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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, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS RULE 56 SUMMARY JUDGMENT MOTION ON PLAINTIFFS' DAMAGE CLAIMS**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

I. INTRODUCTION.

Defendant USAPA by its undersigned attorneys submits this memorandum of law in support of its motion for summary judgment pursuant to Fed. R. Civ. P. 56 on all Plaintiffs' damages claims. Pursuant to LRCiv 56.1(a), Defendant has separately filed "Defendant's Statement of Material Facts Pursuant To LRCiv 56.1" (hereinafter, "Statement of Facts") which sets forth each material fact upon which Defendant relies in support of its motion for summary judgment.

Because there is no genuine issue of material fact, and Defendant is entitled to judgment as a matter of law, summary judgment on Plaintiffs' damages claims is appropriate and warranted under Rule 56.

II. APPLICABLE LAW.

Under Fed. R. Civ. P. 56 "summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1117 (9th Cir. 2009) (*quoting* Fed. R. Civ. P. 56(c)). "When determining whether a genuine issue of material fact remains for trial, we must view the evidence and all inferences therefrom in the light most favorable to the non-moving party and may not weigh the evidence or make credibility determinations." *Id*. at 1117-18 (*citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Once a movant meets this initial burden, the non-movant must then demonstrate

summary judgment is not appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To make such a showing, the non-movant must go beyond the pleadings to designate specific facts showing a genuine issue for trial. *Id*.

An issue is genuine only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

On appellate review the Ninth Circuit will review a district court's grant of summary judgment *de novo*. *McDonald v. Sun Oil Co*., 548 F.3d 774, 778 (9th Cir. 2008); *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1033 (9th Cir. 2005); *Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1138 (9th Cir. 2001).

III. ARGUMENT.

1) There Is No Genuine Issue Of Material Fact That USAPA Has Not Caused Any Loss.

It is axiomatic that damages that are not *caused* by a defendant's claimed or proven wrong-doing are not recoverable. The rule is no different in the context of the duty of fair representation. Here, there can be no damages awarded to Plaintiffs without their first proving causation, i.e., that the Defendant's claimed violation of the duty actually caused compensable loss. *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967) (applying apportionment of damages "according to the damage caused by the fault of each"); *Acri v. IAM Lodge 115*, 781 F.2d 1393, 1397 (9th Cir. 1986) (applying causation analysis in

DFR contract negotiation circumstances); *Brown v. UAW*, 689 F.2d 69, 71 (6th Cir. 1982); *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 580 (8th Cir. 1981); *Deboles v. Trans World Airlines*, 552 F.2d 1005, 1018 (3d Cir. 1976), *cert. denied*, 434 U.S. 837, 54 L. Ed. 2d 98, 98 S. Ct. 126 (1977).

Plaintiffs' damages claims are predicated on the assertion that jobs, wages and benefits were lost *because the Nicolau seniority list had not earlier been "implemented"* in a ratified new, single collective bargaining agreement (CBA). (Amended Complaint, Doc. # 86 at ¶¶ 77-82; *e.g.*, injuries will continue to "until USAPA and Defendant US Airways implement a single CBA that applies the Nicolau List" at ¶ 82).

Nevertheless, with respect to the issue of causation, there can be no genuine issue about the following material facts:

First, pursuant to the Transition Agreement ("TA") separate operations are to be maintained until implementation of a new, single CBA. (Statement of Facts, ¶ 7).

Second, also pursuant to the TA, **no integrated seniority list could ever be implemented without a new, single CBA**. (Statement of Facts, ¶ 8).

Third, the Transition Agreement and ALPA Merger Policy **set no timetable** to agree on a new, single CBA. (Statement of Facts, ¶ 9). The company and predecessor union were in agreement that there was no timetable. *Id*.

Fourth, the Transition Agreement contains no provision limiting the Company from engaging in pilot furloughs except for the minimum aircraft and utilization

requirements set forth in Section II of the Transition Agreement. (Statement of Facts, ¶ 10).

Fifth, **Defendant has not delayed obtaining a new CBA for any reason**, **and Plaintiffs and their Counsel have so admitted or stipulated**. (Statement of Facts, ¶ 12). To the contrary, USAPA energetically resumed the contract negotiations which, under ALPA, had been suspended for eight continuous months. (Final Jury PreTrial Order, Doc. # 417, at § C "Stipulations and Uncontested Facts and Law" ¶ 18). As Plaintiffs' counsel admitted in open court: "We're not saying that they delayed any section" (Pre-Trial transcript Tr. 42:8: Stevens to Court) -- a judicial admission that this Court is not free to ignore. *See*, *U.S. v. Bentson*, 947 F.2d 1353 (9th Cir. 1991) *cert. denied*, 504 U.S. 958 (1992) (on the record statement by counsel "straightforward judicial admission") (*citing United States v. Wilmer*, 799 F.2d 495, 502 (9th Cir. 1986) (attorney's statement during oral argument constitutes judicial admission), *cert. denied*, 481 U.S. 1004, 107 S. Ct. 1626 (1987).

Counsel's trial stipulation was consistent with their earlier, similar disclaimers, and what Plaintiffs actually pled. The Amended Complaint nowhere mentions the word "delay." (Doc. # 86). Rather, what was alleged was just the opposite, i.e., that:

> Since June 2008, Defendant US Airways and USAPA have been negotiating one or more collective bargaining agreements to replace the West CBA and the East CBA. (Doc. # 86 at ¶ 74) [1]

[1] The same is true for the State claim, which also had no delay allegation whatsoever and affirmatively pled the opposite. (Doc. # 1 in Case No. 08-1733, at ¶ 102 (dismissed for failure to state a claim, Doc. # 118)).

In addition to Plaintiffs' Counsel's stipulations, all six named Plaintiffs testified in their depositions, and did not contradict in any trial testimony, that they understood that USAPA is pursuing the bargaining objective of obtaining a single CBA with an integrated seniority list, and they have no evidence that would support the contention that USAPA has deliberately delayed negotiations. (Statement of Facts at ¶ 12). And, in trial testimony, the same result was obtained from Plaintiffs' witnesses. *Id*.

Sixth, there is no evidence that the Plaintiffs would have been in a better position today even if USAPA had included the Nicolau Award in its negotiating proposals. Both the Court and Plaintiffs' counsel acknowledged that proof of causation might be lacking:

> THE COURT: Let me – for example, a logically possible outcome is that plaintiffs could prove liability. The Court would grant some equitable relief. But when the day came, there would be failure to persuade that things would have -- *the timing of the negotiation would have been such that plaintiffs would have gotten to different and better positions than they are today*. That's logically possible. So we could end up in a situation where a damage claim could fail later on entirely even though a liability claim and injunctive relief of some sort is granted here. I'm not making any judgment about it. It just occurred to me that that's a possibility.
>
> MR. STEVENS: Yes, Your Honor. *We're aware of that.*

(Trial Tr. 1056:19 to 1057:6) [emphasis added].

In fact, the evidence establishes that a single CBA would not have been negotiated, signed, and ratified by today even if the Nicolau Award had been included. This is reflected in the fact that the company's "Kirby proposal," which was described by the West MEC as "woefully inadequate," is still the company's negotiating position

at the table. (Statement of Facts ¶ 21). US Airways' Vice-President of Labor Relations, E. Allen Hemenway, testified that USAPA and the company remain a substantial distance apart in negotiating a single CBA on a multitude of issues other than seniority integration. (Hemenway Trial Tr. 887:6-10). The reason for the substantial differences, according to Hemenway, is that "[w]hen a new representative is put in place, they quite understandably have different interests than the old representative." (*Id*. at 887:21-23). As Hemenway explained, when USAPA started negotiating, "what happened immediately is that the previously agreed to 12 tentative sections, 9 of those were unagreed to." (*Id*. at 887:24 – 888:1). In other words, USAPA reopened several sections that had previously been agreed to between the company and ALPA. Hemenway testified that the right to reopen is "a right that both parties have in negotiations" (*Id*. at 870:12-17), and that the company is currently observing this right in the negotiations with USAPA. (*Id*. at 870:18-20). Hemenway rejected the suggestion that USAPA was negotiating in bad faith. (*Id*. at 891:20-25).

Hemenway's testimony establishes conclusively that even if the Nicolau list had been included in USAPA's negotiating proposals, a new single CBA would not yet have been signed and ratified. Thus, if the Plaintiffs have sustained any damages as a result of not having the benefit of the Nicolau Award, the direct cause of such damages, if any, is the fact that negotiations on a single CBA have not concluded, and have not resulted in a signed and ratified agreement, not USAPA's breach (as found by the jury) of its duty of fair representation.

2) Under The RLA A Union Can Maintain Two CBAs And Nothing In The TA Required ALPA Or USAPA To Agree To A Single CBA, Hence Claimed Damages From Implementation Of A Single CBA With The Nicolau List Is Speculative.

The Plaintiffs base their claim for damages on the alleged failure to implement the Nicolau list in a single CBA that would replace the two CBAs, East and West, which USAPA inherited from the predecessor union. But nothing in the TA requires either ALPA, or now USAPA, or the company, to agree and implement a new, single CBA. On the contrary, USAPA and the company retain the right to either modify or terminate the TA according to §§ XII.B. and XII.E respectively.[2] This fact coupled with the absence of any timetable makes any claim for a right to a new seniority list *based on contract* one of sheer speculation. Any contrary interpretation of the TA by the Plaintiffs will be determined by the System Board, as part of the Plaintiffs' Count II grievance. The System Board has exclusive jurisdiction with respect to this issue. *Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 310 (1989).

Under statutory law, there is no issue either. The RLA does not require that a single bargaining representative maintain a single CBA. An NMB-designated craft or class can be covered by two contracts enforced by one union.

The NMB has held as much. *See*, 19 NMB 226, 232 n. 1; 19 NMB No. 51; 1992 NMB Ltr. LEXIS 9; NMB File No. MT-14; (March 10, 1992) ("However, the parties

[2] US Airways' Vice-President of Labor Relations, E. Allen Hemenway, testified that USAPA and the company could mutually agree to terminate the Transition Agreement, and that authority continues to the present day. (Hemenway Trial Tr. 872:8-20).

are not precluded from mutually agreeing to multiple agreements covering a particular craft or class").

Courts have also held that RLA-covered bargaining units are not required to be subject to a single contract:

> We begin with the observation that nothing in the RLA per se requires employees of the same craft or class in a particular system to be subject to the same terms and conditions of employment. While the Board has long interpreted the Act to require system-wide representation certifications, see Missouri Pacific R.R. (Union Pacific), 15 N.M.B. 95, 104 (1988), it has not similarly construed the Act to require system-wide collective bargaining agreements. [n.5: The Board has merely expressed a preference for--or, in its words, a "commitment to"-- system-wide collective bargaining. Atchison, Topeka & Santa Fe Ry. Co., 12 N.M.B. 95, 110 (1985). It has not held that the Act mandates such bargaining.] In other words, *a single craft or class of employees on a particular carrier may not have more than one certified representative, but members of that class may be covered by different collective bargaining agreements*. Counsel for AFA expressly conceded this point at oral argument. Thus, we may eliminate one possible basis for AFA's claim that Shuttle flight attendants were necessarily covered by the AFA-USAir agreement when AFA became the certified representative for Shuttle flight attendants.

Association Of Flight Attendants v. USAir, Inc., 24 F.3d 1432, 1437 (D.C. Cir. 1994) (emphasis added).

And Plaintiffs have sponsored admitted evidence that ALPA, too, took the very same position:

> As your lawyers can tell you, under the Railway Labor Act ... there is no requirement under the Act that there be a single agreement for the entire craft. That is why the parties agreed, in the Transition Agreement, to negotiate a Single Agreement but also left to the parties their respective rights under the RLA.

(Plaintiffs' Trial Ex. 49, letter by ALPA President Prater dated March 19, 2008

addressed to Parker, CEO, US Airways). See also, Defendant's Trial Ex. 1092, Speech by ALPA President Prater ("The result may lead to a merged agreement, umbrella agreement, or multiple agreements.").

3) <u>There Is No Genuine Issue Of Material Fact That Plaintiffs Have Disclaimed Damages In Their Pre-Trial Testimony.</u>

Plaintiffs are not entitled to pursue damages that in pre-trial deposition testimony they waived by conceding that they do not seek damages, have no damages, or could only speculate about because they could not calculate any damages. (Statement of Facts at ¶ 15). And it is undisputed that all Plaintiffs claim damages that are directly the result, (allegedly) of a failure to obtain a new, single CBA.

4) <u>There Is No Genuine Issue Of Material Fact That Plaintiffs Continue To Pursue Overlapping Damage Claims Before A System Board Of Adjustment, Which Could Provide The Same Remedy, But Has Yet To Rule.</u>

It is undisputed that this Court dismissed Counts I and II and that thereafter Plaintiffs pursued those claims before the USAPA-US Airways TA System Board of Adjustment. (Statement of Facts, at ¶ 16).

It is undisputed that the parties provided unhindered access to the Board and scheduled a hearing for May 28-29, and that this hearing is pending. (Statement of Facts, at ¶ 17).[3]

[3] On May 18, 2009, the Plaintiffs requested an indefinite adjournment of the May 28-29 arbitration hearing, which appears to reflect a strategy of attempting to shift contract interpretation from the System Board to the court. Arbitrator Bloch granted the request over USAPA's objection.

And it is undisputed that the Board has plenary authority to provide make-whole relief that is proven, if the Board concludes that the CBA was violated. (Statement of Facts, at ¶ 18).

The Supreme Court has limited a union's liability in a DFR case where the complaining employees had an "alternative remedy, which they could have pursued when the union refused to process their grievances." *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 230 (1983). The same rule applies here. Not only do Plaintiffs have a forum to pursue their damages remedy, the System Board is the proper forum. The path is wide open for them. If Plaintiffs fail or refuse to pursue this path, it is not the fault of the Defendant.[4]

5) Defendant Is Entitled To Judgment As A Matter Of Law In The Absence Of Any Genuine Issues Of Material Fact.

In the absence of any genuine issue of material fact that Defendant has not caused any damages, that Plaintiffs disclaimed damages in pre-trial testimony, and that Plaintiffs continue to pursue the same damages before the Adjustment Board on their grievances based on Counts I and II, Defendant is entitled to judgment as a matter of law that Plaintiffs have no damages. After establishing liability for improper conduct, "[p]laintiffs *must* demonstrate a causal connection between the union's wrongful conduct and their injuries." *Spellacy v. Air Line Pilots Ass'n*, 156 F.3d 120, 126 (2d Cir. 1998) (emphasis added) (*citing Ackley v. Western Conf. of Teamsters*, 958 F.2d

[4] Nor are Plaintiffs entitled to obtain double damages in two different forums.

1463, 1472 (9th Cir. 1992); *Williams v. Romano Bros. Beverage Co*., 939 F.2d 505, 508 (7th Cir. 1991)). A "[u]nion is liable for damages *only* if its breach was a 'but-for' cause of those damages." *Wood v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 406*, 807 F.2d 493, 502 (6th Cir. 1986) (emphasis added).

In recognition of this "but-for" causation requirement, "[F]ederal courts have consistently required a *direct nexus* between breach of [the] duty [of fair representation] and resultant damages to the individual or minority segment . . ." *Deboles v. Trans World Airlines, Inc*., 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977) (emphasis added). *See also Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986); *Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574 (8th Cir. 1981).

This injury causation test is "difficult to satisfy, and rightly so." *Ackley v. Western Conf. of Teamsters*, 985 F.2d 1463 (9th Cir. 1992). That is because in the absence of a "but-for" causal connection between the union's conduct and plaintiffs' alleged injuries, "any remedy against the union would necessarily be a punishment." *Deboles*, 552 F.2d at 1019. And punitive damages have been consistently rejected in duty of fair representation cases. *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42 (1979); *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1167 (4th Cir. 1985); *Lewis v. Local Union No. 100*, 750 F.2d 1368, 1382 (7th Cir. 1984); *Quinn v. Digiulian*, 739 F.2d 637, 647 (D.C. Cir. 1984); *Dependahl v. Falstaff Brewing Corp*., 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981); *Wells v. Southern Airways, Inc*., 616 F.2d 107, 109 (5th Cir.), *cert. denied*, 449 U.S. 862 (1980).

IV. RELIEF REQUESTED.

Defendant respectfully requests summary judgment in its favor on each and every named Plaintiff's claim for damages, pursuant to the separately filed proposed order.

Respectfully Submitted,

Dated: May 22, 2009

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

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- Defendant's Memorandum Of Law In Support Of Its Rule 56 Summary Judgment Motion On Plaintiffs' Damage Claims Certificate of Service
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

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Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On May 22, 2009, by:

/s/ Nicholas Paul Granath, Esq.