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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSN., *et al.*, Defendants.	CASE NO. 2:08-CV-1633-PHX-NVW (Consolidated) **BENCH MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTIONS IN LIMINE TO EXCLUDE EVIDENCE & ARGUMENT FROM THE JURY TRIAL ON LIABILITY**
Don ADDINGTON, *et al.*, Plaintiffs, vs. Steven H. BRADFORD, *et al.*, Defendants.	Case No. 2:08-CV-1728-PHX-NVW

Plaintiffs, on behalf of the West Pilot Class, separately file motions *in limine* to exclude approximately nine (9) categories of evidence and argument from the liability trial, each of which is neither relevant to Plaintiffs' case-in-chief nor to any affirmative defense. These separate motions *in limine* on each issue are supported by the following Bench Memorandum supporting the exclusion or limitation of such evidence.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court had made clear that: "This trial will be limited to the disputed liability facts relating to USAPA's alleged breach of its duty of fair representation." (Order, 2:3-4 (Mar. 16, 2009) (doc. 252).) This does not mean that evidence is admissible merely because it could relate to unfair representation. Rather, it must relate either to Plaintiffs' case-in-chief or to an affirmative defense.

To promote efficiency and to avoid confusing or misleading the jury, Plaintiffs' case-in-chief will address only three discrete factual issues for the jury's determination. Each of these propositions, when proven, will independently establish Defendant's liability for unfair representation. USAPA, having no claims of its own and no affirmative defenses to its undisputed conduct, must be limited in its presentation of evidence.

On April 1, 2009, in response to the deadline set by the Court, the lawyers for USAPA appeared at the offices of Plaintiffs counsel with twenty-one binders, containing over 638 "exhibits", and consisting of approximately 6000-8000 pages of documents, most of which had never previously been disclosed or identified by USAPA. Included in these exhibits were approximately 40 CDs which contained complex Microsoft Excel files with numerous worksheets per file. In addition, USAPA disclosed twenty-nine (29) witnesses that "shall be called at trial", again, many of whom had never previously been disclosed. In its continuing pattern of trying to litigate everything other than its liability, USAPA has demonstrated its continued intent to delay or disrupt this trial by any means possible, contrary to the prior rulings of this Court, and about matters which are not relevant to any material fact issue in the case. The Court should exclude evidence and

argument as to such matters that are irrelevant and/or unfairly prejudicial, pursuant to Federal Rules of Evidence 401, 402 and 403.

II. LEGAL ARGUMENT

A. Only Evidence and Argument Relevant to the Case-in-Chief or Affirmative Defenses are Admissible.

The essential prerequisite of admissibility is relevance. Fed. R. Evid. 402. Evidence is relevant only where: (1) it is "probative of the proposition it is offered to prove," and (2) "the proposition to be proved … is of consequence to the determination of the action." *United States v. Dean*, 980 F.2d 1286, 1288 (9th Cir. 1992). "Simply stated, the proposition to be proved must be part of the hypothesis governing the case, a matter that is in issue or probative of a matter that is in issue in the litigation." *United States v. Hall,* 653 F.2d 1002, 1005 (5th Cir. 1981).

Matters are in issue or are probative of a matter that is in issue where they tend to prove or disprove the plaintiff's case-in-chief or the defendant's affirmative defenses. *See Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986). All else is immaterial. *See* 1 *McCormick On Evid.* § 185 (6th ed.) ("If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial."); 5 *Am. Jur. Trials* 505 § 18 (noting that "[o]rdinarily [a defendant] is obliged only to go forward with the evidence to show a denial of the factors involved in plaintiff's case").

Evidence and argument here, therefore, are inadmissible unless they make an element of Plaintiffs' case-in-chief or an element of an affirmative defense more or less likely.

B. Plaintiffs' Case-In-Chief Will Raise Only Three Factual Issues.

Plaintiffs' case-in-chief will have three components, each of which will independently establish USAPA's liability for unfair representation. Each component will show that USAPA breached its duty to represent the West Pilots with the utmost good faith and honesty of purpose. *Humphrey v. Moore*, 375 U.S. 335, 343 (1964) (a union's "powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.'"). Plaintiffs' case-in-chief will prove that, contrary to this duty, USAPA was created in bad faith, campaigned in bad faith, and is proceeding to integrate seniority in bad faith. Plaintiffs explain further below.

ISSUE #1: Whether USAPA was created so that the East Pilots could use their majority power to disregard the Nicolau Award.

USAPA is liable for unfair representation if it was constituted to disregard the Nicolau Award. (Order 11:12-18 (Nov. 20, 2008) (doc. 84).) *See also Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990) ("[A]n attempt by a majority of the employees in a collective bargaining unit ['to oust the union' for such purposes] … could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool.") Plaintiffs' case-in-chief will present evidence that, at all relevant times, the East Pilots intended to use USAPA to disregard the Nicolau Award.

ISSUE #2: Whether USAPA promised that, if elected as the bargaining representative, it would use East Pilot majority power to disregard the Nicolau Award.

USAPA is liable for unfair representation if it promised that it would disregard the Nicolau Award if elected the bargaining representative—in other words, if prior to the election it "renounced any good faith effort to

reconcile the interests of both pilot groups." (Order at 10:16-17). *See also Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 145 (D.C. Cir. 1967) (promising unfair representation "would . . . constitute a default by [the union] in its obligation to represent fairly all the employees in the unit for which it becomes the exclusive bargaining representative."). Plaintiffs' case-in-chief will present evidence that, prior to the election, USAPA promised to disregard the West Pilot view that the Nicolau Award was final.

ISSUE #3: Whether USAPA has disregarded the Nicolau Award without procedures that gave due consideration to West Pilot views.

USAPA is liable for unfair representation if it failed to adopt and follow procedures that gave due consideration to West Pilot views. (*Order* at 9:19-26.) This Court explained:

> [Al]though the benefit of the Nicolau Award is surely what motivates the West Pilots, their legal objection to USAPA's date-of-hire seniority policy is not directly substantive, but rather procedural. The alleged breach of the duty stems from the bad faith manner of USAPA's determined attempts to evade the Award. Irrespective of whether seniority rights "vest" in a proprietary sense, a union may not arbitrarily abridge those rights after a merger solely for the sake of political expediency. Barton Brands, Ltd. v. NLRB, 529 F.2d 793, 800 (7th Cir. 1976);

(Id.) *See also Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 204 (1944) ("A union violates the duty of fair representation if it fails to "consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action."). In a seniority dispute such as this, USAPA was obligated to "'emphasiz[e] negotiations between representatives of the two [pilot] groups' to avoid intra-union litigation." (Order at 12:3-4). *See also Rakestraw v. United*

Airlines, Inc., 981 F.2d 1524, 1533 (7th Cir. 1992). Plaintiffs' case-in-chief will present evidence that USAPA proceeded to address seniority integration without giving any consideration to the West Pilot views that the Nicolau Award was final and binding.

C. There are no Affirmative Defenses.

Neither avoidable consequences nor clean hands constitute an affirmative defense to liability, and surely not to liability for unfair representation. Therefore, no evidence that might, in other instances, speak to these defenses should be allowed into the liability trial.

(1) Avoidable Consequences Doctrine

Avoidable consequences doctrine "applies only to the diminution of damages and not to the existence of a cause of action." *Restatement (Second) of Torts* § 918 cmt. a (1979). It is no defense, therefore, to liability itself.

> We hold that mitigation of damages is a defense to the amount of damages a plaintiff is entitled to recover after the defendant has been found to have caused the tort. Mitigation of damages is not a defense to the ultimate issue of liability.

Kocher v. Getz, 824 N.E.2d 671, 674 (Ind. 2005); *see also Monahan v. Obici Medical Management Services, Inc.*, 628 S.E.2d 330, 337 (Va. 2006) (same). Evidence that West Pilots failed to avoid consequences, therefore, has no relevance in the liability trial.

(2) Clean Hands Doctrine

Clean hands doctrine is also no defense to liability.

> The availability of an injunction against a committed or threatened tort depends upon the appropriateness of this remedy as determined by a comparative appraisal of the [clean hands factors].

Restatement (Second) of Torts § 933(1); *see also id.* at cmt. a (referring to and explaining the § 936 factors, which are the elements of clean hands

doctrine). Even where a jury determines substantive liability, the court—not the jury—applies clean hands doctrine at the point that it fashions a remedy. *Id.* at § 933(2) & cmt. c; *Cortez v. Purolator Air Filtration Products Co.*, 999 P.2d 706, 722 (Cal. 2000) (same).

In fact, clean hands does not apply at all in matters of statutory duties such as the duty of fair representation. *See Mendoza v. Ruesga*, 86 Cal.Rptr.3d 610, 617 (2008). "To allow such a defense would be to judicially sanction the defendant for engaging in an act declared by statute to be void or against public policy." *Id.*

D. The Court Ought to Exclude Evidence Unless it is Relevant to One of the Three Issues Raised in Plaintiffs' Case-in-Chief.

Plaintiffs can and will limit their case-in-chief to three issues. Because USAPA has no affirmative defenses, it has no basis to introduce any matters into the trial that are extraneous to these issues. Plaintiffs' case-in-chief and USAPA's defense, therefore, should be confined to matters that are relevant to the determination of whether USAPA: (1) was created so that the East Pilots could use their majority power to disregard the Nicolau Award; (2) promised that, if elected as the bargaining representative, it would use East Pilot majority power to disregard the Nicolau Award; or (3) adopted the East Pilot seniority position without procedures that gave due consideration to West Pilot views.

In their separately filed motions *in limine*, Plaintiffs demonstrate that Defendant plans to introduce substantial evidence that has no bearing on Plaintiffs' case-in-chief. This evidence can be grouped into approximately nine (9) discrete categories—whether: (1) the Nicolau Award is fair and equitable; (2) Date-of-hire seniority integration is used in other contexts; (3) ALPA Merger Policy or ALPA itself is at fault; (4) USAPA acted rationally after it determined it would disregard the Nicolau Award; (5) USAPA complied with its Constitution; (6) West Pilots committed "bad

acts"; (7) Expert testimony and statistical evidence that was not timely produced or disclosed; (8) grievances pending or resolved before other tribunals or authorities, and (9) the status of current negotiations between USAPA and the Airline for a single collective bargaining agreement. The Court should exclude all such evidence and argument from the liability trial.

III. CONCLUSION

The Court should limit USAPA to introducing evidence and argument that is relevant to one of the three factual components of Plaintiffs' case-in-chief. Plaintiffs will be denied a fair trial if USAPA is permitted to re-litigate the Nicolau Award by introducing evidence of the history of the two airlines, their respective financial condition, the status of actual pending or potential bankruptcy remedies, and whether the Nicolau Award created a "windfall" to West Pilots that the jury should correct. Plaintiffs will also be denied a fair trial if USAPA is permitted to shift blame for its breach of the duty of fair representation to ALPA, justify its seniority proposal, or influence the jury by bad acts of a few West Pilots. USAPA should also be precluded from presenting expert testimony or evidence that was not timely disclosed, evidence relating to grievances pending elsewhere, or evidence relating to the negotiations of other provisions in the collective bargaining agreement. Plaintiffs bring their separate motions *in limine* to prevent disruption of the scheduled trial by allowing USAPA to introduce irrelevant or misleading evidence that may lead to unfair prejudice and jury confusion.

Dated this 7th day of April, 2009

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By: *Don Stevens*

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2009, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

I further certify that on April 7, 2009, I caused a paper courtesy copy of the foregoing document and the Notice of Electronic Filing to be delivered to the assigned Judge:

s/ *Don Stevens*