. Newspaper Agency*, 43 F.3d 1349, 1359-60 (10th Cir. 1994).

D. Bargaining for Date-of-Hire Does Not State Bad Faith Merely Because a Majority Supports it, Particularly When Modified to Accommodate a Minority.

Plaintiffs now argue that they state a bad faith claim because while USAPA had "statutory power to renegotiate seniority" it could not exercise that power "solely" to advance one group over another (Resp. 37) and, while it had "contractual rights to renegotiate," it could not do so "solely for illegitimate union objectives." (Resp. 41). At the threshold, none of this was pled and the trial was conducted on the contract-evasion theory plaintiffs now seek to jettison on appeal. Aside from the fact that it would deny due process to uphold a claim not tried, there were *no facts* pled to support this new theory and the undisputed facts negate it.

Once the contract-evasion theory is discarded, the "improper motive" that "solely" animated USAPA exists in a vacuum. Nothing in the Response indicates what the improper motive is and it is no substitute to argue that, "USAPA argues it was free to act for improper motives." (Resp. 41). What is left does not suffice: plaintiffs are not entitled to equate with bad faith the mere fact that they would have been better off under ALPA's unratified seniority proposal than the one USAPA was pursuing. *Hass v. Darigold Dairy Products Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985). Here, the pursuit of date-of-hire with conditions and restrictions, standing alone, served the interests of the whole. (Opng. 25-28). Moreover, *any* means of resolving the impasse carries with it an economic benefit for the entire bargaining unit. ((Opng. 11-13) (Resp. 9-10)).

The cases plaintiffs cite are beside the point or even support reversal.

In *Bernard v. Air Line Pilots Ass'n,* 873 F.2d 213 (9th Cir. 1989), the union proceeded as if it did not even represent the plaintiffs, but no such allegation was pled here. USAPA defended its proposal, and the impasse it was designed to overcome, as in the interest of the entire pilot group.

Truck Drivers, 379 F.2d 137, found a bad motive in *not* pursuing date-of-hire integration and further held that the NLRB could "legitimately measure other proposals" by the date-of-hire gold standard. *Id*. at 143, n.10.

Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962) rejected a DFR claim because, as in the instant case, the plaintiffs "have done nothing more than present facts showing dissatisfaction with the result adopted by the majority of the union." *Id*. at 187. The *Hardcastle* plaintiffs, too, complained that the union's motive for its seniority position was improper because it "favors a majority over a minority." *Id*. The Ninth Circuit rejected this argument because unions have "broad discretion to bargain with respect to seniority rights and that should not be interfered with in the absence of ... hostile discrimination." *Id*. at 188.

Lastly, plaintiffs' discussion of *Rakestraw* is inaccurate and misleading; that case entirely supports reversal. In the TWA-Ozark portion of *Rakestraw*, the claim was that it was wrong for ALPA to circumvent its own policy to please a majority by pursuing date-of-hire. The Seventh Circuit set this policy-departure argument aside saying that following the policy "insulates" against a claim but "it does not follow that deviation exposes the union to liability." 981 F.2d at 1533. It rejected the DFR claim saying that the legitimate union objective of date-of-hire seniority integration "does not become forbidden because the majority prefers" it. *Id.* In the UAL portion, the court found ALPA's motive was mixed but that it included punishing "detested" strike-breakers. *Id.* at 1534 ("ALPA had mixed motives. It wanted to harm the" plaintiffs). There can be no reasonable comparison between

USAPA's defensive motive to prevent the annihilation of accrued seniority with the hostility inherent in retaliating against "detested" strikebreakers.

E. Pre-certification Conduct Restates the Wrongful Formation Theory, Which Is Not Actionable.

Plaintiffs attempt to discredit (Resp. 43, n.5) their own lead counsel's on-the-record explanation to the court that their claim is "based upon formation of the union ... because they have formed themselves illegally." (6ER1099:12-23). But plaintiffs' trial presentation and the same lead counsel's closing argument shows their case was, as their claim, predicated on pre-certification conduct. Of ninety-five PowerPoint projections (2ER78-2ER272), only six dealt with post-certification conduct. (2ER159-65). The objected-to verbal closing was the same: "so it's all right for you, as a jury, to consider what went on before they became the bargaining representative." (6ER1383:17). The district court conceded that the intent of its permissive instructions was to invite the jury to find liability based on pre-certification conduct. (Opng. 36-37) (6ER1316:4-8).

Plaintiffs adroitly exploited the jury instructions that negated the court's earlier ruling forbidding liability on pre-certification conduct (2ER329:21) to tell the jury it should "help us get *back* to the deal" that could not obtain ratification under the ALPA structure (2ER172) – a naked, and unfortunately successful, appeal to find USAPA liable for pre-certification conduct.

III. PLAINTIFFS CONCEDE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A JUDGMENT OF A BAD FAITH DFR VIOLATION.

Plaintiffs' argument regarding sufficiency of the evidence serves only to bolster USAPA's position that the evidence was utterly insufficient to support a judgment of a bad faith violation of the duty. (Opng. 42-47). The Ninth Circuit, in no uncertain terms, has held that to "establish that the union's exercise of judgment was in bad faith, the plaintiff must show substantial evidence of fraud, deceitful action or dishonest conduct." *Beck v. United Food & Commercial Workers Union*, 506 F.3d 874, 880 (9th Cir. 2007).

Yet the premise of plaintiffs' entire sufficiency argument is that bad faith *does not* require a showing of fraud, deceitful action or dishonest conduct. (Resp. 55). Instead, plaintiffs contend that a "bad faith DFR breach can be based on lack of legitimate objectives." (Resp. 58).[4] Plaintiffs thereby effectively acknowledged that the record is devoid of *any* evidence, let alone *substantial* evidence of fraud, deceitful action or dishonest conduct.

[4] Not one of the decisions cited by plaintiffs support a finding that a bad faith DFR can be based only on "lack of legitimate union objectives." (Resp. 58).

IV. UNFAIR TRIAL.

A. Plaintiffs' Defense of Jury Instructions is Unavailing.

Plaintiffs concede that the district court's jury instructions effectively forbade consideration of any legitimate union objective other than that of achieving contract ratification. (Resp. 48-49). The objectives that the jury was specifically prohibited from considering included: the policy considerations supporting the protection of a worker's accrued seniority; procedural and substantive defects in the Nicolau process; the politicized and undemocratic nature of ALPA Merger Policy; and addressing ALPA's potential DFR violations. (2ER198-199).

In defense of the court's draconian limitation of USAPA's right to defend its actions, the plaintiffs explain that they are well-founded on the "zero-sum game" theory of DFR liability. (Resp. 53) (The "district court's instructions to the jury on legitimate union objectives are consistent" with this theory).

Plaintiffs' creative theory rests on the misapplication of legal precepts applicable to the compulsory collection of union dues. (Resp. 50-51). From this false premise, plaintiffs attempt to equate the concept of a benefit to the bargaining unit *as a whole* to a benefit for *every individual* in the bargaining unit. Departing from this first false step, plaintiffs then argue that a union cannot have a legitimate objective when it "reallocate[s] advantages inside the union, with no expectation of obtaining better pay or concessions from the employer." (Resp. 51).

The notion that unions must benefit every represented individual in order to avoid DFR liability is a concept utterly alien to established case law:

> [A] union . . . must be able to focus on the needs of its membership *as a whole* without undue fear of lawsuits from individual members disgruntled by the result of the collective process.

Bautista v. Pan American World Airlines, 828 F.2d 546, 549 (9th Cir. 1987) (emphasis added); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by Congress . . . subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.").

The concept applies with equal force in the context of seniority-related negotiations. *Considine*, 43 F.3d at 1357 (10th Cir. 1994) ("any single bargaining decision may inure to the benefit of some members while potentially injuring others."); *Rakestraw*, 981 F.2d at 1530 ("bargaining has winners and losers").

A particularly striking rejection of plaintiffs' theory is found in *Huffman*, 345 U.S. 330, in which the Supreme Court held that a union's negotiation of a CBA that awarded greater relative seniority to individuals with pre and post-employment military service was not a DFR breach even though it worked to the disadvantage of other employees. *Id*. at 331-336. The seniority decision in *Huffman* was based only on considerations of "public policy and fairness inherent in crediting employees with time spent in [the] military." *Id*. at 339.

There is no legally significant difference between a union's desire to reward a member for service to his employer as contrasted with service to his country. Indeed, in view of the complexities of seniority integration, the Ninth Circuit provides that a union need only proceed "on some reasoned basis." *Herring v. Delta Air Lines, Inc*., 894 F.2d 1020, 1023 (9th Cir. 1989). Plaintiffs turned a blind eye to both the United States Supreme Court and the Ninth Circuit when they formulated their "zero-sum game" theory.

USAPA's date-of-hire based proposal honors *every* pilot's years of service to the company. It provides job protection to each pilot as they grow older, recognizes how few years each pilot has to make up for a lost pension, or how little time the pilot has left in his/her career to secure a captaincy for which he/she has waited for twenty years or more. Respect for seniority reflects our republic's policy that America's senior workers require special protection because "their employment problems [are] grave…" 29 U.S.C. § 621(a)(1) and (3). USAPA's objectives are based on the same considerations of "public policy and fairness" that undergird the Supreme Court's decision in *Huffman*.

B. USAPA Does Not Seek A "Do-Over."

Plaintiffs argue that the jury was properly instructed that revisiting the Nicolau arbitration is not a legitimate union objective, and liken it to "insisting on a do-over in the schoolyard." (Resp. 54). Unfortunately for plaintiffs, this is not

the schoolyard and USAPA does not seek a "do-over" – rather USAPA never accepted the decision in principle.

As a threshold matter, the Nicolau decision was not an "arbitration" as that term is commonly understood. This fact was explained in detail by the West MEC's attorney after the East MEC sought to vacate the Nicolau Award in state court:

> Thus, the "arbitration award" Plaintiffs purportedly seek to "vacate" is in actuality the proposed pilot seniority list developed through ALPA's Merger Policy that ALPA will adopt as its bargaining position to be presented to the Company.

(3ER553, 567-572). The jury was precluded from considering the West MEC's position that the Nicolau decision was not, in fact, an arbitration award as that term is commonly understood. (Opng. 54, 61).

Even if the Nicolau proceedings are properly characterized as an "arbitration," arbitrations are, at best, crap shoots, and here the crap shoot was played with loaded dice. Nicolau deliberately disregarded date-of-hire seniority and the reality of post merger developments in favor of a static and misleading economic snapshot. (Opng. 10; *supra.* at 4-5). Furthermore, Nicolau could not even be wrong right as his disregard of the misclassification of MidAtlantic pilots is the subject of ongoing federal litigation, and is discussed at length in *Naugler v. Air Line Pilots Association,* 2008 U.S. Dist. LEXIS 25173, at **47-49 (E.D.N.Y. Mar. 27, 2008).

In *Naugler*, ALPA is being sued on a DFR claim for having deliberately submitted an erroneous seniority list prior to the Nicolau proceedings. Allowing the *Naugler* plaintiffs to amend their complaint to allege that the Nicolau arbitration was based on an erroneous list, the court recognized that such conduct could form the basis of a valid DFR claim. *Id*. at *49.

Notwithstanding this authority, the district court precluded the jury from considering any evidence offered to "challenge the process, procedure, or decision of the Nicolau Award." (Opng. 35) (*citing* 3ER324:1-2), and actually instructed the jury that it was not to consider "whether Mr. Nicolau properly conducted the arbitration." (2ER199:13-14). These exclusions and instructions eviscerated the right that exists under *Associated Transport*, 185 N.L.R.B. 631 (1970), which the district court acknowledged, for a union to revisit an arbitrated seniority decision that it never accepted in principle. (Opng. 34-35).[5] It goes further – in view of *Naugler*, the district court has prohibited USAPA from remedying the DFR violations of its predecessor.

[5] Notably, the plaintiffs failed to address or even once mention *Associated Transport* in their response.

V. THE SCOPE OF THE INJUNCTION.

A. Legal Conclusions Underlying the Injunction Are Reviewed *De Novo*.

Plaintiffs wrongly assert this Court is limited in its review of the injunction to an abuse of discretion standard. (Resp. 60). They ignore that underlying legal principles of injunctions are reviewed under a *de novo* standard, *Playmakers LLC v. ESPN, Inc*., 376 F.3d 894, 986 (9th Cir. 2004), and that whether a court misapprehended the law regarding the underlying issues in a case leading to injunctive relief is also reviewed *de novo*. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1107 (9th Cir. 2006); *Wharf v. Burlington N. R.R.*, 60 F.3d 631, 636 n.2 (9th Cir. 1995) (statutory questions regarding the RLA are reviewed *de novo*).

B. The Injunction Subverts Members' Democratic Rights.

The admissions contained in plaintiffs' response confirm that the effect and intent of the district court's order is to subvert the members' ratification rights and impose specific contractual terms by judicial fiat.

Plaintiffs have confirmed the central importance of the membership ratification right – under both ALPA and USAPA political structures – and acknowledge that the lawful exercise of these democratic rights by the ALPA East MEC and the ALPA-represented East pilots had created an impasse. More specifically, the plaintiffs:

- Defined their concrete interest to include the right to a ratification vote. (Resp. 23);

- Recognized that an integrated seniority list could not and cannot now be implemented without a ratified CBA. (Resp. 7);

- Recognized that, under the ALPA structure, each pilot group's ratification right constituted a "separate veto power." (Resp. 12-13);

- Stipulated that the ALPA East MEC and ALPA East pilots exercised their democratic rights to prevent the implementation of any CBA incorporating the Nicolau Award. (2ER273:10-15);

- Acknowledged that ALPA's efforts to "broker a compromise" had failed. (Resp. 9);

- Stipulated that ALPA's political structure gave rise to an enduring impasse between the two pilot groups. (2ER273:10-18).

Taken collectively, plaintiffs' admissions utterly discredit the district court's claim that the intent of the injunctive relief is to "restore the union to the fulfillment of its duty." (1ER50:19). Rather, the district court unabashedly admitted that the intent of the injunction was to effectively coerce the pilots into surrendering their democratic rights by condemning them to the "lowest pay scale in the industry." (Opng. 39-40).

Plaintiffs and the district court acknowledge the court's obligation to refrain from the imposition of substantive contractual terms (Resp. 62; 1ER49), but argue that the court's order implements terms "previously accepted." (Resp. 62). But, USAPA, of course, never accepted any terms – nor did the ALPA-represented East

pilots. Rather, they demanded that, in order to obtain ratification, their union needed to respond to their concerns and develop a new proposal.

ALPA paid heed to the democratic veto permitted under its structure by attempting to "broker a compromise" and exploring, as an alternative, the negotiation of two contracts. ((5ER1073) (FER12-FER13)). USAPA, too, must be free to pursue alternative options, within a wide range of reasonableness, provided it does not proceed in bad faith.

Nevertheless, in wild excess of the plaintiffs' legal entitlement, the court prohibits the option of compromise as well as the two-contract approach that would obviate the seniority integration conflict in its entirety. In the end, the district court's decision and injunction constitute a determination to punish ALPA-represented East pilots for the exercise of their suffrage in August, 2007.

Finally, the injunction contravenes basic national labor policy by forever removing from bargaining a crucial term of employment, seniority. Seniority rights are contract-based and, therefore, "may be revised or abrogated by later negotiated changes." *Hass*, 751 F.2d at 1099. But here the injunction would bind "any successor union" in perpetuity (1ER55:11) – yet another indication of the district court's wholesale abandonment of black letter labor law.

DATED: November 9, 2009 SEHAM, SEHAM, MELTZ & PETERSEN LLP

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CERTIFICATE OF COMPLIANCE.

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 09-16564

I certify that:

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

Proportionately spaced, has a typeface of 14 points or more and contains 6,998 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 7,000 words; reply briefs must not exceed 7,000 words),

Date: November 9, 2009

s/ Lee Seham, Esq.
Lee Seham, Esq.

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the
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US Court Of Appeals Docket No.: **09-16564**

I hereby certify that I caused the foregoing document, its attachments and supporting documents, to be electronically filed 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: November 9, 2009. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that one (1) true and correct copy of the foregoing document was sent by third-party commercial carrier for delivery on November 9, 2009 to the attorneys of record at the addresses listed below:

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ADDENDUM

INDEX TO ADDENDUM.

ED DOLAN, PIA HUGH-JONES, MARIA O'BRIEN, AMANDA DRAKE, LES HUNTER, LISA KING, and HELEN PEGG, Plaintiffs, v. THE ASSOCIATION OF FLIGHT ATTENDANTS, UNITED AIRLINES MASTER EXECUTIVE COUNCIL, and THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, Defendants.

No. 95 C 7071

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1996 U.S. Dist. LEXIS 3342

March 13, 1996, Decided
March 20, 1996, DOCKETED

COUNSEL: **[*1]** For ED DOLAN, PIA HUGH-JONES, MARIA O'BRIEN, AMANDA DRAKE, LES HUNTER, LISA KING, HELEN PEGG, plaintiffs: Michael Jerry Freed, [COR NTC], Christopher James Stuart, [COR], Much, Shelist, Freed, Denenberg, Ament & Eiger, P.C., Chicago, IL. R. Eric Kennedy, [COR LD NTC A], Laurence J. Powers, [COR], Weisman, Goldberg & Weisman Co., L.P.A., Cleveland, OH. Jerome F. Weiss, [COR], William T. Davis, [COR], Jerome F. Weiss & Associates, Cleveland, OH.

For THE ASSOCIATION OF FLIGHT ATTENDANTS, UNITED AIRLINES MASTER EXECUTIVE COUNCIL, THE ASSOCIATION OF FLIGHT ATTENDANTS AFL-CIO, defendants: Michael B. Erp, [COR NTC], Katz, Friedman, Schur & Eagle, Chtd., Chicago, IL. Robert S. Clayman, [COR LD NTC A], Debra L. Willen, [COR], Guerrieri, Edmond & James, Washington, DC. Edward J. Gilmartin, [COR], Association of Flight Attendants, AFL-CIO, Washington, DC.

JUDGES: Suzanne B. Conlon, United States District Judge

OPINION BY: Suzanne B. Conlon

OPINION

MEMORANDUM OPINION AND ORDER

Plaintiffs Ed Dolan and six other flight attendants ("plaintiffs") sue the Association of Flight Attendants, United Airlines Master Executive Council and the Association of Flight Attendants, AFL-CIO **[*2]** (collectively "the union") under the Railway Labor Act. Plaintiffs allege the union intends to violate its duty of fair representation. The union moves to dismiss for lack of subject matter jurisdiction on grounds this case is not yet ripe.

BACKGROUND

Plaintiffs allege as follows. Plaintiffs are seven flight attendants employed by United Airlines, Inc. ("United") and based at United's London Heathrow domicile. The union represents flight attendants employed by United and a number of other airlines. The union is responsible for negotiating the collective bargaining agreement that governs the employment terms of United's flight attendants.

United established its London Heathrow domicile in April 1991. At some point between April 1991 and April 1993, the union adopted a position opposing the opening of foreign domiciles in addition to United's London Heathrow and Paris domiciles. In February 1994, during negotiations for an Employee Stock Ownership Plan, the union proposed that United close all of its existing foreign domiciles, including the London Heathrow domicile. United refused to close its foreign domiciles during the negotiations, and thus United's London Heathrow **[*3]** domicile remains open.

The collective bargaining agreement between the union and United can be amended after March 1, 1996. Negotiations between the union and United are expected to begin in early 1996. During the negotiations, the union intends to demand that United close the London Heathrow domicile or at least cap the London Heathrow domicile at its present number of employees. If United agrees to close its London Heathrow domicile, plaintiffs would lose their employment with United.

The union has recently supplemented its motion with the affidavit of Kevin Lum, the president of the union. According to Kevin Lum, the union and United entered into collective bargaining negotiations on January 15, 1996. On February 7, 1996, the union and United announced a tentative collective bargaining agreement under which all flight attendants in United's foreign domiciles shall not exceed ten percent of the total number of flight attendants on United's system-wide seniority list. In addition, United will not open any new foreign domiciles without the concurrence of the union. At present, there are approximately 20,000 flight attendants on United's system-wide seniority list. Of those 20,000 **[*4]** flight attendants, approximately 1,633 are currently based in United's five foreign domiciles. The union intends to submit the tentative collective bargaining agreement to the union membership for a ratification vote without any recommendation. The ratification process is scheduled to begin on March 1, 1996, and will last approximately one month.

DISCUSSION

I. *APPLICABLE STANDARD*

The union moves to dismiss for lack of subject matter jurisdiction on grounds this case is not yet ripe. A federal court must have proper subject matter jurisdiction. Jurisdiction is viewed as the "power to decide" and must be conferred on the federal court. *Matter of Chicago, Rock Island & Pac. R. Co.*, 794 F.2d 1182, 1188 (7th Cir. 1986). Where a defendant attacks subject matter jurisdiction, the plaintiff bears the burden of establishing that all jurisdictional requirements have been met. *Kontos v. United States Dept. of Labor*, 826 F.2d 573, 576 (7th Cir. 1987). When ruling on a motion to dismiss for lack of subject matter jurisdiction, the court may consider evidence outside of the pleadings. *Capitol Leasing Co. v. Federal Deposit Ins. Corp.*, 999 F.2d 188, 191 (7th **[*5]** Cir. 1983); *Sanchez v. Edgar*, 710 F.2d 1292, 1295 n. 2 (7th Cir. 1983). Any time it is established that a federal court is without subject matter jurisdiction, the action must be dismissed. Fed. R. Civ. P. 12(h)(3).

The union's motion was filed on February 1, 1996. The union styled its motion as one for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). On February 22, 1996, the court permitted the union to supplement its motion with the affidavit of Kevin Lum. The court also gave plaintiffs until February 27 to supplement their earlier response to the union's motion. *See* February 22, 1996 Minute Order. On February 27, plaintiffs supplemented their response with a request for a stay of the court's decision on the union's motion in order to provide plaintiffs more time to complete discovery. Plaintiffs argue they are entitled to more time to complete discovery because once the union supplemented its motion with an affidavit, the union's motion should be treated as one for summary judgment under Rule 12(c).

Plaintiffs' argument misses the mark. A motion for judgment on the pleadings under Rule 12(c) should be converted into a motion for summary judgment where the **[*6]** motion is intended to dispose of a case on the merits. *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993). Where, however, a motion for judgment on the pleadings is used as an auxiliary device to challenge subject matter jurisdiction, a trial court "may consider evidence by affidavit, deposition or live testimony without converting the proceeding to one for summary judgment." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In fact, the Seventh Circuit has made clear that the question of jurisdiction is inappropriate for resolution by summary judgment. *Capitol Leasing*, 999 F.2d at 191. Subject matter jurisdiction is a determination for the court, not for the fact finder at trial. Accordingly, the union's motion should not be treated as one for summary judgment and plaintiffs are not entitled to more time to complete discovery.

II. *RIPENESS*

The union contends this case is not ripe for adjudication because plaintiffs fail to allege a significant and immediate injury. Under Article III of the United States Constitution, federal courts may adjudicate "only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, **[*7]** 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990). As a result, federal courts may not entertain actions that are moot. *Id.* Nor may they entertain actions that are not yet ripe. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). A case is not considered ripe for adjudication unless there is a "threat of significant and immediate impact on the plaintiff." *Kerr-McGee Chemical Corp. v. United States Dept. of Interior*, 709 F.2d 597, 600 (9th Cir. 1983). Resolution of ripeness issues requires evaluation of the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967).

Plaintiffs allege the union's intention to bargain for the closure or capping of United's foreign domiciles may cause a loss of their jobs. Complaint at P 53. Before that happens, however, a series of events must occur. First, the union must bargain for the closure or capping of United's foreign domiciles. Second, the union and United must reach a tentative agreement that requires the closure or capping of United's foreign domiciles. Finally, the union membership must ratify such an agreement. At the time plaintiffs **[*8]** filed their complaint, it was not clear that any of these events had or would occur. Although the first two of these events have occurred since plaintiffs' complaint -- the union has bargained for and reached a tentative agreement with United to cap the total population of flight attendants at United's foreign domiciles at ten percent of the total number of flight attendants on United's system-wide seniority list -- the union membership has yet to ratify this agreement and, perhaps more importantly, plaintiffs have failed to explain how the capping component of the tentative agreement will cause the loss of their jobs. In fact, a ten percent cap on the total population of flight attendants at United's foreign domiciles appears to pose no threat at all to plaintiffs' jobs. Of the approximately 20,000 flight attendants currently on United's system-wide seniority list, significantly less than ten percent of these flight attendants (approximately 1,633) are currently based in United's five foreign domiciles. Accordingly, the loss of jobs predicted by plaintiffs is not an immediate injury. Rather, it is the type of contingent injury that fails to establish ripeness. *See, e.g., Railway* **[*9]** *Labor Executives' Association v. Grand Trunk Western Railroad Company*, 737 F. Supp. 1027, 1029 (N.D. Ill 1990).

Plaintiffs also allege the union's intention to bargain for the closure or capping of United's foreign domiciles will deny them fair representation during collective bargaining negotiations. More precisely, plaintiffs contend the union's intention to bargain for the closure or capping of United's foreign domiciles will deny them "participation in and enjoyment of rights and benefits of other similarly situation [sic] non-foreign domiciled [union] members," and "fair representation and [sic] present and ongoing [collective bargaining] negotiations." Complaint at P 53.

The union's intention to seek closure or capping of United's foreign domiciles is certainly immediate. In fact, the union began negotiations with United before the plaintiffs filed their complaint, and reached a tentative agreement with United, with a capping provision, six days after this complaint was filed. However, the denial of fair representation plaintiffs claim they have suffered as a result of the union's intention to bargain for the closure or capping of United's foreign domiciles is not **[*10]** a substantial injury. In essence, plaintiffs allege a procedural harm -- the absence of their minority voice from the bargaining table. Normally, however, a procedural harm does not constitute a substantial injury for purposes of a ripeness or standing inquiry unless the plaintiff can show that a substantial injury linked to the procedural harm would likely not have occurred had the procedural harm not occurred. *Alger v. City of Chicago*, 748 F. Supp. 617, 622-25 (N.D. Ill. 1990). Applying that principle here, plaintiffs link the loss of their jobs to the procedural harm they allege -- the absence of their minority voice from the bargaining table. However, the loss of jobs alleged by plaintiffs is a remote injury that may or may not occur. Consequently, plaintiffs fail to show that a substantial injury linked to the absence of their minority voice from the bargaining table would likely not have occurred had the procedural harm not occurred. In fact, the loss of jobs plaintiffs allege has yet to occur, and seems increasingly unlikely in light of the tentative agreement now reached by the union and United. Accordingly, the absence of plaintiffs' voice at the bargaining table is a **[*11]** procedural harm that fails to qualify as a substantial injury.

If a legislative body enacts a statute to protect some interest that would otherwise be considered too abstract for protection, a denial of that interest may constitute a substantial injury for purposes of a ripeness or standing inquiry. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982) (injury is established by violation of "legal right to truthful information about available housing" created by Congress); *White v. Arlen Realty & Dev. Corp.*, 540 F.2d 645, 648-650 (4th Cir. 1975) (injury is established by failure to disclose information regarding department store charge account as required by statute). Hence, there may be an exception to the principle that a procedural harm is not a substantial injury where a statute is specifically designed to protect against a particular procedural harm.

However, that exception does not apply here. The duty of fair representation prohibits union actions that are arbitrary, discriminatory, or in bad faith. *Air Line Pilots Association, International v. O'Neill*, 499 U.S. 65, 78, 113 L. Ed. 2d 51, 111 S. Ct. 1127 (1991). The purpose of the duty of fair representation is to protect the interests **[*12]** of individual union members or minority groups within a union against potential abuse of authority by the union majority. *Vaca v. Sipes*, 386 U.S. 171, 182, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967). Thus, plaintiffs are correct when they assert the duty of fair representation requires that the union avoid arbitrary, discriminatory, or bad faith actions that fail to protect plaintiffs' interests. That said, however, the type of interests protected by the Railway Labor Act are those relating to the terms and conditions of employment. The fundamen-

tal purpose of the Railway Labor Act is to empower unions to collectively bargain for the terms and conditions of employment. *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990). Thus, the duty of fair representation imposed on unions by this legislation is intended to protect minority interests with respect to the terms and conditions of employment, not minority interests with respect to each and every bargaining position adopted by the union. [1] Put in other words, the duty of fair representation is intended to protect minority employees from adverse terms and conditions of employment resulting from arbitrary, discriminatory, or bad **[*13]** faith conduct by the union. However, the duty of fair representation is not intended to protect minority employees from an adverse bargaining position alone that may or may not lead to adverse terms and conditions of employment.

> 1 Technically, the Railway Labor Act has no "duty of fair representation" provision. However, in *Steele v. Louisville & Nashville R.R.*, 323 *** 775** U.S. 192, 199 (1944), the Supreme Court recognized that because the collective bargaining process of the Railway Labor Act deprives minority employees of the right to choose their own representative, the Act imposes a duty on the union to represent all members of the bargaining unit fairly.

Significantly, to find otherwise would require this court to judge whether each and every bargaining position adopted by the union is an arbitrary, discriminatory, or bad faith action. Such a judgment, however, would be extremely difficult to make in light of the "wide latitude that [union] negotiators need for the effective performance of their **[*14]** bargaining responsibilities." *Air Line Pilots Association*, 499 U.S. at 66. Thus, whether the union has acted in an arbitrary, discriminatory, or bad faith manner by adopting a particular bargaining position is an issue that is not appropriate for a judicial decision. In addition, the hardship plaintiffs will suffer if the court withholds consideration of their claim is not serious. Plaintiffs are still employed by United and do not allege they have suffered any adverse employment conditions as a result of the union's current bargaining position. In fact, the tentative agreement between the union and United appears to pose no threat whatsoever to plaintiffs' jobs. Moreover, if the union's current bargaining position eventually creates an imminent threat of job loss that is not contingent on other events, plaintiffs may then bring an action challenging the union's bargaining position and seek appropriate relief. Although an adverse bargaining position alone is not a substantial injury, an adverse bargaining position may constitute a breach of a union's duty of fair representation if it leads to an adverse term or condition of employment. Until plaintiffs have suffered or are about **[*15]** to suffer a substantial injury, however, this case is not ripe for review. Accordingly, this case must be dismissed without prejudice for lack of subject matter jurisdiction.

CONCLUSION

The motion for judgment on the pleadings is granted. This case is dismissed without prejudice for lack of subject matter jurisdiction on grounds this case is not yet ripe.

ENTER:

Suzanne B. Conlon

United States District Judge

March 13, 1996