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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) **REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. SUMMARY.

Plaintiffs' response is a red flag. Their damage-causation theory is one that has *never* been recognized in all of DFR jurisprudence. Plaintiffs continue to fail to cite a single DFR case proving otherwise. Instead, they obfuscate the shortcomings of their theory with a cloud of citations to, of course, the Restatement. This Court has well said, "you can't get much higher level of generality than the restatements" (Tr. 07/07/09 at 38:25-39:1) and Judge Posner would agree. Take away the "crutch of the Restatement ... that antiquated screed" that plaintiffs cling to, and their theory collapses. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 510 (7th Cir. 1997).[1] It collapses because it is inconsistent with the basic precepts of the Duty that are grounded in national labor policy, which courts are to apply and not rewrite.

Plaintiffs' theory is that USAPA is liable *after* certification for DFR damages caused *before* certification by *individuals* supposedly acting in concert with a union not yet representing anyone. Plaintiffs brandish this joint liability theory under the sophistry of a "but for cause" personal negligence damages analysis. But the *applicable* DFR case law clearly holds just the opposite: a union is liable under the Duty *only* for conduct taken pursuant to its representational status. Allow plaintiffs to circumvent this well-demarcated line defining the scope of the Duty with their limitless but-for-cause theory and that line is erased.

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[1] This Court has previously commented that "Judge Posner is pretty good dictum." (Tr. 10/29/08 at 167:9).

There could be no clearer invitation for this Court to rewrite national labor policy, but as Chief Justice Burger once explained, that is not the role of the judiciary.

> The temptation to exceed our limited judicial role and do what we regard as the more sensible thing is great, but it takes us on a slippery slope. Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done.

Bifulco v. United States, 447 U.S. 381, 402 (1980) (Burger, C.J., concurring) (emphasis added). Allowing plaintiffs' damage claim would necessarily impose liability on a non-representing union. And, in the process, on individual employees who cannot be held liable under the Duty, or merely for exercising statutorily protected rights under the RLA. Dismissal is thus required to uphold the integrity of federal labor policy and law.

II. ARGUMENT.

A. Plaintiffs Offer a Strained Analysis of the *Twombly-Ashcroft* Standard.

Plaintiffs downplay the impact of *Twombly* and *Aschroft* by claiming the Supreme Court merely "clarif[ied] that Rule 8 'demands more than an unadorned ... accusation.'" (Doc. # 624 at 3). But whether the impact is characterized as a "sea change" or just a change, the fact is that the *Conley* no-set-of-facts standard that prevailed for the previous four decades is out, replaced by a tougher "plausibility" standard. Indeed, the Supreme Court in *Aschroft* reversed a lower court that misinterpreted *Twombly* as not much of a change. 129 S. Ct. at 1953.

Two things are thus apparent: first, plaintiffs would not need to downplay *Aschroft* if they could meet it; second, they cannot satisfy *Ashcroft* because, exactly like the reversed plaintiffs in *Aschroft*, their new claim – assuming this Court were to recognize it

as cognizable in the first place – is entirely dependent on discovery to overcome pure speculation: first, that concerted action led to the East pilots doing what they had an overwhelming self-interest to do on their own, protect their vested seniority from a widely perceived threat, and second, that a CBA would have been negotiated and happily ratified by the arbitrary time that plaintiffs need to fit their case. But speculative conclusions do not "unlock the doors of discovery." *Id*. at 1950. "We decline respondent's invitation to relax the pleadings requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery." *Id*. at 1953. Yet plaintiffs are utterly dependent on discovery because they have *no facts* to allege that plausibly show the impossible: that the East MEC needed USAPA to reject Nicolau. And for plaintiffs to say they can meet the plausibility standard because they have alleged "specific allegations" is nothing more than saying they have alleged sharper conclusions

B. Plaintiffs' Damage-Causation Theory is Predicated on Pre-Certification Conduct, but DFR Causation does not Flow from Pre to Post-Certification.

Plaintiffs' response serves to highlight that their damage-causation theory is based entirely on pre-certification conduct:

- *Prior to April 18, 2008*, members of the East MEC and other East Pilot rank-and-file solicited support for USAPA with the intention of preventing the Airline from integrating operations using a Nicolau CBA. (Doc. # 624 at 1:19-21) (emphasis added).
- "USAPA was integrally involved in the actions taken by members of the East MEC and East Pilot rank-and-file *prior to April 18, 2008*." (Doc. # 624 at 2:3-4) (emphasis added);
- "*Prior to April 18, 2008*, therefore, the opposition to the Nicolau Award was concerted action." (Doc. # 624 at 7:20-21) (emphasis added);

- "[W]hen USAPA encouraged the East Pilot Enterprise *prior to April 18*, and when it breached its DFR after April 18, it acted with the privity and knowledge of persons involved in the East Pilot Enterprise." (Doc. # 624 at 9:9-12) (emphasis added).
- "*[P]rior to April 18*, USAPA promised to abrogate the Nicolau Award if elected." (Doc. # 624 at 9:14-15) (emphasis added).

Plaintiffs make a feeble attempt to tie their pre-certification causation theory into the post-certification period by arguing that USAPA ratified the pre-certification acts after it was certified. (Doc. # 624 at 10:2-3). But case law has squarely *rejected similar attempts* to revivify pre-certification DFR claims in the post-certification period.

In *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165 (9th Cir. 2002), the Ninth Circuit examined whether a union had violated its DFR to incoming members when, in the wake of an airline merger, it negotiated a seniority arrangement that endtailed the flight attendants of the smaller carrier.

This case arose after American Airlines agreed to purchase 80% of Reno Airlines' outstanding shares. *Id*. at 1168. At the time of acquisition, the American flight attendants were represented by the Association of Professional Flight Attendants ("APFA") and the Reno flight attendants were represented by the Teamsters. Shortly after the acquisition, the APFA began seniority negotiations with American, which eventually resulted in an agreement endtailing the incoming Reno flight attendants. *Id*. at 1169.

This agreement was consummated prior to the NMB's determination that the two airlines constituted a single carrier. Shortly after the single carrier determination, the Reno flight attendants brought suit against APFA contending that it breached its post-

merger duty of fair representation by implementing the unfavorable seniority agreement. The Ninth Circuit affirmed the trial court's dismissal, holding that because APFA reached the agreement prior to the NMB's single carrier determination, it owed no duty to the incoming Reno flight attendants. *Id*. at 1172. Therefore, there could be no DFR breach based on pre-certification conduct – *even though its effect was felt post-certification*.

In making its determination, the Ninth Circuit endorsed the NLRB's finding in *Riser Foods, Inc*., 309 N.L.R.B. 635 (1992). *Id*. at 1173. In that case, as explained by the Ninth Circuit, two companies merged and the surviving union insisted that the incoming unit be endtailed. The company refused and dovetailed the employees. After the merger, the union threatened a slowdown unless the company endtailed the smaller pre-merger group. Those employees argued that the union's demand violated its DFR. The NLRB rejected this contention, and the Ninth Circuit agreed that a union's DFR is not implicated where it "implements a position that it adopted before the new employees became members in the union's statutory bargaining unit." *Id.* (*citing Riser Foods*, 309 N.L.R.B. at 636).

The Reno flight attendants certainly had an argument that but-for its union's conduct in negotiating a seniority agreement that endtailed them, they would not have suffered damages. The same can be said for the employees in *Riser Foods*. Nevertheless, liability – and therefore causation – were not allowed to pass through the line of demarcation separating pre and post-certification conduct.

The same result was reached more recently by the Third Circuit in *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004). This case arose following American Airlines' asset purchase of Trans World Airlines (TWA). Prior to the takeover, the TWA pilots were represented by ALPA and the American pilots were represented by the Allied Pilots Association (APA). The American pilots were the larger group. As in *McNamara-Blad*, APA negotiated a seniority integration agreement with American, which for the most part, endtailed the TWA pilots. The agreement was reached prior to a single carrier determination. The former TWA pilots, following the certification of APA, brought suit based on this agreement.

The *Bensel* plaintiffs' complaint was based on the pre-certification seniority agreement *and* the allegation that the DFR breach had continued post-certification with APA's failure "to negotiate a fair and equitable integration of the TWA pilots." *Bensel v. Allied Pilots Ass'n*, 271 F. Supp. 2d 616, 625 (D.N.J. 2003). The district court, as affirmed by the Third Circuit, rejected this claim outright. *Id*. at 625-626.

Again, the TWA pilots certainly had an argument that the pre-certification seniority agreement negotiated by APA was the "but-for" cause of their loss of seniority and resulting damages that occurred *after* certification. Nevertheless, the Third Circuit followed the Ninth Circuit's decision in *McNamara-Blad*, and rejected the argument that pre-certification conduct could form the basis of post-certification liability.

This rule of law has also been applied outside of the merger context. In *Baggarly v. United Steelworkers of Am.*, 142 L.R.R.M. 2108 (W.D. Ky. 1991), Local 4959 of the United Steelworkers represented over 250 employees at a steel plant in Kentucky. In 1985, the plant was forced to close. The employees were left without jobs and they retired, resigned or were laid off. Thereafter, Local 4959 ceased to have any members.

Two years later, Local 4959 together with civic leaders and state officials worked to secure investors to reopen the plant. *Id*. at *2. They were successful and convinced the company to restart operations. Prior to the reopening, Local 4959 negotiated a CBA with the company intended to cover future employees of the plant. The agreement did not require the company to staff the plant with the prior workforce, nor did it recognize prior service at the closed plant. *Id*. at *3.

After the plant was reopened and the prior workforce recalled, it became evident that workers were not being recalled on the basis of their prior seniority. *Id*. at *4. These employees filed a DFR action based on the union's negotiation of the new CBA. The court dismissed the DFR claim because the union had negotiated the agreement *at a time when it had no members* and owed no duty of fair representation to anybody. *Id*. at 23-25.

> [I]t appears that at the time the union bargained with [the company], there were no persons in the status of "employees" who had duly selected or designated the union to bargain on their behalf. There thus existed no bargaining unit for whom the union could serve as the exclusive bargaining representative. There being no exclusive representative, and no "constituency" on whose behalf the union was acting, there is no one to whom the union owed the duty of fair representation. Accordingly, all claims against the union for breach of the duty must fail.

Id. at 24. Once again, a court declined to allow pre-certification conduct to form the basis of a post-certification DFR – even where the actions were most certainly the but-for-cause of the plaintiffs' alleged injuries.

The law to be applied is clear: pre-certification conduct does not form the basis of a DFR. The Duty is tied to a union's representational status. That is the law according to the Supreme Court and the Ninth Circuit. *Simo v. Union of Needletrades*, 316 F.3d 974, 983 (9th Cir. 2003). Any theory of damages that violates that rule is an expansion of the scope of liability beyond what controlling precedent allows.

C. A Completed and Ratified October 2008 CBA is Inherent Speculation.

In order to withstand a motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level."' *Williams ex rel. Tabiu v. Gerber Products Co*., 523 F.3d 934, 938 (9th Cir. 2008) (*quoting Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). Even assuming, *arguendo*, that plaintiffs' damage (liability expansion) theory survives the legal impediments discussed herein, there are no damages unless there would have been a single CBA in place on a date certain that included the Nicolau Award. USAPA has previously discussed, at length, why plaintiffs' allegation of October 2008 is not only speculative but entirely implausible. (*See* Doc. # 488 at 6-10; Doc. # 512 at 4-7).

Plaintiffs now argue, with respect to ratification, that it "is entirely plausible that ... if given the opportunity to vote on a Nicolau CBA a majority of East Pilots would have voted in favor so that they could obtain the better pay and benefits that would come with it." (Doc. # 624 at 6:2-6). Plaintiffs argue that the economics of the Kirby Proposal

would have enticed East Pilots into voting for a single CBA with the Nicolau Award because, in their words, it "is common sense that workers would vote for better wages and benefits." (Doc. # 624 at 6:5-6). Not only is this speculative but it is actually contrary to the evidence in the record. The East and West MECs considered the proposal to be "*woefully inadequate*"[2] and a document disclosed by plaintiffs after the trial reinforces the inadequacies of the proposal to *both pilot groups*.[3] Moreover, plaintiffs already stipulated prior to the liability trial that a "majority of East Pilots *strenuously objected* to the Nicolau Award and were opposed to its implementation." (Doc. # 417 at 5, ¶ 17). Now, plaintiffs argue that the same majority of East Pilots would have ratified a single CBA that *included Nicolau*. This takes speculation into the realm of fantasy. This is the *same* majority that supposedly formed itself "illegally" taking the unheard-of step of dumping ALPA after 40 years. And this 'tyranny of the majority' was prepared to be bought off for a few "woefully inadequate" bucks?

D. Plaintiffs Seek an Unwarranted Expansion of DFR Injury-Causation.

"[F]ederal courts have consistently required a *direct nexus* between breach of [the] duty 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)

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[2] *See* Doc. # 489 at. p. 11, ¶ 21.

[3] In a February 22, 2008 draft letter from West MEC Chairman John McIlvenna to East MEC Chairman Jack Stephan proposing an interim separate operation agreement (i.e., two contract solution), Mr. McIlvenna wrote that the "May 2007 Kirby Proposal . . . was deemed unacceptable by both pilot groups." (*See* Exhibit A). Plaintiffs have argued that it is proper for this Court to consider extrinsic evidence when deciding this motion. (Doc. # 624 at 1, n. 2).

(emphasis added); *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986). This DFR injury causation test is "difficult to satisfy, and rightly so." *Ackley v. Western Conf. of Teamsters*, 985 F.2d 1463 (9th Cir. 1992), because in the absence of a 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 are forbidden in DFR actions. *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 (1979); *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1167 (4th Cir. 1985).

Notwithstanding the requirement of a *direct nexus* between a breach of the Duty and resulting damages, plaintiffs actually argue in their response that "a union that willfully breaches it DFR" should be held liable "for all harm – *even harm that was not directly caused by the DFR breach*." (Doc. # 624 at 10:10-11) (emphasis added). This is another bright red flag. Plaintiffs either: 1) ignored case law detailing DFR injury causation, or 2) were aware of the law and recognized that trying to fit their damage theory into it was like forcing a square peg into a round hole. Either way, plaintiffs' response, and specifically their argument that USAPA is liable for "harm that was not directly caused by the DFR breach," sums up their damage theory quite well, and demonstrates how, once again, plaintiffs ask that the law be rewritten to support their claim.

E. Plaintiffs Failed to Respond to Valid Arguments.

Finally, plaintiffs' response does not address all of the motion. Grounds three through nine are ignored by plaintiffs. To that extent, those grounds should be regarded either as waived or unanswerable.

III. RELIEF REQUESTED.

Based on the pleadings, evidence, arguments, record, and any testimony, or evidence to be presented in the hearing, USAPA respectfully requests that the Court grant its motion and dismiss plaintiffs' second amended complaint with prejudice.

Respectfully Submitted,

Dated: November 19, 2009

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

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CERTIFICATE OF SERVICE

(Case No. 2:08-cv-1633-PHX-NVW)

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and any attachments, 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 November 19, 2009, by:

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Nicholas P. Granath