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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

vs.

US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC.,

Defendants.

Case No. 2:08-cv-1633-NVW

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION BY US AIRLINE PILOTS ASSOCIATION

I. INTRODUCTION

The US Airline Pilots Association ("USAPA") brings this Motion for Reconsideration based on its conclusion that the Court's Order in this case, dated November 20, 2008, (Docket No. 84) is founded on the misapprehension that the Plaintiffs' claim that USAPA violated a good faith bargaining obligation to implement the Nicolau list is other than-contract based. In view of the Court's conclusion that ripeness of this matter is based on USAPA's alleged failure to bargain in good faith toward a single collective bargaining agreement, and in view of the fact that the only possible source of such a good faith bargaining obligation toward the Plaintiffs – either as alleged or at law – is the collectively-bargained Transition Agreement, Count Three should be dismissed in its entirety for lack of subject matter jurisdiction.

Given the Court's dismissal of Counts One and Two for lack of subject matter jurisdiction, the only sustainable basis for not dismissing Count Three would be the supposed futility of submitting Count Three's contract-based claims to a five-man System Board that included union-appointed members on the arbitration panel. In this regard, the Court also misapprehended USAPA's representations before the Court concerning USAPA's willingness to submit the Plaintiffs' contract-based arguments under Count Three of the complaint to a System Board of Adjustment consisting of a single neutral arbitrator.

Due to the Court's apparent misapprehension concerning the contract-based nature of Plaintiffs' only ripe claim under Count Three, combined with its

misapprehension concerning USAPA's willingness to submit Count Three's contract-based claims to a single neutral arbitrator, USAPA hereby requests that the Court reconsider its decision of November 20, 2008 and dismiss Count Three based on lack of subject matter jurisdiction.

II. APPLICABLE LEGAL STANDARD

LR Civ. 7.2(g)(1) provides, in pertinent part, that a motion for reconsideration must be supported by a:

> showing of manifest error or a showing of new facts or legal authority that could not have been brought to [the Court's] attention earlier with reasonable diligence. Any such motion shall point out with specificity the matters that the movant believes were overlooked or misapprehended by the Court, any new matters being brought to the Court's attention for the first time and the reasons they were not presented earlier, and any specific modifications being sought in the Court's Order.

III. ARGUMENT

The Plaintiffs' Original Complaint in this action alleges three causes of action. Counts One and Two allege that defendant US Airways breached the collectively-bargained Transition Agreement. Of particular relevance to this motion is Count Two, in which Plaintiffs alleged that US Airways breached the Transition Agreement by failing to negotiate in good faith with USAPA to implement a seniority arrangement referred to as the Nicolau List. (Original Complaint ¶ 92). The Plaintiffs alleged a *contractual* basis for US Airways' good faith obligation to the Plaintiffs and expressly disavowed any argument that this good faith obligation was based on the Railway Labor Act. (Original Complaint ¶ 34(j); Docket No. 45, Response in Opposition to USAPA's

Motion to Dismiss at 17:4-22.)("Plaintiffs' Right to Demand Good Faith Negotiations Arises Under Contract, Not the RLA.").

In view of the contractual basis for Plaintiffs' claims under Counts One and Two, the Court dismissed these claims for lack of subject matter jurisdiction based on its determination that the Railway Labor Act requires the submission of such contract interpretation disputes to the Board of Adjustment. (Order, Docket No. 84, p. 14). In reaching this determination, the Court rejected Plaintiffs' argument that the participation of US Airways and USAPA-appointed members on the Board would render the arbitration process futile in view of the Defendants' agreement to submit these disputes to a single neutral arbitrator. (*Id.* at 16).

During hearings conducted on October 29, 2008, the Court stated its determination that, in terms of an adjudicatory process, Counts Two and Three were "inseparable":

> But see, Count 2 is inseparable from Count 3. Whether the employer has breached a duty to negotiate in good faith is entirely dependent on whether they make their case that the union has breached its duty of fair representation.
>
> So I don't see how you can arbitrate one and not the other. You can't decide one and not the other, whether it's an arbitrator or me.

(Transcript at p. 43, lines 2-9).[1] In response, USAPA legal counsel stated USAPA's agreement that claims under Count Three that were related to Count Two's contract-based good faith bargaining cause of action would be submitted to a neutral arbitrator:

> Well, your Honor, that helps clarify your earlier inquiry, at least to my perception, that certainly to the extent that the neutral arbitrator finds that the adjudication of the contractual claims in Count 2 require evaluation of the claims in Count 3, then yes, we are agreeing that goes to a neutral arbitrator.

(Transcript at p. 43, lines 10-15).[2]

Notwithstanding the "inseparable" nature of Counts Two and Three, the Court's November 20th Order held that it did not have subject matter jurisdiction over Count Two, but that it did have jurisdiction over Count Three. USAPA believes that the Court's inconsistent jurisdictional treatment of Counts Two and Three may have been based on: 1) the Court's misapprehension concerning USAPA's willingness to submit the contractually-based good faith bargaining arguments alleged under Count Three to a single arbitrator; 2) the Court's misapprehension that Plaintiffs' claims against USAPA, insofar as they relate to USAPA's alleged breach of a good faith obligation to implement the Nicolau List, are based on statutory in addition to alleged contractual

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[1] "Transcript" refers to the transcript of the October 29, 2008 hearing held in this matter. The pages of the transcript cited within this Memorandum are attached as Exhibit A to the Declaration of Nicholas P. Granath filed in support of USAPA's Motion for Reconsideration.

[2] USAPA Counsel had previously committed that "to the extent the DFR is based on USAPA's alleged violation of a contractual duty in the Transition Agreement to negotiate in good faith, that the System Board would have jurisdiction and that we would proceed to a System Board hearing on that." (Transcript at p. 38, lines 19-24).

rights; and/or 3) the Court's misapprehension that it could interpret the Transition Agreement in the context of Count Three without exceeding its own jurisdiction and undermining the jurisdiction of the System Board to adjudicate the claims under Count Two.

The basis for USAPA's concern relevant to the first misapprehension is based on the Court's finding that:

> USAPA has agreed to waive its representatives only as to Counts One and Two of the complaint. Its waiver does not extend to Count Three, the fair representation claim.

(Order, Docket No. 84, p.16 n.4). USAPA respectfully submits that, as confirmed by the hearing transcripts referenced above, the Court is in error and that, therefore, there is no basis for applying the futility exception to the general rule that contractual disputes are subject to the exclusive jurisdiction of the System Board. USAPA hereby reaffirms its agreement to submit contract-based claims under Count Three to the Transition Agreement System Board that would not include either carrier or USAPA board members.

The basis for USAPA's concern relevant to the second misapprehension – the supposedly statutory source of USAPA's alleged obligation to bargain in good faith toward the implementation of the Nicolau Award – is indicated by the Court's finding that the duty of fair representation dispute "falls outside the Agreement." (Order, Docket No. 84 at 21:23-24). More specifically, with respect to the alleged good faith bargaining obligation, the Court held that:

> The Transition Agreement requires negotiation toward implementation of the [Nicolau] award, *and there is a statutory obligation to exert every reasonable effort in these negotiations*. Transition Agreement §§ IV(A), V, VI(A); 45 U.S.C. § 152, First.

(*Id.* at 11:26-12:1)(emphasis supplied). The Court's finding of a contract-based good faith bargaining obligation to implement the Nicolau Award (which USAPA considers to have been in error) is critical to the Court's determination that it had subject matter jurisdiction over this case in that the alleged breach of this alleged bargaining obligation was the *only* basis cited by the Court in support of its holding that this case is ripe for adjudication:

> It satisfies the constitutional case or controversy requirement to allege, as the Plaintiff West Pilots have, that USAPA has breached its duty by deliberately delaying the single collective bargaining agreement in order to frustrate its *pre-existing obligation* to the minority and thereby causing injury to the West Pilots in the form of ongoing furloughs and other detriments.

(Order, Docket No. 84 at 13:1-5)(citation omitted)(emphasis supplied).

The conclusion that Plaintiffs' bad faith bargaining claims are exclusively contractual in nature is compelled by two considerations. First, because, as referenced above, the Complaint specifically alleges a contract-based good faith bargaining obligation and the Plaintiffs have expressly disavowed any statutory basis for their good faith bargaining claim.[3] Second, because, as previously briefed, the federal courts have rejected the notion that individual employees have any standing to assert good faith

[3] *See infra* pp. 2-3; Docket No. 45, Response in Opposition to USAPA's Motion to Dismiss at 17:4-22.

bargaining claims under the Railway Labor Act. (Docket No. 36, USAPA Memorandum in Support of USAPA's Motion to Dismiss at 17:1-14).

USAPA also respectfully submits that the Court has failed to consider that its interpretation of the Transition Agreement in the context of Count Three exceeded its own jurisdiction and undermines the jurisdiction of the System Board to adjudicate the Plaintiffs' claims under Count Two. A fundamental threshold defense to the Count Two claim of bad faith bargaining is that – as with the parallel statutory obligation under Section 2, First of the Railway Labor Act – any good faith bargaining obligation under the Transition Agreement is owed only as between the carrier and the union. Therefore, no individual pilot has standing under the Agreement to enforce such an obligation. This conclusion receives dispositive support from the fact that the Transition Agreement authorizes the carrier and the union to either modify the Agreement or terminate it altogether. (Transition Agreement § XII.B and E.1). Where a contract grants two named parties the exclusive right to modify or terminate the agreement, the conclusion is inescapable that no third party has a contractual right to demand prospective implementation of any of the agreement's provisions. These arguments will be presented to the Transition Agreement System Board, which has the exclusive authority to interpret the Transition Agreement.

Similarly, the Court has found that the Transition Agreement incorporates ALPA Merger Policy, but fails to consider that ALPA Merger Policy rejects the concept of any good faith obligation to implement the Nicolau List on any specific timetable. In this

respect, the Court misapprehended USAPA's position by mischaracterizing USAPA's arguments in the following manner:

> USAPA also asserted at oral argument that the union majority's right to approve any new collective bargaining agreement subjected the Nicolau Award to a "political veto."2 This argument begs the question. In essence, USAPA argues that it can never be a breach of the duty of fair representation for the majority to seize its own interest.

The referenced footnote stated:

> Exercise of that "political veto" for the reasons supposed may well breach USAPA's duty to exert every reasonable effort in negotiations as required by the Transition Agreement 45 U.S.C. § 152 First.[4]

(Order, Docket No. 84 at 12:15-19, n.2). What, in fact, USAPA counsel stated was the following:

> But clearly, if ALPA Merger Policy, according to [the Plaintiffs'] arguments, was incorporated by reference into the Transition Agreement, it also incorporated a political veto, which is both the East MEC and the East Pilots had to agree to a single contract for this to ever, as they say, see the light of day.

(Transcript at p. 56, lines 6-11).[5] In other words, the Court's conclusion that the Transition Agreement incorporated ALPA Merger Policy by reference (and made this internal union policy binding even on a different labor union) merely begs the question

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[4] Again, as previously briefed, Section 2, First does not provide a cause of action for an employee against the union that represents him/her.

[5] ALPA Merger Policy provides that: "In no event, except by mutual agreement of all parties, will the company be given the right to use the merged seniority list prior to the successful conclusion of the merged working agreement." (Original Complaint, Ex. C at Section 45.N.).

as to whether the Policy created a good faith bargaining obligation to implement the Nicolau Award on a specific timetable.

The simple fact is that the ALPA Merger Policy flatly rejects any such obligation and provides, instead, for each of the two MEC's and their respective pilot groups to forestall implementation of a particular seniority list by refusing to agree to a single collective bargaining agreement. Any question as to the existence of this political veto under ALPA Merger Policy is eliminated by dispositive correspondence from ALPA President, Captain John H. Prater on March 14, 2008 to all US Airways Pilots:

> The Transition Agreement ***requires*** that the parties maintain ***separate operations*** until the implementation of a new collective bargaining agreement covering the entire airline. Both the Transition Agreement and ALPA Merger Policy ***prohibit*** US Airways from utilizing the single seniority list until we reach a single agreement.
>
> ***
>
> [ALPA] Merger Policy does not contain a timetable for completing the single agreement. …
>
> ***
>
> Some members have asked what will happen if pilots from one group or the other sue the Association either to block implementation or to force implementation of the Nicolau award. I repeat – there is no required timetable for implementation of the award. That only happens with a single collective bargaining agreement.
>
> ***
>
> ***When a tentative agreement is reached under the ALPA structure, each MEC, followed by each pilot group, will have the right to a separate ratification vote on that agreement.*** I want to assure you that trusteeship will not be used to deprive you of your right to separate membership ratification. That protection – for each MEC and each pilot group to analyze, debate, and ratify a contract that meets its needs – exists in ALPA Merger Policy and does ***not*** under USAPA representation.

(Exhibit A to Declaration of William H. Turbett, III)(emphasis in original).[6]

Thus, even assuming *arguendo* that USAPA had any obligation under the internal policy of a de-certified predecessor, USAPA has the right to argue before the System Board – as it will in the context of the Count Two claims – that ALPA Merger Policy itself precludes any finding that an individual pilot has the right to assert a good faith bargaining obligation to reach a single collective bargaining agreement for the purpose of implementing the Nicolau List.

IV. REQUESTED REMEDY

In view of the foregoing, USAPA respectfully requests that the Court reconsider its Order and Decision of November 20, 2008 and dismiss Count Three of Plaintiffs' Original and Amended Complaint based on lack of subject matter jurisdiction.

Respectfully Submitted,

Dated: December 1, 2008

By: **/s/ Nicholas Paul Granath, Esq.**

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[6] Counsel for USAPA received this letter on the morning of December 1, 2008. (Turbett Decl. ¶ 8). The relevance of this document only became clear after reading footnote 2 of the Court's November 20th Order whereby the Court misapprehended the "political veto" referenced by USAPA Counsel during oral argument as one not existing under ALPA Merger Policy, but as one existing pursuant to USAPA policy.

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