UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16564

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, individually and representing a class of persons similarly situated,

Plaintiffs-Appellees

v.

US AIRLINE PILOTS ASSOCIATION, an unincorporated association representing the pilots in the employment of US Airways Inc.,

Defendant-Appellant

MOTION TO STAY THE MANDATE PENDING FILING PETITION FOR WRIT OF CERTIORARI

FRAP RULE 41(d)(2)

POLSINELLI SHUGHART, P.C.
MARTY HARPER (SBN 003416)
ANDREW S. JACOB (SBN 022516)
3636 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012
Telephone: (602) 650-2008
Facsimile: (602) 264-7033

EXHIBIT B TO
GRANATH DECLARATION

MOTION

Pursuant to the provisions of 28 U.S.C. § 2101(f), and Fed. R. App. P. Rule 41(d)(2)(B), the above-named Appellees respectfully move the Court to enter an order staying issuance of the mandate in the above-entitled appeal. Appellees make this motion with bona fide intention to make proper and timely application to the Supreme Court of the United States for a writ of certiorari.

This Court denies a motion for a stay of the mandate if it "determines that the application for certiorari would be frivolous or is made merely for delay." Circuit Rule 41-1, adv. committee n. The Court should grant this motion because neither of these concerns applies here.

First, the application for certiorari would not be frivolous. Indeed, ripeness was a close decision here, as evidenced by the fact that two Article III judges were on each side of the issue. Not only was the issue close, but it is reasonably likely to be reviewed by the Supreme Court because any one of three grounds to be raised in the application merit the attention of the Court. These grounds are as follows:

(1) If allowed to stand, this case will encourage other unions to refuse, in bad faith, to implement an arbitrated seniority

integration following an airline merger. This would allow other majority groups in airline mergers to improperly thwart important federal labor policy—evidenced by the 2007 passage of the McCaskill-Bond Bill.[1]

(2) This case affords an opportunity to properly distinguish bad faith representation from arbitrary representation. The latter, by definition, requires a final product of bargaining to prove breach of DFR. *ALPA v.* O'Neill, 499 U.S. 65, 78 (1991). The former does not. *Amalgamated Motor Coach Emp. v. Lockridge*, 403 U.S. 274, 301 (1974).

(3) This decision must be reversed or reconciled with a number of decisions from other circuits. *E.g.*, *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 279 (2d Cir. 2004) ("The duty of fair representation owed by a union to its members is similar to a contractual duty, and the union's announcement of its intent to advocate against its members' interests may be compared to a party's anticipatory repudiation of a contractual duty. In some anticipatory repudiation cases the aggrieved party may sue immediately after the repudiation is

[1] McCaskill-Bond Bill provides that when an airline "merger affects the seniority rights of the carriers employees, . . . provisions shall be made for the integration of seniority lists in a fair and equitable manner" and, if needed, referred to arbitration where "[t]he decision of the arbitrator shall be final and binding on the parties." 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007).

> announced. However, the statute of limitations ordinarily does not begin to run, and the cause of action does not accrue, until the date of the actual breach; that is, until the date on which performance is due."); *Air Wisconsin v. Sanderson*, 909 F.2d 213, 217 (7th 1990) ("[A]n attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees in the fashion apparently envisaged by the plaintiffs could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool."); *Santos v. Dist. Council of New York City & Vicinity of United Brotherhood of Carpenters and Joiners of Am., AFL-CIO*, 619 F.2d 963, 970-71 (2d Cir. 1980) (holding that a union breached its duty of fair representation, and a DFR claim began to accrue, at the time "appellants were aware that the [union] was not proceeding in good faith to seek enforcement of [an arbitration] award").

Second, this motion is not made to delay; it is made to protect the West Pilots from needless hardship. A stay of the mandate would leave the injunction in place and protect West Pilot interests without causing cognizable hardship to USAPA. Hardship analysis should focus on the first 90 days of a stay because, as a general rule, once a stay is in place, it continues after a petition is filed until the Supreme Court's final disposition. *See* Fed. R. App. P. Rule 41(d)(2)(B). Hardship should not be a

problem over the next 90 days because USAPA can freely negotiate a new CBA while the injunction stays in effect, leaving the seniority provision for later. If, by some chance, USAPA completes all other negotiations while the stay of the mandate is in effect, it can move the district court to stay the injunction.

In contrast, if the mandate is not stayed and the injunction is vacated, USAPA will be completely unconstrained. It might put a date of hire seniority list in place before the Supreme Court can address certiorari. That would be difficult to undo if the Supreme Court were to reverse this Court on ripeness. Surely, it would be much harder to protect West Pilots interests in that situation than it would be to protect USAPA's interests if the mandate were stayed.

Wherefore, Appellees respectfully move the Court for an order staying the issuance of the mandate pending their filing a petition for writ of certiorari in the Supreme Court of the United States.

DATED this 14th day of July, 2010.

POLSINELLI SHUGHART, P.C.

By: *s/ Andrew S. Jacob*
Marty Harper
Andrew S. Jacob
Attorneys for Appellees

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket No. 06-16417

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 14, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Participants who are not registered as shown on the Service List will be served by U.S. Mail.

/s/

_____

Andrew S. Jacob

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

_X_ Proportionately spaced, has a typeface of 14 points or more and contains 875 words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/

_____

Andrew S. Jacob