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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 NOS. 2:08-CV-1633-PHX-NVW 2:08-CV-1728-PHX-NVW (Consolidated) **PLAINTIFFS' RULE 50 MOTION FOR DIRECTED VERDICT ON FOUR POINTS OF LAW.**
Don ADDINGTON, *et al.*, Plaintiffs, vs. Steven H. BRADFORD, *et al.*, Defendants.	

Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, on behalf of the West Pilot Class file *Plaintiffs' Rule 50 Motion for Directed Verdict on Four Points of Law*. Pursuant to Rule 50(a)[1], Plaintiffs are entitled to partial directed verdict as to all of the following:

(1) USAPA's seniority proposal is substantially less favorable to West Pilots than the Nicolau Award;

[1] All references to "Rules" are to the Federal Rules of Civil Procedure.

(2) USAPA has no affirmative defenses to liability for breach of the duty of fair representation;

(3) ALPA had authority to compel completion of negotiation of a tentative single CBA incorporating the Nicolau Award and its presentation for ratification;

and

(4) Revisiting the seniority dispute could not (and was not expected to) benefit the bargaining unit as a whole.

If the Court grants this motion the jury would decide whether USAPA's purported intention to resolve an impasse was pretextual. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (holding in a related context that "the plaintiff … must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.").

This Motion is supported by the Memorandum of Points and Authorities that follows.

Memorandum of Points and Authorities

I. LEGAL STANDARDS

In deciding a Rule 50(a) motion, the Court determines, as a question of law, "whether evidence is sufficient to create an issue of fact for the jury." *Lange v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1181 (9th Cir. 1988).

> Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." The standard for granting judgment as a matter of law "mirrors" the standard for granting summary judgment.

Murray v. Chicago Transit Authority, 252 F.3d 880, 886-87 (7th Cir. 2001); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) (same).

II. LEGAL ARGUMENT

A. USAPA's seniority proposal is substantially less favorable to West Pilots than the Nicolau Award.

None of the evidence on the effect of conditions and restrictions is dispositive because, at best, it only allows a comparison of "apples to oranges." The only clear way to compare the two seniority schemes is in the context of catastrophic furloughs—furlough of 25% or more of the pilot list. Only then can there be a like comparison. Given that the merger began with 33% of the East Pilot seniority list on furlough, the risk of this condition is a very valid concern to the West Pilots.

Brian Stockdell, a West Pilot, gave uncontroverted testimony as follows:

> Q. What is a catastrophic reduction?
>
> A. They define catastrophic reduction as in the event of a reduction to 75 percent. In other words, we have 25 percent of our pilots furloughed.
>
> Q. Was US Airways at the time of the merger in a catastrophic reduction mode?
>
> A. Yes. They had -- that 1,691 represented 33 percent of their pilot force at the time of the merger.
>
> Q. And in the event of catastrophic reduction how are the furloughs determined?
>
> A. They're determined by that list, and 25 percent takes us up to just about where Addington is right around 38 to 3900. Right about there, yes. In the catastrophic reductions, specifically bypasses, all conditions and restrictions are suspended.
>
> * * *
>
> Q. On the USAPA date-of-hire list, who is at the greatest risk for any future furloughs in these economic times?
>
> A. The blue there at the bottom, which is the West Pilots.
>
> Q. On the USAPA list, how would the risk or the burden of furloughs, how would that be shared if the Nicolau List was in effect?
>
> A. If Nicolau was in effect? Well, the first pilots would be -- the first pilots that would be furloughed would be the pilots that were on furlough at the time of the merger, and after that it would be the -- it would be shared on a pro rata basis.

(Tr. 765:2- 766:19 (including additional relevant testimony).)

Prior to the October 2008 furloughs there were about 5500 active pilots. A 25 % reduction would be equivalent to a loss of about 1,370 pilot positions. Pilots hired after the merger would account for about 150 of those furloughs. That leaves 1,220 more to furlough.

Under the Nicolau Award of these 1,220 furloughs the first 750 would fall on the East Pilots who were recalled after the merger. That would leave 470 furloughs to apportioned in a ratio of approximately 1:2 between West and East such that a total of about 157 furloughs would fall on West Pilots.

Under the USAPA date-of-hire seniority list hardly any of the of the 1,220 furloughs would fall on East Pilots, not even the East Pilots who did not bring jobs to the merger. Rather nearly all of 1,220 would fall on West Pilots, all of whom had jobs at the time of the merger.

In other words, with a 25% reduction of service, eight times as many West Pilots would be furloughed under USAPA's seniority scheme as would be furloughed under the Nicolau Award. Eight times!

Given the gross disparity set out above, the Court must find that the evidence permits only one rational conclusion—that USAPA's seniority proposal is substantially less favorable to West Pilots than the Nicolau Award. The Court should enter directed verdict to that effect.

B. USAPA has no affirmative defenses to liability for breach of the duty of fair representation.

"An affirmative defense raises matters extraneous to the plaintiff's prima facie case." *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986). There are no such affirmative defenses here to DFR liability here.

First, because it does not exist under the RLA, there is no affirmative defense of failure to exhaust internal union remedies. *See Clayton v.*

International Union, 451 U.S. 679, 683 (1981). "The Railway Labor Act provides no [extrajudicial] remedy for grievances between employees and unions where the allegation is that the union breached its duty of fair representation." *Crusos v. United Transp. Union, Local 1201*, 786 F.2d 970, 973 (9th Cir. 1986).

Second, mitigation of damages is not an affirmative defense because the jury is only considering liability and mitigation is a defense only to damages:

> 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). "Unlike most affirmative defenses, mitigation of damages is not a defense that, if proven, constitutes an absolute bar to the plaintiff's claim." *Monahan v. Obici Medical Management Services, Inc.*, 628 S.E.2d 330, 337 (Va. 2006). Mitigation "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).

Next, a union's proof that its actions were allowed or required by its constitution or bylaws is not an affirmative defense to violation of the duty of fair representation. *Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, AFL-CIO*, 453 F.2d 1018, 1024-25 (9th Cir. 1972) ("It is no answer to say that the complaint relates to appellee union's "internal" policies and practices. The duty of fair representation 'arises out of the union-employee relationship and pervades it.'").

Finally, it is no affirmative defense to disprove violation of one or two of the three components of the duty of fair representation. Unfair representation can be established with proof that "a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory ***or*** in

bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190 (1967) (emphasis added). "[E]ach of these requirements represents a distinct and separate obligation." *Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 617 (9th Cir. 2003).

The Court, therefore, should enter directed verdict that Defendant does not have any affirmative defenses.

C. ALPA had authority to compel completion of negotiation of a tentative single CBA incorporating the Nicolau Award and its presentation for ratification.

Under the terms of the ALPA Constitution, ALPA National had the power to appoint a trustee to act in place of the East MEC. This is proven by Douglas Dotter's uncontroverted testimony that, when the East Pilots refused to participate in joint CBA negotiations, one "option" for ALPA was "appointing of a trustee, which was a possibility and we were advised to prepare for negotiations to do just that." (Tr. 372:9-11.) He explained that ALPA's:

> Constitution and Bylaws has a provision … that provides for … either the president of the association, in this case John Prater or the executive board, to put either an individual local counsel or the entire MEC of an airline into what is called receivership, meaning they would take away their authority to act on behalf of the pilots for the airline that they represent. In that scenario, the president, or the executive board, can then appoint either a trustee or a group of individuals that act as a trustee to conduct the affairs of that airline and act on behalf of that pilot group.

(Id. at 372:13-20.) Indeed, ALPA had already started to take such steps, placing the Philadelphia LEC under a trustee early in 2008. (Id. at 373:4-14; see also id. at 342:11-17; 342:23-343:4.).

Uncontroverted documentary evidence supports Mr. Dotter's testimony. These documents show that ALPA had power and authority to take over negotiation of the single CBA and to present the single CBA for ratification.

It could do so because there is no question that the East MEC was acting to frustrate ALPA Merger Policy.

To start, ALPA Merger Policy states that "[a]ny attempt by a member or members of ALPA to obtain an agreement which would operate to frustrate the objectives of this policy shall be considered an act contrary to the best interests of ALPA and its members." *ALPA Merger Policy*, Part 3 § C (Ex. 3, ADD0107). This provision is important because acts contrary to the best interests of ALPA and its members trigger a series of events according to the ALPA Constitution—events that provide substantial power and authority for ALPA National to intervene in the affairs of a MEC.

> ARTICLE XIX, SECTION 1 - REPRESENTATION
>
> A. The President of the Association … is authorized to take corrective action against an airline Master Executive Council or Local Executive Council, … if any such Council … **violates or fails to comply with any of the provisions** of the Constitution and By-Laws of the Association or **policies** … or exposes the Association to detrimental consequences by engaging in a **substantial failure to perform significant legal or representational duties of a bargaining representative**.
>
> B. Such corrective action may include, in the case of a Master Executive Council or Local Executive Council, the suspension or revocation of recognition of such Master Executive Council or Local Executive Council, its dissolution, the suspension or removal of any of its officers or committees or representatives and the **designation of a Trustee or Trustees** over the affairs and property of the Master Executive Council or Local Executive Council.

(Ex. 509, ADD 5060.) (ALPA Constitution.)

Indeed, by the end of 2007, ALPA began to take steps to compel the East Pilots to negotiate a single CBA implementing the Nicolau Award. Evidence of this is found in correspondence from the President of ALPA directed at the East MEC.

On September 20, 2007, ALPA President Prater wrote:

> [T]here is no basis for the Executive Council to further consider the [East Pilot] request to set aside the Award. The Executive Council further finds that there is no basis for setting aside the

> Award, which under Merger Policy is now to be defended by ALPA as issued by the Arbitration Board.

(Ex. 28, USAPA0312.)

On October 1, 2007, Prater wrote the Chairman of the East MEC as follows:

> With respect to the … merger, it is time for the MEC to comply with its representational and legal obligations under the Constitution & By-Laws, ALPA Merger Policy, the Transition Agreement, and implementing resolutions of the Executive Council. The MEC, at this meeting, should adopt a resolution (or resolutions) reversing all prior efforts to bar or precondition the continuation of joint negotiations.
>
> * * *
>
> ["T]he MEC should also adopt a resolution recognizing that the award is to be included in the single agreement to be negotiated under the Transition Agreement and Merger Policy, provided only that the Association and all MECs will comply with valid court orders, if any, affecting the terms of the award.

(Ex. 19, ADD2151-52.)

In short, the ALPA Constitution empowered ALPA National to compel negotiation of a single CBA that would implement the Nicolau Award. The Court should enter directed verdict to that effect.

D. Revisiting the seniority dispute could not (and was not expected to) benefit the bargaining unit as a whole.

The Supreme Court holds that union nonmembers need pay only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 448, (1984). "Necessary duties" are "those functions that are germane to collective bargaining, contract administration or grievance adjustment." *United Food and Commercial Workers Union, Local 1036 v. N.L.R.B.*, 307 F.3d 760, 765 (9th Cir. 2002) (internal quotation marks omitted).

A nonmember must pay to avoid the free-rider problem, where the nonmember enjoys benefits that accrue to the bargaining unit as a whole without paying for them. It logically follows that the analysis that determines what union expenses can be charged as a nonmember agency fee also determines what is a benefit to the bargaining unit as a whole for purpose of DFR analysis. *Ellis* and *United Food Workers* teach that an activity or goal benefits the bargaining unit as a whole if it (1) obtains overall better rights to pay and working conditions for the bargaining unit, (2) enforces existing rights to pay and working conditions, or (3) strengthens the unions position to better obtain or enforce rights to pay and working conditions.

Merely reallocating pay or working conditions within the bargaining unit does not meet any of the goals enumerated above absent unusual circumstances. The district court that was reviewed in *Rakestraw* explained reallocation in terms of "a zero-sum game," as follows:

> In other words, once union and management settle a dispute about seniority, the union's duty of fair representation prevents reopening the issue--for the only outcome is to prefer one group of employees over another in a zero-sum game.

Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1529 (7th Cir. 1992). Although the court got the concept right, its application of the concept was flawed because it failed to recognize that rewarding loyal members of the bargaining unit at the expense of members who cross picket lines "strengthen[s] the hand of organized labor in future conflicts with management." *Id.* at 1535. Under that particular circumstance, a zero-sum game is a benefit to the bargaining unit as a whole.

In the present matter, USAPA effectively reopened a seniority dispute that was settled by the Transition Agreement and the procedures invoked by that contract. This too was a zero-sum game. Unlike *Rakestraw*,

however, it did nothing to strengthen the union's leverage with the Airline. To be clear, by merely reallocating seniority, USAPA neither obtained, nor had any basis to expect to obtain, better rights to pay or working conditions and it did not improve, or have any basis to expect to improve, its leverage to obtain better rights for the bargaining unit in the future.

USAPA's argument cannot succeed. It starts with a premise that date-of-hire is *per se* a benefit to a bargaining unit. It then argues that a transaction promoting date-of-hire promotes a benefit to the bargaining unit as a whole. This, however, is merely a circular argument. There is no evidence to support USAPA's premise in general, or in this matter specifically. Common sense tells us that a bargaining unit is harmed when a settled dispute is reopened.

The Court, therefore, should enter directed verdict that revisiting the seniority dispute here could not, and was not expected, to benefit the bargaining unit as a whole.

III. CONCLUSION

For the reasons set our above, Plaintiffs respectfully ask the Court to enter the following four directed verdicts:

(1) USAPA's seniority proposal is substantially less favorable to West Pilots than the Nicolau Award;

(2) USAPA has no affirmative defenses to liability for breach of the duty of fair representation;

(3) ALPA had authority to compel negotiation of a tentative single CBA incorporating the Nicolau Award and its presentation for ratification;

and

(4) Revisiting the seniority dispute could not (and was not expected to) benefit the bargaining unit as a whole.

Dated this 7th day of May, 2009.

POLSINELLI SHUGHART PC

By: */s/*

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CERTIFICATE OF SERVICE

I hereby certify that on May 7th, 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*