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US AIRWAYS, INC.

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' OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

Defendant US Airways, Inc. ("US Airways" or the "Company"), by and through its counsel undersigned, hereby files its Opposition to Plaintiffs' Application for Preliminary Injunction (Dkt. No. 12 (Plaintiffs' "App.")).

MEMORANDUM OF POINTS AND AUTHORITIES

This action arises out of a seniority dispute between two groups of pilots employed by US Airways, Inc. ("US Airways") in connection with the merger of US Airways and America West Airlines, Inc. ("America West") in 2005. Prior to the merger, US Airways, America West, and the Air Line Pilots Association, International ("ALPA"), which then represented pilots at both carriers, negotiated a Transition Agreement designed to govern integration of the two pilot groups. The six former America West pilots (the "West" pilots) who filed this action contend that the Transition Agreement required US Airways to implement an integrated seniority list known as the Nicolau Award more than a year ago. Defendant US Airline Pilots Association ("USAPA"), which became the collective bargaining representative of all of US Airways pilots in April 2008, was elected on a platform that the Nicolau Award is unfair to former US Airways pilots (the "East" pilots) and should never be implemented.

As the two groups jockey for position in an effort to improve the relative seniority of their constituents, US Airways is caught in the middle. US Airways takes no position on the proper resolution of the seniority dispute at issue here but, however it is resolved, it should not be done at the expense of US Airways because the Company has complied with both the letter and the spirit of the Transition Agreement. Plaintiffs' present application for preliminary injunction, however, would do just that -- "resolving" a dispute among US Airways' pilots over who should be furloughed as a result of US Airways' recent flight reductions by effectively prohibiting any furloughs at all. There is no justification in law or equity for that result.

Under the Transition Agreement, on the effective date of the merger US Airways was obligated to institute "Separate Operations" under which the East pilots and the West pilots must "remain separate and covered by their respective collective bargaining agreements." During this period, each pilot group is "fenced" off from the other and limited to operation of their respective, pre-merger aircraft (or new aircraft assigned to that group pursuant to the Transition Agreement), and mixing of East and West aircraft or pilots is expressly prohibited. Declaration of E. Allen

Hemenway ("Hemenway Dec."), attached hereto as Exhibit A, at ¶ 8 & Ex. 4 at § II.[1]

Under the Transition Agreement, there are also procedures for integrating the two carriers' seniority lists and negotiating a single collective bargaining agreement applicable to the combined carrier. When the parties have achieved both an integrated seniority list and a single agreement, US Airways may combine the two groups in a process called "Operational Pilot Integration." Hemenway Dec. ¶ 9; TA at § VI.A. Until this occurs (and, thus, until the parties have completed negotiations for a single labor agreement), US Airways is expressly prohibited from using an integrated seniority list. Hemenway Dec. ¶¶ 8, 9; TA at §§ II, IV.C, VI.A. At this point in time, US Airways has received and accepted the Nicolau Award but has not yet reached agreement on a single labor contract despite nearly 100 negotiating sessions over the last three years with both ALPA and USAPA. Hemenway Dec. at ¶¶ 18, 19, 21; Ex. 6.

The present motion was precipitated by US Airways' announcement in June 2008 that, faced with rapidly deteriorating financial results, it would eliminate a large number of unprofitable flights, reduce the size of its aircraft fleet and furlough some 300 pilots, roughly 175 of whom are pilots assigned to fly West aircraft. Declaration of Lyle Hogg ("Hogg Dec."), attached hereto as Exhibit B, at ¶¶ 2, 3. In seeking a preliminary injunction to prohibit the furlough of any pre-merger West pilots, plaintiffs ask the Court to order US Airways to do exactly what the Transition Agreement prohibits the Company from doing -- that is, to base the furloughs on the company-wide seniority list set forth in the Nicolau Award rather than implementing the furloughs separately among the East and West pilot groups, based on the number of pilot positions being eliminating in each operation, as is required under the applicable pre-merger collective bargaining agreements. Hemenway Dec. at ¶¶ 4, 9, 26; Exs. 2, 3.

Plaintiffs' primary argument is that the Transition Agreement "required the Company to institute integrated pilot operations using the integrated seniority list when, by June 30, 2006, the pilots and Company had not agreed on a single CBA [collective bargaining agreement] and were not actively negotiating toward such agreement." App. at 3, 6 and 7. They are simply wrong.

[1] Exhibit 4 to the Hemenway Declaration, the executed version of the Transition Agreement, will be cited to herein as the "TA."

Section IV.C of the Transition Agreement expressly provides that US Airways "may not use an integrated pilot seniority list prior to Operational Pilot Integration as defined in Section VI.A," and Section VI.A expressly provides that Operational Pilot Integration shall occur "no later than twelve (12) months following the later of (i) completion of the integrated pilot seniority list and (ii) negotiation of the Single Agreement."

Plaintiffs' alternative argument is that US Airways was not required to furlough any West pilots because the obligation to maintain separate operations under the Transition Agreement does not apply to new aircraft or operations, and that an increase in the number of East pilots since 2005 show "there are plenty" of aircraft and flights that could have been assigned to the West pilots. App. at 6, 8, 10; Supp. App. at 4. Again, they are wrong. The amount of flying that can be assigned to each group is controlled by the number of aircraft, and both East and West operations are currently near the minimum aircraft threshold under the Transition Agreement. The allocation of the only aircraft not subject to the minimum aircraft requirements, the Company's recently acquired EMB 190 aircraft, was submitted to arbitration under Section II.B.5 of the Transition Agreement to determine "the allocation of such flying," and the arbitrator awarded that flying to East pilots while Separate Operations are in effect.

Accordingly, while plaintiffs characterize this as a dispute over *who* should be furloughed, the practical effect of plaintiffs' application would be to prohibit US Airways from furloughing any pilots in conjunction with US Airways' capacity reductions in its West operations -- despite its urgent financial need to do so. All of the East pilots not already furloughed or scheduled for furlough are needed to operate the East aircraft. If US Airways furloughed these pilots it could not operate its schedule, and the Transition Agreement expressly prohibits US Airways from assigning West pilots to East aircraft. US Airways also cannot transfer aircraft to the West operation because US Airways has already reduced and will continue to reduce the number of East aircraft to at or near the minimum aircraft threshold. Thus, US Airways cannot furlough East pilots "instead of" West pilots, as plaintiffs suggest, and if US Airways were enjoined from furloughing West pilots its only option would be to pay them even though there is no flying they can be assigned. Hemenway Dec. at ¶¶ 31-35.

Even if plaintiffs could show a likelihood of success on the merits with regard to their interpretation of the Transition Agreement, and the Court had jurisdiction to decide that issue,[2] the Court's authority to issue a preliminary injunction is limited by the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (the "NLGA"), because this matter involves a "labor dispute." Section 7 of the NLGA, 29 U.S.C. § 107, prohibits issuance of a preliminary injunction unless (1) plaintiffs prove that failure to issue the injunction will result in irreparable injury; (2) that the injury to plaintiffs will be greater than the injury to defendants in granting the injunction; and (3) the injunction is conditioned upon plaintiffs posting a bond sufficient to compensate defendants if the order is later reversed. Plaintiffs cannot meet the irreparable injury standard, and a sufficient bond must be posted even if they could.

Finally, although plaintiffs purport to seek relief on behalf of all West pilots, they have not sought or obtained class certification. Thus, any injunctive relief must be limited to the individual plaintiffs.

I. Factual Background

The relevant factual background is set forth in prior pleadings and declarations filed in this case, as well as in the accompanying Declarations of E. Allen Hemenway and Lyle Hogg, attached hereto as Exhibits A and B.

II. Legal Analysis

A. Plaintiffs Cannot Demonstrate A Likelihood Of Success On The Merits Because US Airways Has Fully Complied With The Transition Agreement, And The Transition Agreement Expressly Prohibits Use Of The Nicolau Award At This Time.

In their Application for Preliminary Injunction, plaintiffs offer two alternative theories under which, they claim, the furlough of West pilots violates the Transition Agreement: (1) that Section V.G of the Transition Agreement required US Airways to implement the Nicolau Award when the parties had not negotiated a single agreement by June 30, 2006, App. at 3, 6, 7; and (2)

[2] In opposition to this motion, US Airways hereby incorporates by reference the arguments contained in its Motion to Dismiss and Reply, Dkt. Nos. 30, 48, that the Court does not have jurisdiction over plaintiffs' claims under the Transition Agreement because both the Railway Labor Act, 45 U.S.C. § 151 *et seq*. (the "RLA"), which governs this action, and the Transition Agreement, which governs any contractual obligations US Airways might have, provide that any dispute over interpretation of the agreement must be resolved by final and binding arbitration.

that there was an implied obligation under the Transition Agreement, based on the "reasonable expectations" of the West pilots, to assign sufficient aircraft or flights to the West operation to avoid the need to furlough West pilots. App. at 7-10. In their Complaint, plaintiffs offer a third theory -- that Section II.B.7 of the Transition Agreement obligated US Airways to furlough East "new hires" before furloughing any West pilots. Compl. Count 1 (Dkt. No. 1). As demonstrated below, none of these arguments has merit under the Transition Agreement.

1. Section V.G of the Transition Agreement Does Not Require Implementation of the Nicolau Award.

Plaintiffs' primary argument in this case is that Section V.G of the Transition Agreement "required the Company to institute integrated pilot operations using the integrated seniority list when, by June 30, 2006, the pilots and Company had not agreed on a single CBA and were not actively negotiating toward such agreement." App. at 3. Section V.G of the Transition Agreement provides that either ALPA or US Airways may "suspend" negotiations for a combined agreement if the parties have not reached such an agreement by June 30, 2006, "provided, however, that the Airline Parties will continue to be obligated to complete the Operational Pilot Integration within the specified timeframe outlined in Section VI. below. Hemenway Dec. ¶ 12; TA at § V.G. Based on the proviso, plaintiffs argue that the suspension of negotiations pursuant to this section triggers an obligation on behalf of US Airways to implement an operational integration -- and, thus, implement the integrated seniority list -- at the time negotiations are "suspended" notwithstanding the fact that the parties do not have a single labor agreement. App. at 3, 7. This argument is without merit for several reasons.

First, the apparent premise of plaintiffs' argument -- that ALPA suspended negotiations for a single agreement -- is not accurate. *See* App. at 6. During July 2007, one of ALPA's constituent groups, the US Airways MEC, said that it would not participate in a joint bargaining committee working on an single agreement. ALPA, which was the certified bargaining representative and the only party authorized to take action under Section V.G, did not suspend negotiations. To the contrary, ALPA's publicly-stated position throughout was that it was committed to negotiating a single agreement and to implementing the Nicolau Award as part of

that agreement. Hemenway Dec. ¶¶ 12, 19; TA at § V.G.

Second, the plain language of Sections V.G and VI refute plaintiffs' interpretation of those provisions. The proviso in Section V.G says that notwithstanding the "suspen[sion]" of negotiations for a single agreement, US Airways is still "obligated to complete the Operational Pilot Integration within the specified timeframe outlined in Section VI." The only "timeframes" in Section VI are the obligation to merge operations "no later than twelve (12) months following the later of (i) completion of the integrated pilot seniority list and (ii) negotiation of the Single Agreement" and, if a single FAA operating certificate has not been issued by that date, to merge operations "effective with the first bid period following thirty (30) days after the issuance of such certificate." The fact that these "timeframes" continue to apply in no way implies that US Airways is obligated to merge operations notwithstanding the lack of a single agreement. To the contrary, Section V.G means that only after the parties return to bargaining for a single agreement (following suspension of single agreement negotiations), the provisions of Section VI.A would not be waived, *i.e.* the 12-month timeframe is only triggered when the parties have reached a single ratified agreement. Hemenway Dec. ¶ 13.

Third, this argument ignores the evident purpose of Section V.G and the plain meaning of the term "suspend." The option to suspend negotiations on June 30, 2006, existed because that was the date on which ALPA could initiate negotiations under the existing America West collective bargaining agreement. This provision allowed ALPA, "depending on the progress at that time" of the negotiations for such Single Agreement, to "suspend" negotiations for a single agreement in order to renegotiate the America West agreement before resuming negotiations for a single agreement. Nothing in this subsection relieved the parties of the basic obligation set out at the beginning of Section V -- i.e., that "[t]he Association and the Airline Parties will negotiate a single collective bargaining agreement applicable to the merged operations of America West and US Airways." Hemenway Dec. ¶ 12.

Finally, and most importantly, nothing in Section V.G undermines the express requirements of Section IV.C and VI.A of the Transition Agreement that an integrated seniority list may not be implemented until Operational Pilot Integration, and Operational Pilot Integration

cannot be accomplished until the parties have negotiated a single labor agreement. Indeed, the existence of both a single agreement *and* an integrated seniority list are necessary predicates to integrating pilot operations because it would be impossible to implement a single seniority list without a single labor agreement governing work assignments, training and work rules for all of the pilots. Hemenway Dec. ¶¶ 14, 26. Indeed, the premise that US Airways could have adopted a single seniority list while maintaining separate operations and separate labor contracts is nonsensical because, as this case demonstrates, use of a single seniority list during separate operations would lead to such absurd results as the inability to furlough who were not needed because the Company had not furloughed pilots in the other operation who were needed.

As Arbitrator Richard Bloch held in another case decided under the dispute resolution procedures of the Transition Agreement, Operational Pilot Integration under Section VI.A is a "three-legged stool," and all three legs -- an integrated seniority list, a single operating certificate and a single labor agreement -- must be present for Operational Pilot Integration to occur. Hemenway Decl. ¶ 12; Exhibit 8 at 12. Plaintiffs' argument that US Airways should implement an integrated seniority list when there is no single labor agreement would, to use Mr. Bloch's analogy, be like trying to sit on a two-legged stool. It just doesn't work.

2. The Transition Agreement Does Not Expressly or Impliedly Limit the Ability of US Airways To Implement Furloughs Among West Pilots During Separate Operations.

In the alternative, plaintiffs argue that US Airways had an implied obligation under the Transition Agreement to assign sufficient flights and/or aircraft to ensure that no West pilots would be furloughed before East pilots who were on furlough status at the time of the merger. App. at 8-11. They base this argument on two assertions: (a) that West pilots had a reasonable expectation, based on US Airways' announced criteria for acceptance of an integrated seniority list and the Nicolau Award, that a furloughed pilot could not "displace" an active pilot; and (b) that it would be possible for US Airways to meet that expectation by assigning more flying to the West pilots. App. at 9-10. Both of these premises are faulty.

a. West Pilots Had No Reasonable Expectation That They Would Not Be Furloughed Duration Separate Operations.

In claiming that West pilots had a reasonable expectation that they would not be furloughed under the present circumstances, plaintiffs allege that "[p]rior to the finalization of the Transition Agreement, the heads of both airlines jointly stated that they 'expect[ed] that no employee who already had been furloughed prior to the merger would be permitted to bump an active employee out of a job.'" App. at 9; Hemenway Dec. ¶ 28., Ex. 9. This argument does not withstand analysis.

First, the Joint Statement of Labor Principles cited by plaintiffs could not have produced any *reasonable* expectations. At the outset of that document, the CEOS stated that "it will take a long time to complete an operational integration and, as we've already seen, there's always the potential for unexpected changes in our industry." The statement also cautioned that "it's still hard to say what will happen to anyone's particular job," and that "[f]or employees in work groups represented by unions, the question of what will happen to your job is even harder for us to answer because so much of what will happen is outside of management's control." Hemenway Dec. ¶ 27, Ex. 9.

Second, the portion of the joint statements upon which plaintiffs purportedly relied -- and which was, in fact, incorporated into the Transition Agreement at Section IV.A.2 -- addressed the *implementation* of an integrated seniority list at the time operations were merged and were wholly inapplicable to the situation at hand -- where furloughed pilots are recalled before implementation of an integrated seniority list. Allowing a pilot who was on furlough status when the integrated list is implemented to use that seniority to "displace" an active pilot could have cost US Airways a great deal of money because it would have to pay furlough pay to the active pilot and retrain the furloughed pilot, and was perceived to be unfair to the active employees who might lose their jobs purely as the result of implementing an integrated seniority list. The parties therefore provided in Section IV.A.2 of the Transition Agreement that displacement of an active pilot by a furloughed pilot in integrated operations would not be permitted. Hemenway Dec. ¶ 28.

Third, the expectation of West pilots about what rules would apply when the integrated

seniority list was implemented has nothing to do with the present dispute. Plaintiffs could not have had any reasonable expectation at the time of the merger about where the West pilots would end up on the integrated seniority list because that list was not completed until 2007; indeed, if Arbitrator Nicolau had adopted a date of hire rule for integrating the lists, which was a possibility until the Nicolau Award was issued, many of the West pilots would have been below furloughed East pilots on the integrated seniority list. Similarly, plaintiffs could not have had any reasonable expectation that the integrated seniority list would be used while a fence remained in place because the Transition Agreement expressly provides that an integrated seniority list may not be used until pilots operations are merged. Hemenway Dec. ¶ 9-11; Ex. 5; TA at §§ II, IV.C., VI.A. Moreover, as Arbitrator Richard Bloch noted in a recent case interpreting the Transition Agreement, the use of a "fence" is a standard industry practice in airline mergers, and even apart from the terms of the agreement West pilot should have understood that during separate operations each group would operate, in effect, as a separate airline. Hemenway ¶ 24; Ex. 8 at 7-8.

Fourth, the argument that plaintiffs had a reasonable expectation they would not be furloughed because "established seniority relationships between pilots ordinarily do not change," App. at 9, is even more attenuated. At the time of the merger, there were no "established" seniority relationships between East and West Pilots, and plaintiffs plainly understood that adoption of an integrated seniority list *would* change their pre-merger career expectations. More importantly, as noted above, the present dispute involves the question of what seniority rules apply during a period of Separate Operations, and in light of the explicit provisions of the Transition Agreement prohibiting use of an integrated seniority list until a merger of pilot operations, plaintiffs could not have had any reasonable expectation to the contrary. The furloughs at issue here occurred exactly as they would have occurred if no merger had occurred. Hemenway Dec. ¶¶ 4, 24, 27; Exs. 2-3. Until an integrated seniority list is implemented, there is no basis for the plaintiffs to claim that they had a reasonable expectation that recalled pilots would be furloughed ahead of West Pilots.

Finally, it is a basic rule of contract interpretation that one cannot imply an obligation that

is inconsistent with the express terms of a contract. Here, the Transition Agreement makes it as clear as it could possibly be that during the period of Separate Operations, the East and West operations must be maintained separately, and what happens on one side of the fence is simply irrelevant to what happens on the other side of the fence. *See* TA at § II.A (the two pilot workforces "will remain separate and covered by their respective collective bargaining agreements"). Thus, each pilot group accepts the risk that the normal ebb and flow of operations on its side of the fence will increase, or decrease, the number of pilots. By providing that each pilot group will be governed by the pre-merger collective bargaining agreements applicable to that group, the Transition Agreement requires that any furloughs must be conducted pursuant to the seniority list and furlough procedures applicable under that collective bargaining agreement. Because of Separate Operations, as described in Section II of the Transition Agreement, US Airways must treat its two fleets separately, and cannot move pilots from East aircraft to West aircraft or vice versa. Accordingly, when furloughs become a necessity, as they currently are, US Airways must furlough according to the fleet that is being affected by reduced flying. Hemenway Dec. ¶ 26.

Moreover, ALPA sought to prohibit the Company from furloughing pilots during the period of Separate Operations but failed to obtain that prohibition. As a result, the Transition Agreement contains no provisions limiting the Company from engaging in pilot furloughs except for the minimum aircraft and utilization requirements set forth in Section II of the Transition Agreement. Under those terms, furloughs are permitted during the period of Separate Operations so long as US Airways maintains a sufficient number of pilots in each of its East and West operations to fly at least the minimum number of aircraft at their minimum utilization rate for that fleet. Hemenway Dec. ¶ 25.

3. US Airways Could Not Have Satisfied Plaintiffs' Alleged "Expectations" By Assigning East Flying to West Pilots.

In support of the premise that US Airways could have satisfied the alleged expectation of plaintiffs that they would not be furloughed during the period of Separate Operations, plaintiffs suggest that US Airways could fulfill that expectation by transferring certain EMB 190 aircraft

currently operated by East pilots to West operations. As a result, East pilots would be furloughed instead of West pilots because those aircraft are not subject to the minimum aircraft provisions of the Transition Agreement. Supp. App. at 4. In fact, US Airways cannot do what plaintiffs suggest, and granting plaintiffs' motion would effectively mean that US Airways cannot furlough any pilots in conjunction with US Airways' capacity reductions in its West operations -- despite its urgent financial need to do so. All of the active East pilots not scheduled for furlough are needed to operate the East aircraft currently assigned to US Airways' flight schedule, and the Transition Agreement expressly prohibits US Airways from assigning the West pilots to those aircraft. US Airways also cannot transfer aircraft to the West operation because US Airways has already reduced and will continue to reduce the number of East aircraft to at or near the minimum aircraft threshold. Therefore, an injunction would require the Company to carry an additional 140 West pilots for whom it has no work in its workforce indefinitely and at great expense. Hemenway Dec. ¶ 31; Hogg Dec. ¶ 4.

Moreover, plaintiffs' assertion that US Airways could transfer the EMB 190 to West operations is simply inaccurate. Section II.B.5 of the Transition Agreement contains a procedure, culminating in binding arbitration, for allocating the flying of aircraft that were not in the two carriers' fleets at the time of the merger between the two pilot groups. The union parties invoked that procedure in 2006 with regard to the EMB 190 aircraft, and in September 2006 Arbitrator Dana Eischen issued a decision holding that the EMB flying should be assigned to East pilots until US Airways implements a complete operational integration pursuant to the terms of the Transition Agreement. Hemenway Dec. ¶ 33 & Ex. 10; TA at § II.B.5. Accordingly, US Airways has no other options, and prohibiting the furlough of West pilots would convert a disagreement among US Airways' pilots over who should be furloughed into a prohibition against any furloughs. Such a conclusion would be inconsistent with the express terms of the two agreements -- the Transition Agreement and the West labor agreement -- that govern US Airways right to furlough of West pilots, and clearly permit the furlough of such pilots under the present circumstances.

There is simply no obligation anywhere in the Transition Agreement requiring US

Airways to move flying in the service of East pilots on East aircraft to West Pilots on West aircraft, and plaintiffs' claim that since US Airways has employed 239 additional pilots on the East side of the operation, it must have enough extra flights "sufficient to employ the premerger America West pilots that the Company plans to furlough," App. at 10, is simply wrong. First, there is no obligation anywhere in the Transition Agreement requiring US Airways to move flying in the service of East Pilots on East aircraft to West Pilots on West aircraft. Second, currently, US Airways' East operations are running near the minimum fleet and minimum utilization requirements. Accordingly, if it were to move flying to the West, it would likely fall under the minimum fleet and utilization requirements on the East and be in breach of the Transition Agreement. Third, the Eischen Award also requires that E190 flying be performed by East pilots until Operational Pilot Integration. Fourth, the training costs of moving flying between East and West, would be prohibitive and would unnecessarily delay US Airways' efforts to reduce its flying to meet its need to deal with the current economic environment. As a result, it is impossible to implement the injunction without violating the Transition Agreement or incurring extraordinary costs. Hemenway Dec. ¶ 34.

3. The Transition Agreement Does Not Require US Airways To Furlough New Hire Pilots in the East Operation Before It Furloughs West Pilots.

Although not explicitly discussed in plaintiffs' application for preliminary injunction, plaintiffs contend in their Complaint that, under Section II.B.7 of the Transition Agreement, US Airways was obligated to furlough all "new hire" pilots before furloughing other West pilots. Compl. Count I. Pilots hired since the merger have been placed by US Airways on either the East or West side of the fence operating under the terms and conditions of the applicable collective bargaining agreement. Hogg Dec. ¶ 4; Hemenway Dec. ¶ 30.

Section II.B.7 provides that "[n]ew pilots hired during the Separate Operations will be placed by their date of hire on a third seniority list entitled "New Hire Seniority List," will be junior to all pilots on the pilot seniority lists of America West and US Airways on the effective date of this Letter of Agreement, and will continue to be junior to those pilots on the integrated seniority list of America West and US Airways pilots." Section II.B.7 by its terms governs the

seniority of new hire pilots relative to pre-merger pilots on the separate seniority lists during Separate Operations, and also relative to pre-merger pilots on the integrated seniority list. Hemenway Dec. ¶ 29.

Once the new hire pilots were assigned to the East or West operations -- and were junior to those pilots on the respective seniority lists where they were assigned -- they were subject to all of the same rules as other pilots, including the principle that what happens on one side of the fence is irrelevant to what happens on the other side because each side must operate with its separate seniority list and its separate contracts. While US Airways, in fact, furloughed all of the new hire pilots on the West seniority list before furloughing any West pilots who were active on the merger date, it has not yet furloughed the new hire pilots on the East seniority list because those pilots are currently needed to operate the East operation (although they have been notified that they will be furloughed by April 1, 2009, as US Airways continues to reduce its flight operations). Hemenway Dec. ¶ 30. This process was wholly in accord with Section II.B.7 of the Transition Agreement, as well as the Separate Operations requirements of Section II.

B. The NLGA Limits the Court's Authority to Issue a Preliminary Injunction in This Case.

The NLGA limits the authority of the federal courts to issue a temporary restraining order or preliminary injunction in any "labor dispute."[3] 29 U.S.C. § 107. The definition of the term "labor dispute" is "extraordinarily broad" and the present case clearly falls within this definition. *See Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1342-43 (9th Cir. 1990) (citing *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982) ("the test of whether the Norris-La Guardia Act applies is whether the employer-employee relationship [is] the matrix of the controversy") (citation and internal quotations omitted).

Section 7 of the NLGA provides, in relevant part:

[3] The requirements for issuance of a preliminary injunction under the NLGA are similar to the requirements applicable generally within the Ninth Circuit. *See Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993) (to obtain a preliminary injunction, movant must show (1) the moving party will suffer irreparable injury if relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and (4) the public interest favors granting relief).

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect--
> (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, . . .
> (b) That substantial and irreparable injury to complainant's property will follow;
>
> (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; . . .

29 U.S.C. § 107.

In their application, plaintiffs allege that the pilots subject to furlough would suffer irreparable harm because damages would be "difficult to ascertain," "irreparable harm [can result] from improper termination of an employee," and because "irreparable harm [can result] from the improper application of airline pilots seniority rights." App. at 11-12. These assertions are insufficient to justify a preliminary injunction under the NLGA.

First, "conclusory allegations are insufficient to establish irreparable harm." *Solidus Networks, Inc. v. Excel Innovations, Inc.*, 502 F.3d 1086, 1098-99 (9th Cir. 2007); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72-73 (2d Cir. 1979).

Second, the loss of income resulting from furlough is easily calculated, and does not warrant a finding of irreparable injury. Indeed, courts and labor arbitrators determine the amount of back-pay awards in employment cases on a daily basis. Here, US Airways knows the identity of all pilots to be affected by the furloughs, their rates of pay, and the duration of any furlough period. Thus, the U.S. Supreme Court has held that the loss of income arising from termination of employment "does not usually constitute irreparable injury."[4] *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

[4] *See also Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir. 1985) (reversing preliminary injunction enjoining enforcement of an ordinance where "the only injury [the town] could possibly suffer as a result of its retailers' conduct" was economic losses from reduced revenues); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (reversing order granting a preliminary injunction because economic injuries from closure and relocation of business would be compensable); *EEOC v. Pacific Press Pub. Ass'n*, 535 F.2d 1182, 1187 (9th Cir. 1976) (in a private action, instances where irreparable injury would result from the discharge of an employee are extraordinary) (citing *Sampson*, 415 U.S. at 90);.

> [T]he key word in this consideration is *irreparable*. Mere injuries, however substantial in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, and the ordinary course of litigation, weighs heavily against a claim irreparable harm."[5]

Id. (quoting Virginia Petroleum Jobbers' Assn. v. FPC, 259 F.2d 921, 925 (1958)).

Third, as explained above, an injunction would shift the harm from the pilots scheduled to US Airways because the Transition Agreement prohibits US Airways from furloughing East pilots in lieu of West pilots. US Airways is eliminating flying in its West operations because certain flying -- largely Las Vegas night flying -- has resulted in huge losses over the last year. If US Airways were enjoined from furloughing the pilots associated with the reduction in West flying, the corresponding cost savings would be forever lost.

In their application, plaintiffs argue that "[e]quitable considerations require that any hardships from the Company's need to furlough pilots should fall on the [former] US Airway pilots" because of the supposed "taint of a violation of the duty of fair representation" of the plaintiffs by USAPA. App. at 12-13. Even if that were correct, the hardship will not fall on the East pilots -- it will fall on US Airways, which has done nothing wrong.

Finally, Section 7 of the NLGA requires that preliminary injunctions shall not be issued absent a bond "sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. If the injunction is granted, the plaintiffs must be required to post a bond adequate to protect US Airways from an estimated $800,000 in additional monthly costs it will incur indefinitely to carry unneeded pilots on its books, as well as hundreds of thousands of dollars in attorneys fees incurred in the defense of the injunction. *See* Hemenway Dec. ¶ 35.

[5] The *Sampson* Court also noted that "an insufficiency of savings or difficulties in immediately obtaining other employment-external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself-will not support a finding of irreparable injury, however severely they may affect a particular individual." *Sampson*, 415 U.S. at 92 n. 68.

C. Plaintiffs Cannot Obtain Preliminary Injunctive Relief on Behalf of All West Pilots.

Even if the Court determined that injunctive relief was appropriate, plaintiffs cannot obtain preliminary injunctive relief on behalf of all West pilots. In order to properly proceed with their claim for what is essentially "classwide" injunctive relief, plaintiffs must be certified as class representatives under Fed. R. Civ. P. 23. See Fed. R. Civ. P. 23(b)(2); *cf. Cooper v. TWA Airlines*, 274 F. Supp. 2d 231 (E.D.N.Y. 2003) (class action plaintiff representatives of flight attendants sued the airline and the union for breach of duty of fair representation and sought a preliminary injunction to prohibit furlough of flight attendants, which was denied). Accordingly, plaintiffs' claim for injunctive relief must be limited to the individual plaintiffs.

CONCLUSION

For the foregoing reasons, US Airways respectfully requests that the Court deny the plaintiffs' request for a preliminary injunction.

RESPECTFULLY SUBMITTED this 28th day of October 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2008, I caused to be electronically transmitted the attached US Airways Opposition to Plaintiffs' Application for Preliminary Injunction, as well as the Declarations of E. Allen Hemenway and Lyle Hogg, to the Clerk's office using the CM/ECF System for filing.

I hereby certify that on the 28th day of October, 2008, I caused to be served the attached US Airways Opposition to Plaintiffs' Application for Preliminary Injunction, as well as the Declarations of E. Allen Hemenway and Lyle Hogg, by hand delivery 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