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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' OBJECTION TO SECOND ISSUE OF LAW IN FINAL PRETRIAL ORDER FOR BENCH TRIAL

PRELIMINARY STATEMENT

This Court dismissed US Airways from this matter for lack of subject matter jurisdiction and expressly stated that any remedy awarded to Plaintiffs must be limited to defendant USAPA. Nevertheless, Plaintiffs have continued to seek relief against US Airways. Specifically, the second issue of law Plaintiffs submitted in their Proposed Final Pretrial Order for Bench Trial, which this Court incorporated into its Final Pretrial Order for Bench Trial, seeks to compel US Airways to submit to "NMB mediation/arbitration." Because, as this Court has recognized, it has no jurisdiction over US Airways, the Company requests that the Court strike that issue from the Order.

PROCEDURAL HISTORY

Plaintiffs are six pilots employed by US Airways, Inc. ("US Airways" or the "Company") who originally brought this action against the Company and defendant US Airline Pilots Association ("USAPA" or the "Union"). On November 20, 2008, this Court granted US Airways' motion to dismiss all claims against it on the grounds that the Court lacks subject matter jurisdiction over US Airways. (Dkt. No. 84.) The Court held that "no remedy lies against the company in this Court." (*Id.* at p. 17) USAPA is the only remaining defendant in this action.

As the Court recognized in dismissing US Airways from the case, the dispute between Plaintiffs and US Airways is a "minor dispute" subject to the exclusive jurisdiction of a System Board of Adjustment pursuant to the Railway Labor Act. (*Id.* at p. 14.) In fact, Plaintiffs have a grievance against US Airways pending before the relevant System Board of Adjustment with an arbitrator sitting as the sole neutral decision maker. That grievance asserts the same claims against US Airways that were dismissed in this matter, and is set for a three-day hearing on May 27-29, 2009.

In the Case Management Report, Plaintiffs stated a request for injunctive relief "that would preclude the Company from furloughing" pilots in a certain manner. (Dkt. No. 109; Case Management Report at § 3.a.v.) US Airways filed a Response to the Case Management Report objecting to Plaintiffs' continued attempts to seek relief from the Company following its dismissal from the action. (Dkt. No. 110.)

At the Case Management Conference, this Court rejected Plaintiffs' assertion that, "the order to USAPA, the remedy you would fashion because you found a DFR might include US Airways and the implication or the imposition of either interim or permanent restrictions on what the airline could do," stating: "THE COURT: I am extremely skeptical of that. I think that's exactly what I ruled I cannot do, that your remedy against the union is limited to the union. And that may have some other consequences for the Railway Labor Act that we haven't even touched on." (Dec. 15, 2008 Tr. at 46:15-47:1.) As for US Airways' own objections, the Court stated: "Now, as to the -- let me briefly address US Airways. I don't see any smuggled in injunction against US Airways here. I thought I threw that out. So I appreciate your lawyerly paranoia, but I'm not seeing a problem for you there in this case." (*Id.* at 27:21-25.)

While the Court's rulings on this matter are crystal clear, Plaintiffs have continued to seek relief against the Company. In the Final Pretrial Order for Bench Trial, dated May 1, 2009, the Court adopted Plaintiffs' proposed second issue of law: "Whether USAPA so violated its duty of fair representation that ***the Court should order the airline*** and USAPA to submit to NMB mediation/arbitration to create and implement a single joint collective bargaining agreement that incorporates the Nicolau Award seniority list." (Dkt. No. 420 at p. 3; emphasis added.) US Airways respectfully requests that the Court strike that issue from the Order.

DISCUSSION

I. Plaintiffs Cannot Obtain Relief Against US Airways.

Plaintiffs' continued requests for relief against US Airways violate the basic and straightforward principle of law that the Court cannot issue a remedy against one who is not a party to the action and over which it has no jurisdiction — a principle that this Court has repeatedly stated to Plaintiffs. Plaintiffs were fully heard on US Airways' motion to dismiss for lack of subject matter jurisdiction, and they cannot now disregard the Court's ruling by seeking relief from US Airways anyway.

The second issue of law in the Final Pretrial Order for Bench Trial suggests that if Plaintiffs can establish liability as to defendant USAPA, the Court should somehow issue an injunction against not only USAPA but also US Airways. But, as the Court recognized in

dismissing US Airways for lack of subject matter jurisdiction and again at the Case Management Conference, it has no authority to issue such relief. *See* Dkt. No. 84 at pp. 14-17; Dec. 15, 2008 Tr. at 46:15-47:1; *see also Zepeda v. United States Immigration & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir. 1983) (a court "may not attempt to determine the rights of persons not before the court"); Fed. R. Civ. P. 65(d) (court may enjoin a party or an officer, agent, servant, employee, or attorney of a party, or persons in active concert with them); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009) ("The text of Rule 65(d) is exclusive, stating that an injunction can permissibly bind 'only' those persons listed in Rule 65(d).").

Plaintiffs' second issue of law — "[w]hether USAPA so violated its duty of fair representation that the **Court should order the airline** and USAPA to submit to NMB mediation/arbitration . . ." — is a non sequitur. It is simply not possible for a party to "so violate" its duties that injunctive relief somehow becomes proper against a non-party over whom the Court has no subject matter jurisdiction. If USAPA violated its duties, then any remedy must be as to USAPA alone. As this Court held in dismissing the Company from the case, the Court has no subject matter jurisdiction over US Airways, and "no relief can be granted by this court in the absence of subject matter jurisdiction." (Dkt. 84 at p. 14.)

II. The Requested Relief Would Also Violate US Airways' Contractual and Statutory Rights.

In the Issue of Law that US Airways requests the Court to strike, Plaintiffs seek an order compelling US Airways and USAPA to "submit to NMB mediation/arbitration to create and implement a single joint collective bargaining agreement that incorporates the Nicolau Award seniority list." While, as this Court has recognized, relief against US Airways is not possible in this matter regardless of the nature of that relief given the Court's lack of jurisdiction, the specific relief Plaintiffs request is particularly inappropriate because it would contravene US Airways' statutory and contractual rights respecting the negotiation of a collective bargaining agreement.

Plaintiffs' request for an order compelling "mediation" before the NMB would violate US Airways' contractual rights because it is contrary to the process of private mediation to which US Airways and the unions representing its pilots agreed. As this Court is aware, at the time of US Airways' merger with America West, the airlines and the unions representing their employees

entered into a "Transition Agreement" to govern the parties' relationship pending a combination of the two airlines' operations. (Declaration of E. Allen Hemenway in Support of US Airways' Objection to Second Issue of Law in Final Pretrial Order for Bench Trial ("Hemenway Decl.") ¶ 2, Exh. A.) The Transition Agreement provides that the parties will appoint one of five named mediators from the National Academy of Arbitrators to assist the parties in negotiating a collective bargaining agreement. (Hemenway Decl. ¶ 2, Exh. A at § V.) This, rather than NMB mediation, is the agreed-upon mediation procedure to which US Airways is entitled as a matter of contract.

Significantly, US Airways has already instituted mediation under Section V of the Transition Agreement by sending a letter to USAPA on April 24, 2009. (Hemenway Decl. ¶ 3, Exh. B.) Therein, US Airways invoked its contractual "rights to use the services of one of the mediators listed in Section V of the Transition Agreement." The private mediator panel in the Transition Agreement is a list of reputable, nationally-known labor experts who specialize in the airline industry, in whom US Airways has complete confidence as regards facilitating an agreement. Indeed, that is why US Airways invoked the contractual mediation procedure. Accordingly, to the extent that Plaintiffs seek to have US Airways and USAPA engage in mediation over the terms of a collective bargaining agreement, such mediation already is in the works. It will take place, however, before a private mediator agreed to by the parties.

Plaintiffs also request an order compelling US Airways to submit to "NMB arbitration." Such an order would violate US Airways' rights under the Railway Labor Act. Under the RLA, the NMB may proffer the option of arbitration to parties unable to reach agreement through mediation, and if *both* parties agree, an independent arbitrator is appointed or selected. But, the RLA does not require either party to accept the NMB's proffer of arbitration, and thus a party cannot be compelled to arbitration under the RLA. *See* Section 7, First of the RLA (45 U.S.C. § 157) (a controversy between a carrier and employees "may, by agreement of the parties to such controversy, be submitted to the arbitration . . . Provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.").

US Airways has not agreed, in the Transition Agreement or otherwise, to engage in arbitration to establish the terms of the collective bargaining agreement being negotiated by the parties. Absent such agreement, US Airways cannot be compelled to arbitration. A contrary rule would dramatically change the legal landscape from one in which the government encourages parties to reach agreements regarding the terms and conditions of employment to one in which the government compels the parties to accept the terms and conditions of employment that the government dictates. Plaintiffs' request that the Court compel US Airways to participate in arbitration would violate US Airways statutory right to refuse arbitration — and it demonstrates the danger inherent in any request by Plaintiffs' for relief against a non-party over whom the Court has no jurisdiction.

CONCLUSION

For the foregoing reasons, US Airways respectfully requests that the Court strike the second issue of law from the Final Pretrial Order for Bench Trial.

RESPECTFULLY SUBMITTED this 5th day of May, 2009.

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