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US AIRWAYS, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington, *et al.*;

Plaintiffs,

v.

US Airline Pilots Association and US Airways, Inc.,

Defendants.

Case No. 2:08-cv-01633-PHX-NVW

US AIRWAYS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant, US Airways, Inc. ("US Airways" or the "Company), by and through its counsel undersigned, hereby files its Reply in Support of Motion to Dismiss.

I. Plaintiffs Have Not, And Cannot, Establish That Resorting To The Congressionally-Mandated Board of Adjustment Would Be Futile

Although Plaintiffs' Complaint alleges that this Court has jurisdiction over its contractual disputes with the Company because it is part of a "hybrid claim" that is "inextricably linked" to the duty of fair representation claim brought against the union, they have not attempted to defend that incorrect position in their Response. Instead, Plaintiffs now make an argument not alleged in the Complaint -- that because resorting to the Board of Adjustment would be "futile," this Court should assert jurisdiction over what Plaintiffs have conceded are "minor grievances."[1] Plaintiffs again are incorrect.

A. Plaintiffs Incorrectly Assert That They Can And Will Be Prevented From Reaching A Neutral Arbitrator

Plaintiffs assert that because USAPA could prevent them from having their case heard before a neutral arbitrator, and because USAPA and US Airways would do so, resort to the Board of Adjustment would be futile. Response at 7-10. Plaintiffs' factual premise is simply wrong.[2]

1. Disputes Regarding Interpretation Or Application Of The Transition Agreement Are Heard By A Five Member Board Of Adjustment, Including A Neutral Arbitrator

Plaintiffs claim that the collective bargaining agreement procedures do not provide for a neutral arbitrator to hear their contract dispute (Response at 6-7), and that Plaintiffs would be prevented from obtaining such a hearing in any event (Response at 7-9).[3] In doing so, Plaintiffs incorrectly cite to the procedures under the America West collective bargaining agreement, and

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[1] Plaintiffs do not deny that the two contract claims against US Airways must be dismissed if the duty of fair representation claim against USAPA is dismissed. Dkt. No. 44 ("Response") at 11; *see* Dkt. No. 30 ("Motion to Dismiss") at 11. US Airways incorporates by reference USAPA's reply to Plaintiffs' claim that they have stated a valid claim for breach of the duty of fair representation contained in USAPA's Memorandum in Reply to Plaintiffs' Response.

[2] Even if Plaintiffs were factually correct, which they are not, under the Ninth Circuit's reading of *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969), without sufficient allegations of the type of egregious acts alleged in *Glover* -- i.e., invidious discrimination or unjustified hostility -- the lone fact that a grievance is not heard by a neutral provides no basis for a finding of futility. *Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 551 (9th Cir. 1987).

[3] Plaintiffs ask the Court to "assume all facts and inferences in favor" of Plaintiffs based on the standard for Rule 12(b)(6) motions to dismiss. Response at 2-3. This standard is not applicable to US Airways' Motion to Dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *See* Motion to Dismiss at 3, n. 1, & 4.

ignore the applicable procedures set forth in the Transition Agreement -- the agreement Plaintiffs allege US Airways has violated.[4] Under the Transition Agreement procedures, unlike the America West agreement, there is no initial four member board of adjustment step. Instead, all disputes referred to the Board of Adjustment are directly submitted to a five-person Board of Adjustment composed of Company and union appointees sitting with a designated neutral arbitrator. Dkt. No. 1 ("Complaint") at Ex. B, § X (emphasis added).

The composition of this Transition Agreement Board of Adjustment, involving a neutral arbitrator sitting together with Company and union-appointed Board members, is firmly grounded in the 1934 and 1936 Congressional amendments to the RLA. In 1934, Congress mandated the creation of a National Railroad Adjustment Board ("NRAB") for all rail carriers, with four divisions established to hear contract disputes involving various groups of railroad employees, each of which is composed of equal numbers of carrier and labor organization representatives. 45 U.S.C. § 153, First; *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 549-50 (1959). If the company and union members of a division hearing a dispute deadlock, the RLA requires that a neutral referee be appointed to sit with the railroad and union appointees as a member of the NRAB division. 45 U.S.C. § 153, First. In 1936, Congress extended the RLA to the airline industry and, in doing so, Congress required the establishment of either a national board of adjustment for the airline industry, or single or multi-carrier boards of adjustment, to resolve disputes involving the interpretation or application of airline collective bargaining agreements. 45 U.S.C. § 184. The Board of Adjustment established by US Airways pursuant to the Transition Agreement complies with this statutory directive, and tracks the NRAB's composition as established by Congress, except that the Transition Agreement *requires* a neutral to sit as a member of the Board of Adjustment with Company and union-appointed members in the first instance.

Thus, contrary to Plaintiffs' contentions, there is no means by which USAPA or the Company can prevent a dispute heard under the Transition Agreement, such as involved here,

[4] All of Plaintiffs' citations to grievance and arbitration procedures are to the 2004 America West pilot collective bargaining agreement. Response at 7, 8. Plaintiffs also incorrectly attribute a citation to that 2004 collective bargaining agreement's § 21.D.4.a as a citation to the Transition Agreement. Response at 8:14.

from reaching a neutral arbitrator.

2. The Company Is Processing the McIlvenna Grievance To The Five-Member Board Of Adjustment, Including The Neutral Arbitrator

Plaintiffs argue that the Company misled the Court when it stated that Captain McIlvenna's grievance regarding seniority and the furloughs will be processed for arbitration before the Board of Adjustment. Response at 9-10. It is the Plaintiffs, however, who are misleading the Court.

As Plaintiffs are well aware, the Company has stated in writing to Captain McIlvenna that his grievance will be processed to arbitration before the Transition Agreement Board of Adjustment with a neutral arbitrator sitting as a Board member. As stated in US Airways' September 26, 2008 letter to Captain McIlvenna, attached as Exhibit B to his affidavit, "the Company and USAPA have agreed, on a non-precedential, non-referable basis, to allow your grievance to proceed through the dispute resolution processes of the Transition Agreement," and Captain McIlvenna "may refer this matter to a Board of Adjustment in accordance with the terms of Section X of the Transition Agreement." Therefore, Plaintiffs' assertions that the Company denied Captain McIlvenna's right to proceed to the Board of Adjustment and was not "currently processing" Captain McIlvenna's grievance are incorrect.

Plaintiffs also disingenuously complain that the Company did not inform the Court that it denied Captain McIlvenna's grievance. Response at 9. The fact that US Airways denied his grievance *on the merits* because it disagreed with his interpretation of the Transition Agreement cannot be a surprise -- and is irrelevant to Plaintiffs' claim that they should be permitted to bypass the mandatory Board of Adjustment procedures.

B. The Congressionally Mandated System Board Is Not Rendered Futile Merely Because Of Differences In The Interpretation Of The Contract

Plaintiffs complain that the Company has not granted Captain McIlvenna's request to change the normal composition of the Transition Agreement Board of Adjustment from a five-member Board composed of company and union designees sitting with a neutral chair, to a one-member Board, composed solely of the neutral arbitrator. Nothing under the RLA, however,

requires the Company and union to alter the Board composition. In fact, the Transition Agreement Board of Arbitration composition is entirely consistent with the composition of the NRAB originally established by Congress in 1934 for the railway industry.

A number of cases decided under the RLA have upheld the composition of a board of adjustment where the company and union-appointed members sit with a neutral arbitrator, including where the union and company disagree with the grievant's contractual interpretation position or the grievant is otherwise dissatisfied with his union. *See, e.g., Haney v. Chesapeake & Ohio R.R. Co.*, 498 F.2d 987, 992 (D.C. Cir. 1974) (court denied futility claim where adjustment board was composed of members appointed by the union and employer, both of which had allegedly contributed to plaintiff's harm, with no neutral absent a deadlock, because the "sound course is to require her to seek relief before the administrative tribunal . . . ."); *Stumo v. United Air Lines, Inc.*, 382 F.2d 780, 787 (7th Cir. 1967) (contract claim subject to board of adjustment jurisdiction even where plaintiff complained she could not get a fair hearing because "the Board . . . [was] composed of members selected by the employer and the union" defendants); *Sensabaugh v. Ry. Express Agency, Inc*., 348 F. Supp. 1398, 1402 (W.D. Va. 1972) (where both union and employer disagreed with plaintiff's contractual interpretation, the fact that members of board of adjustment were selected by defendants "is not an adequate reason for plaintiff's failure to use the internal remedies"); *McBride v. Trans World Airlines, Inc.*, 312 F. Supp. 731, 736 (W.D. Mo. 1970) (plaintiff's "conclusory statement" that "[h]e wouldn't gain anything by taking [his grievance] to the System Board . . . [because the] members . . . [we]re selected by the defendants," did not render resort to the Board futile where there was no collusion between the employer and union); *cf. Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 298 (5th Cir. 1981) (rejecting plaintiff's contention that the System Board's holding should be set aside "because all of the board members were biased against him").[5]

[5] *Dean v. Trans World Airlines*, 924 F.2d 805, 807-08, 811 (9th Cir. 1991) is not to the contrary. There, the Ninth Circuit excused exhaustion of the RLA-mandated contractual remedies, but only because of unique facts: the plaintiff invoked the first step of the contractual grievance procedures (which Plaintiffs have failed to do here), but the union and company repudiated those procedures; the union and company provided no "meaningful response" to plaintiff's "repeated complaints" prior to his discharge; and the company gave only "cursory consideration" to his

C. Plaintiffs Cannot Circumvent The Strict Standards Set Forth By The Supreme Court And Ninth Circuit For Establishing Futility

Plaintiffs ask the Court to allow them to circumvent the Board of Adjustment's exclusive jurisdiction over their contract claims against the Company (Counts One and Two of the Complaint) because, according to the Plaintiffs, the union's position on those contract claims is driven by "hostility" to their "seniority interests," and thus the Board procedure is purportedly futile.[6] Response at 10-11. Plaintiffs do not, however, allege in the Complaint or argue in their Response that the Company is also "hostile" to their seniority interests or otherwise acting in concert with the union.[7] Instead, they argue that the *Glover* "futility" exception to the Board's exclusive jurisdiction "does not require collusion." Response at 13-14. Plaintiffs are plainly wrong.

In support of their argument, Plaintiffs suggest that *Glover* stands for the proposition that there is "'no meaningful distinction . . . between discriminatory action' undertaken in concert with the carrier and that which is undertaken independent of the carrier." Response at 15 (citing *Glover*, 393 U.S. at 329). The cited language from *Glover* is taken out of context; *Glover* stands for no such proposition.[8] Indeed, the invidious discrimination suffered by the plaintiffs in *Glover* that led to the futility finding was engaged in by the employer *and* union acting "in concert" with

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complaints after his discharge, and the company refused to consider his grievance. Here, Plaintiffs claim only that they have "availed themselves of the internal union procedures" and concede they have not attempted to file a grievance or seek arbitration before the Board of Adjustment. Response at 15. That is simply not sufficient to avoid the Board of Adjustment's exclusive jurisdiction.

[6] US Airways respectfully refers the Court to the arguments contained in USAPA's Memorandum in Reply to Plaintiffs' Opposition regarding USAPA's alleged hostility.

[7] While, in their Response, Plaintiffs' state that "[t]he Company will appoint members to the [Board of Adjustment] who will deny relief so that the Company can preferentially furlough the more expensive West Pilots," Response at 2, they offer no support for such a conclusory assertion, nor do they argue that their suspicions about the Company's motives amount to "invidious discrimination or unjustified hostility." In fact, Plaintiffs make no allegation that the Company's position regarding Plaintiffs' claims is driven by anything other than a legitimate disagreement with Plaintiffs about the proper interpretation of the collective bargaining agreement.

[8] The full "paraphrased" sentence in *Glover* is: "In this situation no meaningful distinction can be drawn between discriminatory action in negotiating the terms of an agreement and discriminatory enforcement of terms that are fair on their face." *Glover*, 393 U.S. at 329.

"tacit understanding[s]" and "subrosa agreement[s]" to deny black employees promotions. *Glover*, 393 U.S. at 325, 331. "The [*Glover*] Court reasoned that resort to the Adjustment Board in such a case [where management and the union had acted 'in concert' to bar black employees from promotions on account of their race] would have been 'absolutely futile,' because the Board comprises only union and management representatives, the very groups against which the employees' complaint was made." *Bautista*, 828 F.2d at 551. Indeed, the Ninth Circuit directly held in *Croston*: "Conclusory allegations that do not demonstrate any act of collusion between the union and the railroad will not establish jurisdiction." *Croston v. Burlington N. R.R. Co.*, 999 F.2d 381, 387 (9th Cir. 1993), *overruled on unrelated grounds by Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

Plaintiffs' reliance on *Jones v. Union Pacific R. Co.*, 968 F.2d 937 (9th Cir. 1992) as support for this proposition is similarly misplaced. *Jones* is inapposite here because it involved only a dispute about exhaustion of *internal union remedies*. *Id*. at 942. There, of course, the analysis was focused solely on the hostility of the union officials administering the internal union remedy. That was because only the union officials were involved, and not the employer. *Jones*, therefore, does not stand for the proposition asserted by the Plaintiffs.

Plaintiffs also argue that the *Glover* futility standard does not reflect any special RLA mandate. Response at 13-14. They are wrong. While courts do rely on *Glover* in cases arising outside of the RLA context, such reliance cannot be interpreted as lessening the heavy burden Plaintiffs must overcome to invoke an exception to the Congressionally-mandated arbitration procedures of the RLA. The Ninth Circuit has been clear that, in analyzing futility, "[w]e are reluctant to assert more general subject matter jurisdiction when it would eviscerate the Railway Labor Act's system of arbitrating disputes."[9] *Croston*, 999 F.2d at 386 (internal quotation marks and citation omitted); *see also Crusos v. United Transp. Union, Local 1201*, 786 F.2d 970, 972

[9] Plaintiffs' assertion that, because the Court is serving in its "role as the primary guardian[] of the duty of fair representation," the Court must construe the Complaint so as to avoid dismissal, is wrong. *See* Response at 3. Plaintiffs' causes of action against US Airways are for breach of contract, not breach of the duty of fair representation. Thus, the Complaint should be dismissed where the failure to do so would "eviscerate the Railway Labor Act's system of arbitrating disputes." *See Croston*, 999 F.2d at 386.

(9th Cir. 1986) ("[a]sserting federal court jurisdiction undermines an important part of the Railway Labor Act -- resolving grievances between employees and employers through arbitration."). The non-RLA case cited by Plaintiffs, *Clayton v. Int'l Union, United Auto., Aerospace, & Agricultural Implement Workers of America*, 451 U.S. 679 (1981), involved only exhaustion of an internal union appeals procedure and thus does not provide the correct futility standard here. The proper standard that this Court should apply is found under case law analyzing exhaustion of RLA-mandated contractual grievance procedures. *See* Motion to Dismiss at 6-10.

Thus, without a contractual resolution process decided by both company and union-appointed Board members infected with unjustified hostility or invidious discrimination (or, as stated in US Airways Motion to Dismiss, "inadequate representation suggesting that the arbitration had been tainted"), the *Glover* futility rationale is simply inapplicable. *See* Motion to Dismiss at 6-9.

II. The System Board Has Jurisdiction To Provide The Relief Plaintiffs Seek

Plaintiffs claim that the Court should find it has jurisdiction over Count 2 of the Complaint because, even though they concede that Count 2 raises a minor dispute, Count 2 seeks an order that "the Company … negotiate CBA changes that would implement the Nicolau Award," which is a form of relief Plaintiffs believe the Board of Adjustment would not have the power to award. Response at 11-13. Plaintiffs' argument is based on a misapprehension of both the RLA and the Transition Agreement.

Count 2 alleges that US Airways is in "breach of the . . . *Transition Agreement* because it has not been negotiating with USAPA in good faith to institute Integrated Operations by adopting a single collective bargaining agreement that would implement the Nicolau List." Complaint at ¶ 91. The allegations in Count 2 appear to be based in large part on Sections V and VI of the Transition Agreement, which sets forth certain procedures for negotiating a single pilot collective bargaining agreement and the process for obtaining "Operational Pilot Integration." Complaint at Ex. B. To resolve this dispute, the arbitrator will be required to interpret the Transition Agreement to determine what requirements it contains with respect to Operational Pilot

Integration, negotiation of a single collective bargaining agreement and completion of an integrated pilot seniority list. Under the RLA, the Board of Adjustment has exclusive jurisdiction to hear and remedy any dispute that involves the interpretation or application of the collective bargaining agreement. *Bhd. of Locomotive Eng'rs v. Louisville & N.R.R. Co.*, 373 U.S. 33, 38 (1963) (jurisdiction of the adjustment board in a minor dispute to interpret or apply the existing agreement is "mandatory, exclusive, and comprehensive"); *Woolridge v. Nat'l Passenger R.R. Corp.*, 800 F.2d 647, 648-49 (7th Cir. 1986) (holding that National Railroad Adjustment Board has exclusive jurisdiction over employee's claims for breach of collective bargaining agreement and implied covenant of good faith).

Plaintiffs correctly state that both the 2004 America West collective bargaining agreement and the Transition Agreement prohibit the Board of Adjustment from modifying the terms of the collective bargaining agreement. Response at 12. Those prohibitions, however, do not prevent the arbitrator from ordering that the parties comply with the terms of the Transition Agreement, including any terms that might require the Company to negotiate changes to the collective bargaining agreement that would implement the Nicolau Award. In such a circumstance, the arbitrator would not be modifying the collective bargaining agreement, but rather *enforcing* existing terms of the collective bargaining agreement. Arbitrators have full authority to order compliance with contractual terms, including terms requiring negotiation. *See, e.g., Federal Bureau of Prisons*, 116 Lab. Arb. (BNA) 1271, 1274-5 (2002) (Moore, Arb.) (ordering company to comply with contract provision requiring company to meet and negotiate with union regarding changes to working conditions); *Reno-Tahoe Airport Auth.*, 121 Lab. Arb. (BNA) 1238, 1242 (2005) (Staudohar, Arb.) (ordering employer to comply with the terms of the collective bargaining agreement); *Village of Arlington Heights*, 107 Lab. Arb. (BNA) 1010 (1996) (Goldstein, Arb.) (same). There is simply no basis to Plaintiffs' claim that the collective bargaining agreement prohibits the award of such relief.

Plaintiffs' reliance on *Bernard v. Air Line Pilots Assoc.*, 873 F.2d 213 (9th Cir. 1989), is misplaced. What Plaintiffs fail to point out is that, unlike in their own Complaint, there is no mention whatsoever in the *Bernard* decision of a claim against the employer for breach of a

collective bargaining agreement independent of a duty of fair representation claim against the union. For that reason, the court was not addressing the issue of whether the jurisdiction of an adjustment board was mandatory or exclusive with regard to breach of contract claims against an employer. The court simply concluded that the union breached its statutory duty of fair representation and ordered negotiation of a new integrated seniority list as a remedy for that statutory violation. *Id.* at 218. The fact that a court has jurisdiction to do that does not change the core point applicable here: a Board of Adjustment has exclusive jurisdiction over a claim for breach of the collective bargaining agreement and has full power to remedy that breach.

Conclusion

For the reasons stated herein, US Airways respectfully requests that Counts 1 and 2 of the Complaint alleged against US Airways be dismissed for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 17th day of October 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2008, I caused to be electronically transmitted the attached Reply in Support of Motion to Dismiss to the Clerk's office using the CM/ECF System for filing.

I hereby certify that on the 17th day of October, 2008, I caused to be served the attached Reply in Support of Motion to Dismiss by Federal Express on the following:

The Honorable Neil V. Wake
District Court Judge
401 W. Washington Street, SPC 52
Phoenix, Arizona 85003

/s/ Rachel S. Janger

Rachel S. Janger