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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.

Don ADDINGTON, *et al.*,

Plaintiffs,

vs.

Steven H. BRADFORD, *et al.*,

Defendants.

CASE NOS.
2:08-CV-1633-PHX-NVW
2:08-CV-1728-PHX-NVW

(Consolidated)

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT USAPA'S RULE 50 MOTION AND RENEWED MOTION FOR LEAVE TO FILE RULE 56 MOTION, BOTH ON DEFENSE OF LACK OF JURISDICTION FOR LACK OF RIPENESS

Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, on behalf of the West Pilot Class file *Plaintiffs' Response in Opposition to Defendant USAPA's Rule 50 Motion & Renewed Motion for Leave to File Rule 56 Motion, Both on Defense of Lack of Jurisdiction for Lack of Ripeness* (doc. 418). This motion is entirely based on the purported lack of actual injury-in-fact. The Court should deny this motion because, as set out in *Plaintiffs' Trial Brief*

on Contested Issues of Law (doc. 355), there is actual injury-in-fact caused by the conduct at issue. This Response is supported by the Memorandum of Points and Authorities that follows.

Memorandum of Points and Authorities

I. LEGAL STANDARDS

A. The Court's focus is on the pretrial order (and evidence).

The litigation has gone far beyond testing the sufficiency of the Complaint. "When an issue is set forth in the pretrial order, it is not necessary to amend previously filed pleadings because the pretrial order is the controlling document for trial." *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) (internal quotation marks omitted).

> Under Fed.R.Civ.P. 16(e), a pretrial order "shall control the subsequent course of the action unless modified by a subsequent order," and the order "shall be modified only to prevent manifest injustice." Issues not preserved in the pretrial order are eliminated from the action.

Pierce County Hotel Employees & Restaurant Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324, 1329 (9th Cir. 1987) (citations omitted).

Moreover, even where not identified in the pretrial order, plaintiffs are entitled to any remedy supported by the trial evidence. *See* Fed. R. Civ. P. 54(c) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."). Indeed, "if evidence is presented creating a jury question on such relief, the judge commits reversible error in not instructing the jury on that issue." *Scutieri v. Paige*, 808 F.2d 785, 792 (11th Cir. 1987) (addressing punitive damages).

The Court, therefore, should disregard Defendant's argument directed at the pleadings and prior filings. Its focus should be on how the case is defined in the pretrial order and by the evidence in Plaintiffs" case-in-chief.

B. Defendant's motion is limited to ripeness.

Defendant's entirely bases its motion on the "defense of lack of jurisdiction for lack of ripeness." (Mot. 1:13-15.) Defendant asserts only that it is "entitle to judgment on ripeness," nothing more. (Id. at 13:8). Defendant offers no other basis for relief. The Court, therefore, can (and should) deny relief if—as a matter of law—ripeness is satisfied.

C. Ripeness is satisfied by injury-in-fact.

Duke Power Co. v. Carolina Environmental Study group, Inc., 438 U.S. 59 (1978), "collapse[d] the article III ripeness inquiry into the article III standing inquiry and … alter[ed] the primary policy of ripeness from a concern with the issues to a **concern with the plaintiff's cognizable injury in fact.**" Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 Tex. L. Rev. 273, 298 (1980) (emphasis added). Hence, the Supreme Court later acknowledged:

> The term "standing" subsumes a blend of constitutional requirements and prudential considerations…. [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or **threatened injury** as a result of the putatively **illegal conduct of the defendant**, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-472 (1982) (citations and quotation marks omitted, emphasis added).

"[S]tanding doctrine" and, therefore, ripeness, "requires that the plaintiff demonstrate both a fairly traceable causal connection between the claimed injury and the challenged conduct, and a substantial likelihood that the relief requested will redress the injury claimed." *Pacific Legal Foundation v. State Energy Resources Conservation & Development*

Commission, 659 F.2d 903, 910-11 (9th Cir. 1981) (citing *Duke Power Co. v. Carolina Environmental Study group, Inc.*, 438 U.S. 59 (1978)).

In short, ripeness is an inquiry into injury-in-fact. Ripeness, therefore, is satisfied if Plaintiffs show actual injury-in-fact. If there is actual injury-in-fact the Court should deny Defendant's motion.

II. APPLICATION OF LEGAL STANDARDS

A. The Pre-Trial Order (doc. 417) identifies injury-in-fact.

Because the pretrial order (and evidence) now define the case, Defendant must show that no injury-in-fact is identified in that Order (or by the evidence) to show lack of ripeness. The pretrial order identifies two wrongful aspects of USAPA's conduct: that USAPA committed itself to disregarding the Nicolau Award, and that USAPA adopted and promoted a seniority policy other than the Nicolau Award. USAPA does not deny either. It does not assert that Plaintiffs failed to prove either in their case-in-chief. (See Order at 33 (Apr. 30, 2009) (doc. 417).) Rather, USAPA argues (in effect) that this has not (and cannot) caused actual injury-in-fact.

B. USAPA caused injury-in-fact satisfies ripeness.

1. USAPA has caused actual injury to the "Nicolau Right."

Plaintiffs claim (and the evidence shows) that the parties to the Transition Agreement and Nicolau Arbitration agreed to the following: (1) to treat the outcome of the arbitration as a final and binding integration of the East Pilot and West Pilot seniority lists for purposes of the Transition Agreement, (2) to negotiate a single integrated CBA implementing that list, and (3) to present that single integrated CBA and integrated seniority list to the pilot groups for a good faith ratification vote. Plaintiffs have cognizable rights arising from these agreements. *See Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1103 (2d Cir. 1991) (holding that workers who "voluntarily and actively" participated through representatives in a merger

related seniority arbitration were "bound by its outcome"). USAPA neither denies these facts nor assert that Plaintiffs failed to prove these facts in its case-in-chief.[1]

As explained in Plaintiffs' Trial Brief, the Transition agreement and Nicolau Arbitration established the "Nicolau Right," the right to require implementation of the Nicolau Award as a condition of integrated operations. (Id. at 2: 19-21). The Nicolau Right is protected by separate ratification—because separate ratification prevents the East Pilots from using their majority power to implement a single CBA over West Pilot objections.

2. The Nicolau Right is a statutory procedural right.

The Nicolau Right provides Plaintiffs the right to preclude: (1) reopening the question of seniority integration, (2) negotiating a single CBA that would not use the Nicolau Award, and (3) implementing a single CBA without West Pilot ratification. The Nicolau Right is a statutory "procedural right," a right to require or prevent certain procedures to protect a concrete right, to the extent that the RLA imposes a duty on USAPA to not act in derogation of the Nicolau Award absent a legitimate union objective. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish

[1] Transition Agreement § IV(A) provides: "The seniority lists … will be integrated in accordance with ALPA Merger Policy." (Trial Ex. 21, ADD 2624.) ALPA Merger Policy Part 1, § 1(D)(3) states that an arbitrated integrated list, "shall not be subject to ratification." (Trial Ex. 3, ADD 0096.) Ken Stravers testified: "In the case of a merger, there is no ratification; it is just the six of us that decide what is a fair and equitable settlement for a combined seniority list." (Tr. 399:7-9.)

> with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. at n.7.

Lujan requires a plaintiff to show two essential elements for procedural standing: (1) that he or she is a "person who has been accorded a procedural right to protect [his or her] concrete interests...." *id.*, and (2) that the plaintiff has "some threatened concrete interest ... that is the ultimate basis of [his or her] standing." *Id.* at n.8. In addition, plaintiffs must show that their interest falls within the "zone of interests" that the challenged statute is designed to protect. *Douglas County v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995).

The Nicolau Right, *vis a vis*, USAPA is a right to procedures that were agreed to in the Transition Agreement and intended to protect the finality of the Nicolau Award.

3. There is injury to the Nicolau Right.

USAPA admits that it reopened the question of seniority integration, that it is negotiating a single CBA that would not implement the Nicolau Award, and that it established governance where the West Pilots had no right of separate ratification. USAPA, therefore, admits that it abrogated all three elements of the Nicolau Right. It claims it did so under the guise of breaking a "log-jam."[2] USAPA's motive, however, is immaterial to ripeness analysis. USAPA's motive may affect its liability but it does not affect Plaintiffs' standing to determine that liability. There is no question, therefore, that there is actual injury to the Nicolau Right.

[2] Plaintiffs can provide citation to the record when available.

4. There is actual injury-in-fact.

Injury needed to establish ripeness "need not be monetary or tangible; even psychological or aesthetic injury is sufficient." *Bertulli v. Independent Assn. of Continental Pilots*, 242 F.3d 290, 295 (5th Cir. 2001). So long as injury is "personal," it can be an injury to procedural rights, "particularly procedural rights protected by statute." *Id.* In other words, *Bertulli* establishes that the duty of fair representation can establish procedural rights that are analyzed for standing under *Lujan*.

The Nicolau Right, as shown above, is a statutory procedural right. Injury to the Nicolau Right, therefore, is injury-in-fact, satisfying ripeness considerations.

5. This case is distinguishable from *Breeger*

Breeger v. USAPA, Case No. 3:08CV490-RJC-DSC (W.D.N.C. Apr. 23, 2009), is distinguishable. The issue there is whether USAPA should give actual date-of-hire seniority to a group of pilots who merged into the old US Airways more than 10 years ago. (See doc. 402 at page 2.) The *Breeger* plaintiffs do not complain about any procedures that USAPA has employed. They complain only about the substance of the results of those procedures. Plaintiffs here do not complain about the result of USAPA's reopening the seniority dispute—they complain that it was reopened at all. That is a procedural claim—quite different from the claim in *Breeger*.

III. CONCLUSION

Plaintiffs claim injury arising from USAPA reopening the seniority integration dispute. USAPA's scheme, beginning prior to NMB certification and continuing to the present, has been to impair Plaintiffs rights flowing from the finality of the Nicolau Award. Because this scheme, in fact, has

impaired these rights, Plaintiffs satisfy ripeness and the Court should deny Defendant's motion.

Dated this 4th day of May, 2009.

POLSINELLI SHUGHART PC

By: */s/*

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CERTIFICATE OF SERVICE

I hereby certify that on May 4th, 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 to CM/ECF registrants.

s/ *Andrew S. Jacob*