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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 USAPA'S MEMORANDUM ADDRESSING THE FORMULATION OF AN APPROPRIATE INJUNCTIVE REMEDY**
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

These comments are offered in anticipation of the Court's formulation of an appropriate injunctive remedy.[1] More specifically, USAPA requests that the Court take into consideration the following factors:

- the interest of the parties and the court in implementing a self-policing injunctive remedy rather than a remedy that requires ongoing judicial intervention in both the collective bargaining process and matters of union self-governance;
- the interest of the bargaining unit as a whole in successfully negotiating for increased wages and benefits; and
- that the plaintiffs not be permitted to use the judicial process to place themselves in a position superior to – or the East Pilot "majority" in a position inferior to – that which prevailed under ALPA Merger Policy.

The Court has previously stated that it would focus on paragraph 2 of the plaintiffs' requested relief, which seeks an:

> Order directing USAPA (with equal West Pilot representation) to negotiate a single CBA that incorporates the Nicolau Award, and to then present that CBA for a single ratification vote by all USAPA members

(Doc. # 447 at 2). USAPA submits that the plaintiffs' requested relief runs counter to all three of the policy considerations listed above.

As an alternative remedy that would better address the policy considerations listed above, USAPA respectfully requests that the Court consider an:

[1] The submission of this memorandum does not waive any objections made in USAPA's Trial Brief on Remedy. (Doc. # 451). USAPA has already objected to any remedy that would contravene well-settled case law forbidding a court from mandating a specific bargaining result. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970).

> Order directing USAPA to submit any tentatively agreed to single CBA to separate, dual ratification votes of West and East USAPA members in good standing
>
> **or**
>
> Order directing USAPA to incorporate the Nicolau Award into any tentatively agreed to single CBA, and to then present that CBA for a single ratification vote by all USAPA members; provided that, in event of a failed ratification vote, this injunction will be dissolved.

II. A COURT-CREATED OBLIGATION TO NEGOTIATE TOWARD A SINGLE CBA IS UNNECESSARY, WILL CREATE INTRUSIVE JUDICIAL INTERFERENCE IN THE BARGAINING PROCESS, AND WILL UNDERMINE USAPA'S EFFORTS TO OBTAIN BETTER WAGES AND BENEFITS FOR THE ENTIRE BARGAINING UNIT

A. AVOIDING "INTRUSIVE JUDICIAL MANAGEMENT"

To the extent the proposed order produces a court-created (rather than a purely contractual) obligation to negotiate a single CBA, it is both unnecessary and creates intrusive judicial management that will undermine USAPA's efforts to obtain the best contract terms for the pilot group.

With respect to the goal of avoiding the Court's continuing involvement in the collective bargaining process, the Court has recognized:

> There is truth in your observation with [respect to] avoiding intrusive judicial management. That's a **fundamental principle** of the courts of equity to not take on injunctive remedies that they lack the practical ability to monitor, to police and enforce.

(May 7 Tr. 1745:17-21) (emphasis added). Moreover, the practical effect of even the potential for further judicial intervention will undermine USAPA's efforts to obtain

better wages and benefits for the entire bargaining unit.

Throughout the discovery process and in the trial itself, plaintiffs' counsel was second-guessing USAPA's bargaining strategy and insinuating that USAPA's negotiating goals were excessively ambitious. (Tr. 5/1/09 at 886:16-889:1, 891:10-16). These criticisms arose despite counsel's pre-trial stipulation that USAPA has, in fact, been bargaining in good faith toward a single collective bargaining agreement. (Doc. # 417 at p. 19, ¶ 116; *see also* Tr. 4/21/09 at 42:8).

A court-created (rather than a purely contractual) obligation to negotiate a single CBA will have one or both of the following undesirable effects: First, the Court will be involved in a series of contempt proceedings to determine whether USAPA is engaged in a good faith effort to reach a single CBA. Second, USAPA, in order to avoid further judicial proceedings and potential contempt sanctions, will be pressured to ratchet down its economic demands thereby reducing the future wages and benefits of the entire bargaining unit and/or resulting in a negative ratification vote that will indefinitely delay any contract enhancements.

An order producing a court-created obligation to negotiate a single CBA is unnecessary. US Airways has expressly linked improved wages and benefits with the negotiation of a single collective bargaining agreement. US Airways CEO Doug Parker's stated position was that the standing offer to increase pilot labor costs by $122 million per year was being offered to "get our pilots working together as one team with one contract." (Trial Ex. 5). US Airways Vice President of Labor Relations

Al Hemenway testified that "It's been our view and continues to be our view that enhancements to a labor agreement flow through reaching a single agreement." (May 1 Tr. 883:16-17). Thus, wholly aside from any contractual and statutory enforcement rights that US Airways may possess with respect to the collective bargaining process,[2] the Court has recognized that seniority-oriented East pilots face an economic Hobson's choice:

> THE COURT: [USAPA] submit[s] it to the members, and the members, as I see it, if the majority in the end are sufficiently distressed that they don't want to have a new single collective bargaining agreement with the Court-ordered list, then they can vote it down.
>
> * * *
>
> So it would not disrupt and take advantage of the normal entitlement of the members to consider all of their self interest and make an up or down vote on the agreement. But they will be knowing that if they act out of an unregulatable disregard of the Court's determination of the Union's obligation, the result is they are still at the lowest pay scale in the industry, they are foregoing what could have been obtained and they will know whatever betterment could come from a new CBA is still not going to change that.

(May 7 Tr. 1746: 5-9, 21-25; Tr. 1747: 1-4).

The economic Hobson's choice described by the Court effectively eliminates the

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[2] Federal courts have rejected the standing of individual union-represented employees to enforce the good faith bargaining obligation. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 319 (3d Cir. 2004), *cert. denied* 544 U.S. 1018 (2005) (individual pilots "lack[ed] an implied private right of action to bring claims asserting breaches of the duty to bargain and duty to negotiate in good faith . . . because they are not and have never been a certified representative of the. . . pilots."). *See also Marcoux v. American Airlines, Inc.*, 2008 U.S. Dist. LEXIS 55751 at *51-52 (E.D.N.Y. 2008); *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 503 (E.D.N.Y. 2004).

need for ongoing Court supervision of the collective bargaining process. Thus, it is sufficient that any Court order provide that any future single collective bargaining agreement incorporate the Nicolau Award without specifically mandating the negotiation of a single contract.

B. ADVANCING THE ECONOMIC INTERESTS OF THE ENTIRE BARGAINING UNIT

Unfortunately, whereas the approach described above may address the Court-described policy issue of avoiding "intrusive judicial management," it does little to advance what ALPA described as the "imperative" union objective of negotiating a better contract. (Trial Ex. 1057). In fact, the remedy proposed by the plaintiffs promises a more enduring stalemate than that which existed under ALPA Merger Policy as administered by ALPA National.

ALPA National recognized that each side possessed "veto power" over the other and therefore, through a series of mediatory efforts – the Rice Committee, the Blue Ribbon Committee, the Denver summit meetings, the Wye River lockdown – ALPA worked to effectuate a compromise. Indeed, the record reflects that ALPA National applied "extreme pressure" on the West MEC in an effort to obtain some form of mitigation of the Nicolau Award. The Court concluded that ALPA did not have the opportunity to exhaust this mediatory process; however, as part of that ongoing mediatory process, ALPA National took the position that:

> the resolution does not require the MECs and the Rice Committee to focus on continuing to seek a merged agreement at this time, but it recognizes that potentially there are other practical solutions that may or may not lead

to a merged agreement.

(Trial Ex. 1092).

The plaintiffs' proposed order replaces the potential for political compromise with a Nicolau or nothing approach. Unfortunately, the likely result of this approach is the latter option – nothing. No wage increases, no benefit increases, no work rule enhancements for any pilot East or West. The likelihood of this result is confirmed by the stipulated facts that reflect the depth of the East pilots' resistance to the implementation of a list that eliminated up to sixteen years of their seniority. USAPA, by virtue of the proposed order, would be compelled to abandon ALPA National's stated goal of seeking "practical solutions" to the stalemate.

The United States Supreme Court has long held "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994) (*citing Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Consistent with this Supreme Court precedent, any injunction entered in this matter should be no more broad or burdensome on USAPA than is necessary "to address the concerns raised by the claims on which plaintiffs succeeded in this lawsuit." *Geertson Farms, Inc. v. Johanns*, 2007 U.S. Dist. LEXIS, at *11 (N.D. Cal. June 26, 2007), *aff'd sub nom., W. Org. of Res. Council v. Johanns*, 541 F.3d 938 (9th Cir. 2008) ("injunctive relief should not be more broad than necessary"). Plaintiffs, however, ask this Court for much broader injunctive relief than is necessary to address the claims raised in their lawsuit.

Plaintiffs seek to replace the democratic/political process that existed under ALPA Merger Policy, which ALPA National recognized required some form of compromise, with a Court-ordered fiat that will most likely result in stalemate to the economic detriment of the entire pilot group. The plaintiffs, who based their litigation on their "rights" under ALPA Merger Policy, are not entitled to a remedy that is superior and so wildly at odds with that policy and that seeks to enlist the Court as a long-term ally in a political dispute.

More consistent with this action as pled by the plaintiffs[3] would be injunctive relief which provides an:

> Order directing USAPA to submit any tentatively agreed to single CBA to separate, dual ratification votes of West and East USAPA members in good standing

Such an order would restore the *status quo ante* under which the two pilot groups – East and West – have full power to defend their respective interests. The order would provide for a self-regulating process pursuant to which the parties would be empowered to work toward a mutually acceptable resolution without the need for what the Court has described as "intrusive judicial management."

The plaintiffs have pled their case, and the Court has issued its jury instructions, based on USAPA's obligation to comply with ALPA Merger Policy. That policy

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[3] Not only did the plaintiffs base their action on an entitlement to the enforcement of ALPA Merger Policy, but, with respect to remedy, they specifically sought a Court order that "Defendants shall not amend the West CBA without the approval of the Court unless such amendment is ratified by a majority of the West pilots." (Doc. # 86, ¶ 123.A(3)).

provides that a single seniority list cannot be implemented in the absence of a single collective bargaining agreement without the agreement of "all parties." (Trial Ex.3, § N.2 at 12). The remedy sought by the plaintiffs effectively seeks to advance the purported interests of a class of West pilots while at the same time eliminating the East pilots as a party. Neither the complaint, ALPA Merger Policy, nor any concept of equity, permits such an approach.

C. THE ORDER SHOULD BE DISSOLVED IN THE EVENT OF AN UNSUCCESSFUL VOTE ON A SINGLE CBA

As stated above, the plaintiffs' action and the Court's jury instructions were based on a legal conclusion that USAPA is obligated to comply with ALPA Merger Policy. However, ALPA Merger Policy does not require the Union to dash its head against a brick wall in perpetuity; rather, it requires only that the Union use "all reasonable means" to implement the merged seniority list. (Trial Ex. 3, § I.1 at 8). ALPA National interpreted its own policy as permitting, under the existing circumstances, the exploration of practical alternatives that would advance the "imperative" union objective of obtaining better terms of contract. Among the "practical" alternatives that ALPA National was exploring were "mitigation" of the Nicolau Award, an "umbrella agreement," or "multiple agreements." (Trial Ex. 1092).

Any Court order that compelled USAPA to repeatedly submit a single CBA with the Nicolau list despite membership rejection would exceed the requirements of ALPA Merger Policy and subvert federal labor policy, which supports union democracy. Moreover, such an order would run counter to the arguments that plaintiffs' counsel

shrewdly employed to sway the jury.

As plaintiffs' counsel stated, "the pilots have never been given the opportunity to vote on a single CBA" (May 12 Tr. 1990:20-21), and he stated that a ratification vote was:

> **all the West Pilots ever wanted. They are willing to take a risk on a vote. They want to vote. The entire process they agreed to, they fulfilled from top to bottom just to get the vote.**

(May 12 Tr. 1981:14-17) (emphasis added). The jury responded to these plaintive cries for a vote and found liability. Nevertheless, having played upon the jury's sensibilities with this relatively modest remedial request, plaintiffs' counsel seeks a decidedly anti-democratic remedy that far exceeds what ALPA National determined they were entitled to.

In sum, any injunctive remedy that either mandates the negotiation of a single collective bargaining agreement, or multiple ratification votes on a single CBA, would exceed the requirements of ALPA Merger Policy, be harmful to the pilot group as a whole, and disserve the goal of equity.

D. THE NICOLAU LIST VERSUS THE NICOLAU AWARD

Significantly, the plaintiffs' complaint speaks in terms of the implementation of the "Nicolau List." (Doc. # 86, ¶ 123.B). By contrast, the plaintiffs propose Court-ordered implementation of the "Nicolau Award." (Doc. # 447 at 2). Moreover, the plaintiffs further specify in paragraph 1 of their proposed relief that the Nicolau Award remain "unmodified by added conditions or restrictions." (*Id.*). Here, again, is a recipe

for prolonged judicial intervention and prolonged stalemate, both in contravention of ALPA Merger Policy.

ALPA Merger Policy speaks in terms of the implementation of a "merged seniority list." (Trial Ex. 3 §§ I.1 at 8 and N.2 at 12). There is nothing in ALPA Merger Policy that restricts it from obtaining the necessary political compromise by providing for staged implementation or other conditions and restrictions. To the contrary, ALPA National interpreted ALPA Merger Policy as permitting it to "mitigate" the Nicolau List through either delayed implementation, operational fences, or other "career progression provisions." (Trial Ex. 1034 at 1; Trial Ex. 1092). As previously stated, ALPA National determined that it was consistent with ALPA Merger Policy to apply "extreme pressure" on the West MEC to consider these options as a means of advancing the imperative union objective of negotiating better terms and conditions of employment. (Trial Ex. 1094).

For example, is the Court determined to forbid USAPA the option of obtaining contract ratification of a single CBA, which incorporates the Nicolau List and applies it to all future furlough determinations, simply because it adopts ALPA-suggested concepts of fences or career progression provisions?

In order to serve equity, promote the bargaining unit's interests, and refrain from exceeding the dictates of ALPA Merger Policy, any Court order must permit the introduction of conditions and restrictions that do not actually alter the Nicolau List. This objective can be obtained either by expressly permitting the introduction of such

conditions or restrictions, or, by ordering a self-regulating political framework that would allow the West pilot USAPA members to veto any conditions or restrictions they considered to be excessive. Since the plaintiffs' proposed injunctive remedy does not provide for these options – and thus frustrates the bargaining process, exceeds ALPA Merger Policy and disserves equity – it must be rejected.

Respectfully Submitted,

Dated: May 30, 2009

By: ***/s/ Lucas K. Middlebrook, 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 USAPA's Brief Addressing the Formulation of an Appropriate Injunctive Remedy
- 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 30, 2009, by:

/s/ Lucas K. Middlebrook, Esq.