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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,

Plaintiff,

vs.

Don Addington, an individual, *et al*

and

US Airline Pilots Association,

Defendants.

Case No. 2:10-CV-01570-PHX-ROS

DEFENDANT USAPA'S NOTICE OF MOTION, MOTION AND SUPPORTING MEMORANDUM TO DROP THE *ADDINGTON* DEFENDANTS, PURSUANT TO RULE 21

TO : PLAINTIFFS, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD.

NOTICE OF MOTION.

PLEASE TAKE NOTICE that Defendant, the US Airline Pilots Association ("USAPA" or Defendant), will move this Court to be heard as soon as possible for an order dropping the *Addington* defendants from this action, pursuant to Fed. R. Civ. P. 21.

MOTION.

COMES NOW defendant, the US Airline Pilots Association, and hereby moves this Court pursuant to Rule 21 for an order dropping Defendants Addington, Bostic, Burman, Iranpour, Velez, and Wargocki (hereinafter referred to as the "*Addington* Defendants") from this action.

The particular grounds in support of this motion are stated herein below.

This motion is based on the below included memorandum, all pleadings, papers, and other records on file, and any oral argument or evidence presented in any hearing pursuant to this motion.

MEMORANDUM IN SUPPORT OF MOTION.

In further support of its Rule 21 motion USAPA states as follows:

First Rule 21, in pertinent part, states, "on motion, or on its own, the court may at any time, on just terms, add or drop a party."

There is no local rule. The scope of application of Rule 21 is extremely broad and covers any civil action in the federal courts, including suits for declaratory judgment. *Hyplains Dressed Beef, Inc. v. EE Operating Corp.,* 142 F.R.D. 174, 176 (D.

Kan. 1992) (*citing Wright, Miller & Kane* Federal Practice and Procedure: Civil 3d § 1682). The application of Rule 21 "has not been limited" to cases in which parties were misjoined. *Wright, Miller & Kane* Federal Practice and Procedure: Civil 3d § 1682 (*citing Verizon Maryland Inc. v. RSN Telecom Servs., Inc*., 232 F. Supp. 2d 539 (D. Md. 2002), *affirmed in part, dismissed in part on other grounds sub nom*, *Verizon Maryland, Inc., v. Global NAPS, Inc.*, 377 F.3d 355 (4th Cir. 2004) [emphasis added].

Misjoinder of parties, however, occurs when no relief is demanded from one or more parties joined as defendants. *See Letherer v. Alger Group, L.L.C*., 328 F.3d 262 (6th Cir. 2003) (a court may exercise its discretion to drop a party from a lawsuit whose presence no longer affects the issues being litigated); *Great Am. Ins. Co. v. Louis Lesser Enterprises, Inc*., 353 F.2d 997 (8th Cir. 1965). Misjoinder may also occur from the operation of some substantive rule of law. *Wright, Miller & Kane* Federal Practice and Procedure: Civil 3d § 1683 (*citing Sabolsky v. Budzanoski*, 457 F.2d 1249 (3d Cir. 1972) (defendant labor unions were not properly joined in suit under the Labor-Management Reporting and Disclosure Act since that statue permits suits only against "any officer, agent, shop steward, or representative of any labor organization").

Rule 21 specifically permits a change in parties at any stage in the action. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1154 (9th Cir. 1998).

The grant or denial of a motion to drop a party lies in the discretion of the court. *See City of Syracuse v. Onondaga County*, 464 F.3d 297, 307 (2d Cir. 2006) (*citing* Wright, Miller & Kane). The trial court's exercise of discretion will not be disturbed on appeal unless abuse is shown. *Koehler v. Dodwell*, 152 F.3d 304 (4th Cir. 1998).

Second, the presence of the *Addington* defendants is not necessary for the relief that the Complaint seeks.

On its face, the Complaint seeks three alternative declarations. Count I seeks the same relief that the *Addington* defendants sought in the now dismissed matter of *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010). Yet, neither Counts I or II are necessary for resolution of Count III. That is, Count III – in essence judicially created immunity – is sought "*regardless* of whether it would constitute a breach of USAPA's duty of fair representation to the West Pilots or otherwise violate the Railway Labor Act for USAPA to insist upon or enter into a collective bargaining agreement that does not incorporate the Nicolau Award ..." (Complaint, Doc. # 1, p. 22, ¶ 3; same ¶ 59) [emphasis added]. The Company professes neutrality: "It always has been and still is, neutral." (*Id*. ¶ 1). If so, then the Company can have no interest in resolution of Count I or its alternative unless it is required for a "declaratory judgment confirming that it would not be liable under the Railway Labor Act or otherwise if it were to agree to USAPA's seniority-list demands." (*Id*. ¶ 59). But, taking the Complaint at face value, resolution of Counts I and II are *not* required to resolve Count III because it is alleged that, "in the event the Court does not find the declaratory judgment requests in the first and second claims for relief to be warranted ... US Airways is [still] entitled, in the alternative, to a declaratory judgment confirming that it would not be liable under the Railway Labor Act ..." (*Id*. ¶ 59).

Even if Count I were necessary to Count III, the presence of the *Addington* defendants is no more necessary to resolve Count I than is the presence of any

individual East Pilot who opposes the Nicolau award, to resolve Count II. (If it were otherwise, then the Company has plainly committed non-joinder and the Court might expect further changes in the parties).[1]

Third, the *Addington* defendants are misjoined.

In the first instance, under the Railway Labor Act, 45 U.S.C. § 152, Ninth, the *Addington* defendants are misjoined because the Company has an affirmative duty to only treat with the certified union, USAPA: "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." (*Id.*). It is a violation of the RLA for an employer to treat with any party except the certified bargaining representative, including factions of disgruntled represented employees:

> [T]he RLA "imposes the affirmative duty on the employer to treat only with the true representative, and hence the negative duty to treat with no other."

Barthelemy v. Air Line Pilots Ass'n, 897 F.2d 999, 1007 (9th Cir. 1990) (*citing Virginian R.R. v. Fed'n*, 300 U.S. 515 (1937)); *Railway & Steamship Clerks v. Florida E.C. Ry.*, 384 U.S. 238 (1966); *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944). The suit at bar purports to be an outgrowth of collective bargaining yet the inevitable consequence of misjoining the *Addington* defendants is that the Company will treat, or risk treating with, a mere group of individual pilots.

[1] "Rule 12(b)(7) allows dismissal of an action for failure to join a necessary party under Rule 19." *Greenberg v. Fireman's Fund Insurance Co.*, 2007 U.S. Dist. LEXIS 86621, at *3 (D. Ariz. Nov. 16, 2007).

Moreover, individual pilots have no *standing* under the RLA to sue or advance bad faith bargaining claims against a bargaining employer. *Bensel v. Air Line Pilots Ass'n*, 387 F.3d 298, 319 (3d Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005) ("appellants as a class lack an implied private right of action to bring claims asserting breaches of the duty to bargain and duty to negotiate in good faith against American and TWA-LLC because they are not and have never been a certified representative of the TWA pilots"); *see also Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 503 (E.D.N.Y. 2004).

In the second instance, under the Duty of Fair Representation, the *Addington* defendants are misjoined because only *unions* owe a duty of fair representation, and only *unions* may be liable for a breach (individuals, even union officers, agents or employees, can only be sued in their official capacity and then not for money damages). *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 416 (1981); *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985); *Carter v. Smith Food King*, 765 F.2d 916, 920-21 (9th Cir. 1985); *Wilkes Barre Publ'g Co. v. Newspaper Guild Loc*. 120, 647 F.2d 372, 377 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (officers are proper defendants where only equitable relief sought). "[I]ndividual union members are immune from suits for damages ... even if their conduct was unauthorized by the union and was in violation of an existing collective bargaining agreement. *Evangelista v. Inland Boatmen's Union*, 777 F.2d 1390, 1400 (9th Cir. 1985) (*citing Complete Auto Transit Inc. et al. v. Reis et al*., 451 U.S. 401, 417 (1981)); *see also* 29 U.S.C. §185(b) (money judgment against union "not enforceable against individual member"); *Morris v. Local*

819, 169 F.3d 782, 784 (2d Cir. 1999) (individuals have "damages immunity" from DFR); *Bey v. Williams*, 590 F. Supp. 1150, 1154 (W.D. Pa. 1986), *aff'd without opinion*, 782 F.2d 1026 (3d Cir. 1986) (same).

This rule applies under the RLA as well. *See Arnold v. Air Midwest, Inc. et al*., 100 F.3d 857 (10th Cir. 1996); *Kozy v. Wings West Airline, Inc*., 1994 U.S. Dist. LEXIS 20097 (N.D. Cal. Dec. 24, 1994) (pilots' union representatives were granted summary judgment in DFR claim because individuals, whether acting as agents for the union, or not, are "immune from liability ... in "suits for breach of the duty of fair representation."); *Felice v. Sever*, 985 F.2d 1221, 1231 (3d Cir. 1983).

The suit at bar, however, purports to seek declarations of whether *USAPA* might breach its duty of fair representation. USAPA, as the only union-defendant, is the proper party regarding that abstract issue.[2] Yet the *Addington* defendants have no ripe DFR claim. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010). USAPA cannot be charged with a duty to fairly represent *all* employees while at the same time presumed to represent only *part* of the bargaining unit, here the East. Yet that is the unavoidable logic of the Company's inclusion of individual West pilots and exclusion of individual East pilots as defendants.[3]

[2] And alleging a hybrid collusion-theory DFR suit is no escape because that too would require a finding that the union is liable for a breach of its duty to fairly represent. *DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983)

[3] Just as the Company mistakenly alleges that "USAPA advanced the position of the East pilots, while the position of the West Pilots was advanced by the [*Addington* defendants]." (Doc. No. 31 at 4, fn. 1). In fact, USAPA, consistent with its duty, has advanced the interests of the entire craft and class as a whole.

Fourth, whether misjoined or not, the presence of the *Addington* defendants is inappropriate, problematic, and prejudicial to USAPA.

Dropping the *Addington* defendants does not prejudice them because they are pursuing their original DFR claim with the Supreme Court. When given the opportunity to declare their intention not to pursue this course of action, and thus remove the grounds for a stay, the *Addington* defendants declined to do so. (Doc. # 26). Therefore, this Court must presume the *Addington* defendants will pursue their Supreme Court petition or continue to preserve their option to do so.

Yet the presence of the *Addington* defendants, while unnecessary for the ultimate relief that plaintiffs seek (even if the Company desires their inclusion for other reasons), has resulted in a series of attempts by the *Addington* defendants to invite the Court in the dismissed action to flout the Ninth Circuit's mandate. While transfer to the dismissed court would, at a minimum, deny USAPA the appearance of justice (and result in the filing by USAPA of a writ of mandamus), the *Addington* defendants have insisted upon it. Indeed, the *Addington* defendants now seek nothing less than to *continue litigating* their dismissed action under the guise of Rule 60(b) relief.

Without dropping the *Addington* defendants, the practical effect will be to allow the *Addington* defendants the opportunity to re-litigate their unripe DFR claim that was recently dismissed by the Ninth Circuit. That is nothing more than a backdoor end run around the Ninth Circuit's decision. In addition, without dropping the *Addington* defendants, USAPA will be effectively forced to face *two plaintiffs*, not just one. And this even as it is exposed to a parallel case at the Supreme Court that could result in

remand to yet a *third forum* – back to the Ninth Circuit. This amounts to unfair prejudice that is entirely avoidable at the outset of this litigation simply by dropping the unnecessary *Addington* defendants.

Further, the inclusion of the *Addington* defendants illustrates the collusive effect of this action, and prejudices USAPA accordingly. The Company's action demonstrates a collusive effect in three ways:

First, timing. Coming just before the mandate was to issue in the Ninth Circuit, the instant suit was also brought after the Company successfully defeated the claims brought by the *Addington* plaintiffs in the dismissed action, and further after the Company gave up the opportunity to have those claims heard in the forum the Court directed – in a labor arbitration. In short, the Company had ample opportunity to pursue the relief they now seek. That the Company pursues its action before the *Addington* plaintiffs have pursued their petition to the United States Supreme Court further illustrates the manipulative aspect of the timing of this suit.

Second, choice of venue. Given several other proper and convenient venues, the Company chose the one venue where the judge in the dismissed action could have heard the case despite the fact that the appearance of justice in that case would be impossible given the judge's previous strongly expressed rulings against USAPA. Moreover, this venue is favored by the *Addington* plaintiffs who chose it, and avoids other venues that would not lend themselves to a concentration of either East or West pilot groups – such as the District of Columbia – where the National Mediation Board is located.

Third, exclusion of the East pilots and inclusion of the West pilots. The premise of the Company's inclusion of the *Addington* defendants appears to be that they brought suit on the same issue raised in Count I. But this ignores the fact that some East pilots also brought a DFR suit based upon USAPA's seniority integration proposal. *See Breeger vs. US Airline Pilots Ass.,* Case No 3:08CV490-RJC-DSC (W.D.N.C. Apr. 23, 2009) (unpublished), adopted by 2009 U.S. Dist. LEXIS 40489 (W.D. N.C. May 12, 2009) (duty of fair representation claim dismissed as unripe). In addition, another group of East pilots are currently engaged in DFR litigation against the Air Line Pilots Association ("ALPA") in the Eastern District of New York based on ALPA's allegedly deliberate introduction of an erroneous East pilot seniority list, which prejudiced their standing on the Nicolau list. *See Naugler v. Air Line Pilots Ass'n, Int'l*, 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008). The only rationale for the Company's inclusion of one group and exclusion of the other is to stack the deck.

The above reasons present the appearance of collusion, or of manipulation of the courts incident to collective bargaining. Dropping the *Addington* defendants is a remedy to cure that defect that prejudices no one.

Respectfully Submitted,

Dated: September 7, 2010

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

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CERTIFICATE OF SERVICE

I hereby certify that on this day of September 7, 2010, I electronically transmitted the foregoing document to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

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