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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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT USAPA'S RULE 12(b) MOTION TO DISMISS

Oral Argument Requested

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A. Background Facts.

i) The Merger and Formation of ALPA's Seniority Proposal.

In 2005, US Airways, Inc. and America West Airlines, Inc. merged into a single carrier known as US Airways. *Addington v. US Airline Pilots Association*, 606 F.3d 1174, 1177 (9th Cir. 2010). The merger raised the issue as to how seniority would be integrated between the two airlines' respective employee groups. With the exception of the pilots, every unionized employee group at US Airways proceeded with integration on the basis of date-of-hire seniority or "dovetailing." (Mowrey Decl. ¶ 9). With respect to the flight attendants, mechanics, baggage handlers, and stores keepers, the corresponding union negotiated directly for date-of-hire seniority integration, which the union and the carrier agreed to be a fair and equitable approach. (Mowrey Decl. ¶ 10).

At the time of the merger, the Air Line Pilots Association ("ALPA") was the collective bargaining agent for both the US Airways pilots ("East") and the America West pilots ("West"). 606 F.3d at 1177. Under the ALPA structure, the two pilot groups' separate collective bargaining agreements ("CBA") were administered by their respective Master Executive Councils ("MEC's"). *Id*.

ALPA maintained an internal union "Merger Policy" which, in the absence of an agreement between unelected "Merger Representatives," provided that ALPA's seniority integration proposal would be determined by an *internal* Arbitration Board composed of two non-voting ALPA members chosen from ALPA's Master List of Pilot Neutrals and an

ALPA-approved arbitrator who acted as the Arbitration Board's Chairman. (Mowrey Decl. ¶ 11). The parties to the arbitration were the "US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." 606 F.3d at 1177.[1] These Merger Representatives were subject to expulsion from ALPA if they resisted the ALPA-governed process or merger criteria. (Mowrey Decl. ¶ 12).

The Arbitration Board was obligated to render a decision consistent with criteria set forth in ALPA Merger Policy. Whereas these criteria had historically placed primary emphasis on date-of-hire seniority, in 1991, ALPA Merger Policy had been amended (without a vote of the rank-and-file pilots) to eliminate any reference to date-of-hire seniority. (Mowrey Decl. ¶ 12). Subsequent to the seniority integration arbitration in this matter, ALPA Merger Policy re-introduced "longevity" as a criterion upon which seniority integration could be based. (Mowrey Decl., ¶ 13, Ex. A at p. 12).

On September 23, 2005, US Airways, America West and ALPA entered into a "Transition Agreement" ("TA"), which addressed the process of the two airlines' operational merger as it related to the pilots. 606 F.3d at 1177. "Under the TA, the carriers agreed not to object to ALPA's seniority integration proposal, provided it did not result in certain additional costs." *Id*. As with ALPA Merger Policy and the ALPA Constitution, rank-and-file pilots were never allowed to vote on the TA. (Mowrey Decl. ¶ 14).

Nevertheless, the "seniority integration proposal could be implemented only as part of a single CBA." 606 F.3d at 1177. That single CBA, in turn, "would require approval by the East Master Executive Council, the West Master Executive Council, and a majority of

[1] US Airways previously *stipulated* that these were the parties prior to its dismissal from the *Addington* litigation. (Case No. 08-1633, Doc. # 77, ¶ 26).

each of the East and West pilot groups, **effectively giving each side a veto**." *Id*. (emphasis added). Since rank-and-file pilots had no participation in the development of ALPA Merger Policy or the TA, their sole opportunity for democratic input came at the tail end of the process, at which point they were permitted by ALPA to vote yes or no on any contract incorporating the seniority proposal. (Mowrey Decl., ¶ 15, Ex. B).

In the instant case, the ALPA arbitration culminated in a May, 2007 decision referred to as the "Nicolau" Award. 606 F.3d at 1177. Nicolau disregarded date-of-hire seniority principles in favor of granting super seniority to more junior West pilots, based ostensibly on a snapshot evaluation of the respective airlines' economic status at the time of the merger. (Mowrey Dec. ¶ 16). It resulted, for example, in the placement of probationary West pilots with under two months seniority – who had never flown a revenue trip for the airline – above East pilots who had more than sixteen *years* of credited length of service. (Mowrey Decl. ¶ 16).

A vigorous dissent by Arbitration Board member Captain James Brucia objected that the Nicolau Award improperly failed to consider post-merger evidence confirming the economic opportunities inherent in the vitality of East operations and higher East pilot attrition rates. (Mowrey Decl. ¶ 17, Ex. C). Chairman Nicolau responded in his opinion that ALPA Merger Policy prohibited him from considering this evidence. (Mowrey Decl. ¶ 17).

The Nicolau Award provoked state court litigation between the East and West MEC's concerning whether the Award had properly adhered to ALPA Merger Policy criteria; however, this litigation was discontinued after ALPA's decertification and the

consequent dissolution of the two MEC's whose Merger Representatives were the parties to the arbitration. *See US Airways MEC v. America West MEC*, 525 F. Supp. 2d 127 (D.D.C. 2007). The Nicolau Award also provoked federal court litigation by an East pilot group against ALPA based on ALPA's allegedly deliberate introduction of an erroneous East pilot seniority list, which prejudiced their standing on the Nicolau list. *Naugler v. Air Line Pilots Ass'n, Int'l*, 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008). That federal court litigation is still pending.

As the Ninth Circuit held, "[a] majority of East Pilots strenuously objected to the Nicolau Award and opposed its implementation … [and] the East Master Executive Council determined that the East Pilots would never ratify a CBA that incorporated the Nicolau Award." 606 F.3d at 1178. ALPA attempted to break the Nicolau-generated impasse by sponsoring intense efforts to foster a compromise between its West and East MECs. However, ALPA Merger Policy only required ALPA to use all "reasonable means" to negotiate for the implementation of the seniority integration proposal provoked by the Arbitration Board. *Id*. at 1177. Moreover, under the Transition Agreement referenced in US Airways' Complaint, ALPA and US Airways had the right to modify or even terminate the TA by mutual agreement. (T.A. §§ XII.B & E). Ultimately, ALPA was unsuccessful in its attempt to get the East and West Pilots to "reach a compromise." 606 F.3d at 1178. During these efforts, ALPA applied "extreme pressure" on the West MEC to moderate its position; however, the West MEC persisted in its refusal to compromise.

ALPA President John Prater advised both East and West pilots that they were entitled to employ their respective democratic rights to protect their interests and that there

was "no required timetable" for resolving the dispute. (Mowrey Decl. ¶ 15, Ex. B at 1). One of the options offered by ALPA President Prater was to pursue interim modification to the existing collective bargaining agreements on a two-contract basis. (Mowrey Decl. ¶ 19, Ex. E).

ii) The Formation of USAPA and Its Goal of Resolving ALPA's Nicolau-Generated Impasse.

From August 17, 2007 until the date of ALPA's decertification on April 18, 2008, there were no further negotiations towards a single CBA between ALPA and US Airways. 606 F.3d at 1177.[2] An impasse had arisen, and it was an impasse of potentially indefinite duration since neither the Transition Agreement nor ALPA Merger Policy contained a timetable or deadline within which to complete a new, single CBA. The Ninth Circuit specifically recognized the existence of this impasse and its practical effect:

> ALPA had been unable to broker a compromise between the two pilot groups, and the East pilots had expressed their intentions not to ratify a CBA containing the Nicolau Award. Thus, even under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated.

Id. at 1180.

Dismayed with the inability to secure a combined contract, and dissatisfied with past ALPA representation, certain East pilots formed an independent union, USAPA, to challenge ALPA as the pilots' collective bargaining agent. *Id*. USAPA campaigned on a platform of greater democratic participation, transparency in union governance, and

[2] US Airways President, Scott Kirby, specifically recognized that ALPA's Nicolau-generated impasse had stalled bargaining since "May of 2007," and specifically commented to investors in April, 2008 that the change in bargaining representatives from ALPA to USAPA was "a good thing" because it meant the company was finally "able to get back to talking to [its] pilots and having formal negotiations with them." (Doc. No. 19-4 at 9).

constitutionally-mandated membership ratification of all collectively-bargained agreements. This platform was in response to ALPA's denial of membership participation and/or ratification in such fundamental issues as the development of ALPA Merger Policy, the TA, and surrender of the East pilots' pension during bankruptcy proceedings.

With respect to the issue of seniority integration, USAPA sought to overcome the negotiating impasse by constructing a new seniority proposal that would effectively preserve for East and West pilots the job opportunities generated by their respective operations. In furtherance of this platform, "USAPA adopted a constitution that established an 'objective' of 'maintaining uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations.'" *Id*.

On "November 29, 2007, the National Mediation Board certified a representation election. USAPA won the election and was certified as the collective bargaining representative for the entire group of pilots, East and West, on April 18, 2008." *Id*. Subsequent to its certification, USAPA formed a negotiating committee and resumed collective bargaining with the carrier; however, USAPA had not yet submitted any seniority proposal to the carrier when, on September 4, 2008, the *Addington* plaintiffs commenced their action claiming that USAPA breached its duty of fair representation because it *intended* not to adopt the Nicolau Award.

On September 30, 2008, USAPA presented to the carrier its first seniority integration proposal. *Id*. Consistent with its constitutional objective, the USAPA seniority integration proposal provided for a combined list based on date-of-hire, modified with

conditions and restrictions designed to protect each pilot's un-merged career expectations. (Mowrey Decl. ¶ 20). For example, the proposal provided for a ten-year "fence" that prevented senior East pilots from displacing junior West pilots from their existing positions and preserved the promotional opportunities arising from West attrition *exclusively* for West pilots.[3] During the ten-year time frame, West pilots would nonetheless be permitted to bid into East operations based on their seniority. By contrast, the status quo of the ALPA-negotiated TA, "place[s] a 'fence' between East and West operations, such that each would continue to operate under its respective CBA," thereby precluding West pilots from bidding into East operations. 606 F.3d at 1177.

Significantly, within the specified ten-year time frame, the majority of East pilots will have retired, thereby opening up thousands of promotional opportunities for junior West pilots within East operations – opportunities that were never previously available to them. To this day, US Airways has never responded to USAPA's seniority integration proposal. (Mowrey Decl. ¶ 20). Moreover, USAPA's seniority proposal remains just that – a proposal, which is subject to alteration as a result of internal union processes and collective bargaining. (Mowrey at ¶ 27).

The complaint in the *Addington* litigation consisted of three counts. Counts I and II were brought against US Airways. (08-cv-01633, Doc. # 86). Count I alleged that, in its

[3] USAPA has been subject to repeated threats of litigation by angry East pilots upset with the fact that USAPA's proposed conditions and restrictions will block them from bidding into West pilot bases for a ten year period. The most recent threat was communicated a mere five days before this lawsuit was filed. (Mowrey Decl. ¶ 37, Ex. F). USAPA was also subject to litigation by a group of East pilots who alleged that USAPA should be obliged to retroactively apply date-of-hire seniority principles. *Breeger v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009). The *Breeger* case was dismissed on ripeness grounds.

planned implementation of pilot furloughs, the Company failed to furlough in accordance with the Nicolau list, but instead, furloughed from East and West operations independently in accordance with the respective East and West pilot seniority lists. Count II alleged that US Airways had failed to bargain in good faith toward the implementation of the Nicolau Award as allegedly required by the Transition Agreement. This court (the Honorable Judge Wake presiding) dismissed both Count I and Count II on the grounds that the alleged claims were contract-based and, therefore, within the exclusive jurisdiction of an arbitration panel referred to as the System Board. *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1063 (D. Ariz. 2008). A hearing date before the System Board was subsequently scheduled, however, the *Addington* plaintiffs declined to proceed. (Doc. No. 33 at pp. 5-8).

The district court in *Addington* did proceed to trial on the Count III DFR claim later determined, by the Ninth Circuit, to be unripe. During the trial, the district court barred USAPA from presenting:

- Any evidence challenging the process, procedure or decision of the Nicolau Award despite clear precedent allowing unions, based on principled objections to the process, to revisit seniority integration instituted through a disputed arbitration *See Associated Transport*, *Inc*., 185 N.L.R.B. 631 (1970);
- Any evidence of other seniority integrations at US Airways that resulted in a date-of-hire system despite existing case law that specifically referenced industry standards in general, and the seniority integration of other employee groups in particular, as evidence supporting the agreement that the union had acted within a wide range of reasonableness;
- Any evidence challenging the independent merits of ALPA Merger Policy including evidence detailing how ALPA Merger Policy had undergone a political process whereby consideration of a pilot's date-of-hire had been deliberately excised in 1991.

Subsequent to a finding of liability, the district court ordered USAPA to adopt, as its own, the Nicolau proposal of its decertified predecessor, which ALPA itself had been

unable to implement. In addition, the court order forbade any modification of the Nicolau proposal, thereby prohibiting USAPA from continuing ALPA's efforts to seek a satisfactory middle ground. The injunction also forbade USAPA from continuing ALPA's efforts to negotiate interim modifications of the two existing East and West CBA's. 606 F.3d at 1178 (setting forth injunction terms).

iii) The Company's Dilatory Bargaining Strategy with USAPA.

After its certification, USAPA's Negotiating Advisory Committee ("NAC") resumed bargaining with the Company towards a single pilot CBA in June, 2008. (DiOrio Decl. ¶ 7). Since that time, over the course of two years, out of some 30 sections, USAPA and the Company have reached tentative agreements on 5 minor contract sections, and are close to tentatively agreeing to 3 additional minor sections. Despite the progress made on these "minor issues," the parties have made little, if any, progress on the major high cost sections of the contract. (DiOrio Decl. ¶ 9). The lack of progress on these significant sections is attributable to the Company's dilatory bargaining tactics.

First, the Company has failed to provide USAPA with the necessary information required for the union's contract costing expert to accurately determine what specific contract changes will ultimately cost. (DiOrio Decl. ¶ 11). The Company's refusal to provide this necessary information to USAPA is a gratuitous wrench thrown into the bargaining process solely for the sake of delay.

Second, in the two years since USAPA resumed negotiations, the Company has engaged in a take-it-or-leave-it approach to bargaining. Each and every time USAPA offers proposed solutions to areas of disagreement, the Company has responded with a "no"

and counters only with their original position. (DiOrio Decl. ¶ 13). In addition, the Company has purposefully made itself a moving target. The Company has routinely presented contract concerns to USAPA, but when USAPA responds with a proposed solution, the Company either ignores the proposal or raises new and completely unrelated objections. (DiOrio Decl. ¶ 14).

It is obvious to the USAPA negotiators that the Company is deliberately dragging out the pace of negotiations in order to prolong separate operations under the bankruptcy wages currently paid to pilots – a tactic that resulted in a $279 million profit last quarter and an immediate stock sell-off by many of the Company's executives. (Doc. No. 19-5 at 2). A member of the Company's Board of Directors, Bruce Lakefield, openly admitted during a recent conversation with USAPA NAC member Jeff Davis that the Company was intentionally dragging out negotiations in order to "preserve cash." (Davis Decl. ¶ 3).

The Company's request for declaratory relief, although disguised as a tool to "promptly … complete negotiations with USAPA for a combined collective bargaining agreement," (Compl. ¶ 34) is nothing more than another wrench thrown into the collective bargaining process for the purpose of delay. The Company's expressions of neutrality are farcical. It claims to want an agreement, but now sues to compel USAPA to adopt a seniority proposal, which its CEO, Doug Parker, explained would be "*impossible to get ratified*."[4] The Company claims that it is prejudiced by the lack of an agreement, but has engaged in tactics to delay bargaining. By letter dated December 4, 2009, the Company opposed the mediatory services of the National Mediation Board (NMB) on the grounds

[4] *See* Mowrey Decl. ¶ 19, Ex. E.

that a "chasm" existed between the parties.[5] As of the date of this submission, USAPA and the Company have reached a tentative agreement with respect to only 8 of 30 contract sections.

The Company's lawsuit constitutes a new and formidable impediment to the collective bargaining process. US Airways evaded participation in the *Addington* litigation by successfully arguing before this Court that any issue concerning its supposed obligation to negotiate toward the implementation of the un-ratifiable Nicolau Award was within the exclusive jurisdiction of the System Board. Thereafter, neither the *Addington* plaintiffs nor the Company sought to pursue the matter further. Now, almost two years after the commencement of the *Addington* litigation, and only after the Ninth Circuit dismissed the action as unripe in a published decision acknowledging that the implementation of the Nicolau Award was effectively unattainable, does the Company seek, through litigation, to prolong the impasse so that its executives can continue to reap the benefits of the pilots' divide.

B. Procedural Facts.

On September 4, 2008, the same six individual pilots named as defendants in this action filed a hybrid suit against their union, USAPA, and employer, US Airways. They alleged in Count I that the company breached the existing labor contract (including its supplemental Transition Agreement) by failing to furlough in accordance with the Nicolau list, and, in Count II, a breach of contract action for failing to negotiate in good faith toward the implementation of the Nicolau list in a new, single collective bargaining agreement.

[5] DiOrio Decl.¶ 15, Ex. A.

Count III was a claim for violation of the duty of fair representation against USAPA for merely *intending* not to implement the Nicolau list (USAPA had not made any seniority proposal when suit was filed).

US Airways fought vigorously for, and was granted, dismissal on the grounds that "the System Board of Adjustment had exclusive jurisdiction." 606 F.3d at 1178. The Company agreed to arbitrate Counts I and II in a class action grievance, but when the *Addington* plaintiffs voluntarily abandoned their grievance, the company acquiesced. The *Addington* lawsuit then proceeded against USAPA and a trial resulted in the issuance of a permanent injunction directing USAPA to implement the Nicolau list as its own proposal *Id*. On multiple grounds, including ripeness, USAPA appealed and did so on an expedited basis. The *Addington* plaintiffs never appealed the district court's dismissal of counts I and II. On June 4, 2010, the Ninth Circuit determined that the DFR claim was never ripe and remanded to the district court "with directions that the action be dismissed." *Id.* at 1184.

On June 10th of this year, the *Addington* plaintiffs petitioned the Ninth Circuit for a rehearing *en banc* but that request was denied on July 8 when not a single judge requested a vote (the decision is published). The *Addington* plaintiffs next filed a motion to stay the mandate pending the filing of a petition for writ of certiorari to the United States Supreme Court, which was also summarily denied. The *Addington* plaintiffs' ninety days to petition the Supreme Court does not expire until on or about October 4, 2010. On August 13, the *Addington* lawsuit was dismissed by the district court and judgment entered for USAPA.

Prior to dismissal, however, the *Addington* defendants in this matter filed a motion to transfer the instant case to Judge Wake (08-1633, Doc. # 642), as well as a motion for

relief from judgment (08-cv-01633, Doc. # 645). Their Rule 60(b) motion seeks to continue the dismissed DFR action before the same judge who earlier ruled against USAPA. Both motions remain pending.

Without any advance notice to USAPA, US Airways filed the current action on July 26, 2010. This was in anticipation of an imminent Ninth Circuit mandate directing complete dismissal of the *Addington* DFR suit (and hence, at long last, the need to bargain over USAPA's seniority proposal). The current action alleges the same facts and issues as the original *Addington* litigation did, and merely invites this Court to issue an advisory opinion that effectively end-runs the recent ruling by the Ninth Circuit.

III. ARGUMENT.

A. The Case Does Not Present A Ripe Case Or Controversy For Same Reasons Articulated By The Ninth Circuit In *Addington.*

The Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*., is not a grant of jurisdiction to federal courts. Instead, the Act merely makes available an additional remedy. *Ybarra v. Town of Los Alto Hills*, 500 F.2d 250 (9th Cir. 1974); *Correspondent Servs. Corp. v. First Equities Corp*., 442 F.3d 767 (2d Cir. 2006). Moreover, the plaintiff has the burden of establishing jurisdiction. *Thomson v. Gaskill*, 317 U.S. 442, 446 (1942). In a 12(b)(1) factual attack on subject matter jurisdiction no "presumptive truthfulness attaches" to plaintiff's allegations. *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988). The court does not accept conclusory allegations as true. *Zappia Middle East Const. Co. Ltd., v. Emirate of Abu Dhabi*, 215 F.3d 447, 1253 (2d Cir. 2000)). The court must weigh the evidence before it, and find the facts, but enjoys broad discretion to receive and consider extrinsic evidence. *Stalley ex rel. U.S. v. Orlando Regional Healthcare Systems Inc*., 524 F.3d 1229, 1232 – 33 (11th Cir. 2008). A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

As with any other federal litigation, a declaratory judgment action must be ripe. *Preiser v. Newkirk*, 422 U.S. 395 (1975). "The Declaratory Judgment Act … does not lessen this jurisdictional requirement; rather, the Act is interpreted as requiring the same showing required by Article III." *Daines v. Alcatel*, 105 F. Supp. 2d 1153, 1155 (E.D. Wash. 2000) (*citing Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991)). "In actions for declaratory judgment invoking the RLA ... a dispute appropriate for resolution

... 'must not be *nebulous or contingent*, but must have taken on fixed and final shape.'" *Atlas Air, Inc. v. Air Line Pilots, Ass'n*, 232 F.3d 218, 227 (D.C. Cir. 2000) (emphasis added). Addressing the same facts now presented to this Court, the Ninth Circuit has held that the contingencies related to the East-West seniority dispute are so numerous as to preclude a finding of ripeness. *Addington*, 606 F.3d at 1174.

In its decision of June 4, 2010, the Ninth Circuit first articulated the precepts of ripeness applicable to this Court. The ripeness doctrine rests, in part, on the Article III requirement that federal courts decide only cases and controversies, and in part, on prudential concerns. 606 F.3d at 1174 (*citing Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir.2009), *cert. denied* _U.S._ (2010)). The ripeness doctrine is "intended to 'prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* To determine whether a case is ripe, the court must "consider two factors: 'the fitness of issues for judicial decision," and 'the hardship to the parties of withholding court consideration.'" 606 F.3d at 1174 (*citing, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211-12 (9th Cir.2006)).

A question is fit for decision when it can be decided without considering "contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Id*. (*citing Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir.2002)).[6] Addressing the facts before it, the Ninth Circuit in *Addington* held both that a number of contingencies existed that necessarily precluded a finding of ripeness and that, furthermore, the West pilots had failed

[6] "Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy [for purposes of the Declaratory Judgment Act]" *Educ. Credit Mgt. Corp. v. Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) (citations omitted).

to identify a sufficiently concrete injury.

With respect to the issue of contingencies, the Ninth Circuit held:

> **Not until the airline responds to the proposal**, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal – whatever USAPA's final proposal is. Because these contingencies make the claim speculative, the issues are not yet fit for judicial decision.

Id. at 1180 [emphasis added].

The Ninth Circuit explained, there can be no effective DFR analysis of a proposal over which there has been *no negotiation*: "USAPA's final proposal may yet be one that does not work the disadvantage Plaintiffs fear, *even if that proposal is not the Nicolau Award*." *Id*. at 1181 [emphasis added]. Moreover, even with the advent of a "final" proposal, no DFR (or hybrid DFR) liability could exist without completion of the ratification process since no West pilot would "actually be affected by USAPA's seniority proposal" until that time. *Id*. at 1180.

Furthermore, precisely because of this ratification requirement, the Ninth Circuit rejected USAPA's failure to adopt the Nicolau Award as constituting a "sufficiently concrete injury":

> The present impasse, in fact, could well be prolonged by prematurely resolving the West Pilots' claim judicially at this point. Forced to bargain for the Nicolau Award, any contract USAPA could negotiate would **undoubtedly be rejected by is membership.**

Id. at 1180 n.1 [emphasis added]. Indeed, the Ninth Circuit attributed the inability to move forward with a contract incorporating the Nicolau Award **not** to the actions of labor unions, but rather to the pilots' exercise of their democratic franchise:

> As demonstrated by ALPA's similar difficulties in reaching a CBA, the pilot

> groups, and individual pilots with their ratification/non-ratification powers, are the major contributors to the absence of a CBA under these circumstances.

Id. at 1181 n. 2.

US Airways concedes that, in the instant case, the parties are addressing the "same facts that previously were litigated."[7] Indeed, the facts have not changed, in part, because the Company, to date, has never responded to USAPA's seniority proposal presented on September 30, 2008.

Nevertheless, the Company's Count I seeks to condemn USAPA and the pilots it represents to a negotiating posture that would guarantee an interminable impasse. Whereas the perpetuation of such an impasse could produce an enormous economic benefit for the Company, it would cause only harm to USAPA and its members.

In addition to the contingencies expressly identified by the Ninth Circuit, there are other further contingencies that would either: 1) resolve the controversy within the pilot group, 2) address and/or neutralize the potential for any "injury" to the Company, and/or 3) obviate altogether the divisive issue of seniority integration. None of these potential solutions can be addressed without further collective bargaining. Furthermore, the Company's unseemly race to the courthouse will have the certain effect of short-circuiting these options.

i) Resolving The Controversy Within The Pilot Group.

USAPA – as the certified collective bargaining agent – has the exclusive authority and obligation to negotiate in the collective interest of the bargaining unit it represents.

[7] *See* Doc. # 1, Complaint, ¶ 16.

Part of that bargaining process is the resolution of conflicts that arise within the bargaining unit. That is the Union's job, not the Company's. Indeed, the Company's determination to create a certified class of West pilots for the purpose of evading the existing negotiating process runs counter to its obligations under the Railway Labor Act. *See Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1007 (9th Cir. 1990) (the "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.").

It is not for the Company or this Court to determine preemptively what combination of wages, benefits, work rules and seniority provisions would satisfy the interests of the collective pilots or any subgroup therein. Indeed, the Ninth Circuit in *Addington* determined that the federal judiciary's premature involvement in the collective bargaining process could doom the pilots to continuing impasse by saddling USAPA with an un-ratifiable agreement. As the Ninth Circuit recognized, if the final agreement is "acceptable to" the West Pilots, the alleged fear of litigation currently held by US Airways would *never materialize*.[8] By deferring consideration of this premature claim, the parties will be afforded the "opportunity to function [through collective bargaining] to iron out differences." *Young v. City of Detroit*, 652 F.2d 617, 627 (6th Cir. 1981).

Moreover, allowing USAPA the opportunity to negotiate an agreement that satisfies a majority of the West pilot subgroup would dispositively resolve any DFR claim under existing precedent. *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992);

[8] The alleged class is not uniform; there are senior West pilots whose interest is adverse to their disgruntled junior litigants. *See*, USAPA brief to Ninth Circuit, No. 09-16564, DktEntry: 7074777, p. 67.

Gullickson v. Southwest Airlines Pilots' Ass'n, 931 F. Supp. 1534, 1541 (D. Utah 1995), *aff'd*, 87 F.3d 1176 (10th Cir. 1996). ("ratification of a seniority arrangement is a valid defense to complaints about a union's actions in making that arrangement.").[9] Instead of avoiding litigation, the US Airways' lawsuit condemns the parties to litigation.

ii) Neutralizing The Alleged Company Injury

Among the options to address and/or neutralize the Company's purportedly imminent injury would be negotiated provisions providing for either indemnification or stage implementation. Under an indemnification provision, USAPA could agree to assume the risk of damages arising from a particular seniority integration proposal. Such indemnification provisions are routinely found in collective bargaining agreements that compel employees, under penalty of termination, to pay dues or agency fees to the Union. Indeed, such an indemnification provision is found within the existing East pilot agreement.

Alternatively, a delayed or staged implementation of the seniority term (i.e. Section 22 in the CBA) that deferred operational integration until one-year after the ratification vote could allow the opportunity to determine if pilots approved the integration proposal and postpone the accrual of any damages until any subsequent litigation could be resolved. Indeed, the Ninth Circuit in *Addington* already found that the mere perpetuation of the status quo inflicts no harm on the *Addington* plaintiffs. 606 F.3d at 1180 ("We also conclude that withholding judicial consideration does not work a direct and immediate hardship on the West Pilots").

[9] USAPA's balloting process permits a breakdown of the pilot ratification process on a domicile by domicile basis. All West pilots are based at a single domicile – Phoenix. (DiOrio Decl. ¶ 16).

iii) Obviating The Seniority Integration Issue.

The Company has advised its investors that, even in the absence of pilot seniority integration, it has already obtained virtually all of the operational synergies there are to be had. (Doc. No. 19-4 aT 9). If the Company's primary source of injury is a supposed work stoppage or litigation over seniority integration, then a continuation of the existing dual contract approach may be indicated. ALPA – USAPA's predecessor – took the position that interim modifications of the existing two East and West contracts was consistent with the parties' Transition Agreement. (Mowrey Decl. ¶ 18, Ex. D).

B. <u>This Court Has Already Determined That The Purported Dispute Is Within The Exclusive Jurisdiction Of The System Board Of Adjustment And The *Addington* Plaintiffs' Failure To Process Their Grievance Renders The Dispute Moot.</u>

Count II of the *Addington* suit alleged that the Company had violated the Transition Agreement "because it has not been negotiating with USAPA in good faith to institute Integrated Operations by adopting a single collective bargaining agreement that would implement the Nicolau List." (08-1633 Doc. Doc. No. 86, ¶ 101). US Airways successfully argued in favor of the dismissal of Count II on the grounds that, under the Railway Labor Act, the claim presented a dispute that was within the exclusive jurisdiction of the System Board. 588 F. Supp. 2d at 1064. After the scheduling of their class grievance for hearing before the System Board, the *Addington* plaintiffs elected to withdraw the grievance in favor of focusing exclusively on their Count III DFR claim against USAPA.[10]

Count I of the Complaint in this action replicates the *Addington* claim by asserting

[10] *See* Doc. # 33 at pp. 5-8 (*Addington* plaintiffs' waiver of arbitration).

that the failure to adopt the Nicolau Award "is not in accord with the requirements of the Transition Agreement…." (Compl. ¶ 39). The replicated contract claim is one that no federal court could ever have jurisdiction over for the same reasons the Company successfully argued to dismiss Count II of the *Addington* plaintiffs' case:

> It is well established under the RLA that any dispute over the interpretation or application of an airline collective bargaining agreement (called a "minor dispute") must be submitted to final and binding arbitration before an arbitration panel known as a Board of Adjustment, and that the federal courts have no jurisdiction over such disputes.

See US Airways Motion to Dismiss, 08-cv-01633, Doc. 30, p. 2 (*citing Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989) ("Conrail"); *Ass'n of Flight Attendants v. Horizon Air Indus., Inc*., 280 F.3d 901, 904, 906 (9th Cir. 2002).

It is USAPA's position that the *Addington* plaintiffs' waiver of their class action grievance is dispositive of the claims that the Company now seeks to press on their behalf under Count I of the complaint in the current action. In any event, the question of whether these claims could enjoy a Lazarus-like resurrection is for the System Board to determine. Significantly, until the inception of the instant lawsuit, it has also been US Airways' position that the System Board has sufficient remedial authority to address such claims.[11]

C. <u>The Company Seeks A Ruling Of Immunity That Is Neither Appropriate Under The Declaratory Judgment Act Or Necessary In Light Of The Ninth Circuit's Decision in *Addington*.</u>

Notwithstanding the remote nature of any case or controversy over seniority integration, the Company asserts that it is "entitled," pursuant to Count III of its complaint,

[11] *See e.g.*, 08-cv-01633, Doc. Nos. 30; 31 ¶ 5: "if the Board of Adjustment determines that US Airways is *incorrect* in its interpretation of the collective bargain agreement ..."; Doc. 48; email by company attorney R. Janger to Arbitrator Bloch, 11 Dec. 08: "We have a Transition Agreement *dispute* that has been filed by [*Addington*]").

to a grant of immunity regardless of any future negotiating posture it may take. (Doc. # 1 ¶ 56).[12] The Company is not entitled to a declaratory judgment under such circumstances. *See Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712 (7th Cir. 2002) ("The declaratory judgment plaintiff must be able to show that the feared lawsuit from the other party is immediate and real …").

In the absence of any real case or controversy, the Company's action is reduced to a plea for legal advice from this Court over putative worries about the consequences of fulfilling its acknowledged duty to bargain.

> No doubt, a persuasive argument can be made for extending the use of advisory opinions to all situations in which conflicts may impend … Much of the uncertainty of business management could, perhaps, thus be eliminated. What a comfort it would be, if a declaratory judgment could be made as available as in interoffice memorandum, whenever a board of directors meets to consider a proposed new venture. But that millennium has not yet arrived.

Helco Prod. Co., Inc. v. McNutt, 137 F.2d 681, 684 (D. C. Cir. 1943). This suit is a prime example of an employer, in the midst of collective bargaining, seeking a tactical advantage under the guise of a declaratory judgment claim that requires dismissal. *See North Am. Airlines, Inc., v. Int'l Bhd. of Teamsters*, 2005 U.S. Dist. LEXIS 4385, at *43 (S.D.N.Y. Mar. 21, 2005) ("In the context of an ongoing labor negotiation it is particularly inappropriate to have courts opine on the legality of certain proposals by a party to the dispute.") [attached in Addendum]

In any event, in view of the history of the *Addington* litigation, such a demand for immunity seems hardly necessary. The district court in *Addington* required the Company to

[12] Even if this action were brought *after* ratification, because Count III (immunity) is pled in the alternative to *both* Count I (with Nicolau) and Count II (without it), this action will not necessarily resolve the seniority issue, therefore no justiciable case or controversy is presented by it.

remain a party even after dismissing Counts I and II precisely due to the possibility that evidence of "collusion" might appear. *Addington*, 588 F. Supp. 2d at 1064 n. 5. It never did. Nor did the fact that the union was subsequently found liable on a DFR claim lead to a finding of collusion. Instead, the Company was ultimately dismissed as a party.[13] As remote as the possibility of a liability finding against USAPA on a DFR claim is, more remote still is the possibility of a finding of DFR collusion against the Company.[14] Only the Union owes a duty of fair representation and, to the extent they have not been waived, any contract-based claims previously asserted against the Company are, indisputably, within the exclusive jurisdiction of the System Board.

D. Absence Of Hardship.

In addition to being unfit for judicial decision, this action is not ripe because withholding consideration presents *no hardship* to any party. "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail *more than possible financial loss*." 606 F.3d at 1180 (citing cases) (emphasis added). But the Company cannot make this showing, and the Ninth Circuit has already explained, at length, why the *Addington* plaintiffs have yet to suffer a "sufficiently concrete injury" warranting judicial relief. *Id*. at 1180-1181.

With respect to US Airways, the Complaint merely alleges that the plaintiff may "potentially" suffer financial loss (Doc. No. ¶ 17), whether from a work stoppage, litigation or delay in negotiating a contract. But potential monetary loss is admittedly speculative, and bare conclusory allegations such as these are inadequate to prove hardship as a matter

[13] *See* 08-cv-01633, Doc. # 594, p. 2, line 9.
[14] *See infra* at § III, 4, b.

of law.[15] Furthermore, any allegation by US Airways that a work stoppage is imminent or that it is currently suffering any harm as a result of not having a single pilot contract is wholly contrived and contrary to its prior representations.

As set forth at length in the briefing surrounding USAPA's motion for stay[16], US Airways is currently suffering *zero harm* as a result of the pilot seniority issue. Rather, in reality, it is *benefitting* from the division between its pilots. In fact, Bruce Lakefield, a member of the US Airways Board of Directors recently informed Jeff Davis, a member of USAPA's NAC, that the Company was intentionally dragging out negotiations in order to "preserve cash." (Davis Decl. ¶ 3). This is entirely consistent with CEO Parker's comments to investors that entry into a new single pilot CBA "would be a net negative to the financials." (Doc. # 19-4 at 9).[17] Therefore, US Airways' sudden allegation that it faces "substantial damage to its operations and finances through … protracted negotiations" is simply untrue. (Doc. No 1, ¶ 34).

Finally, contrary to US Airways' allegations, the possibility of a strike is hardly imminent. Collective bargaining under the Railway Labor Act has been described by the Supreme Court as "an almost *interminable* process." *Detroit & Toledo Shore Line RR Co. v. United Transp. Union*, 396 U.S. 142, 149 (1969). A work stoppage would require exhaustion of all of the Act's requirements including a "release" from mediated

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[15] Not only is the allegation of potential monetary loss speculative, it is simply unbelievable given the Company's posting last quarter of its second highest ($279 million) *profit* since the merger – while still operating under separate pilot contracts. (Doc. # 19-5 at 2).

[16] *See* Doc. # 18 at 10-12 & Doc. # 32 at 4-9 for full discussion of lack of harm suffered by US Airways and its representations to investors detailing same.

[17] The company's game of delay was further evidenced by its staunch opposition to NMB mediation over negotiations. (*See* DiOrio Decl. ¶ 15, Ex. A) (US Airways' Dec. 4, 2009 letter to NMB).

negotiations by the NMB. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co*., 394 U.S. 369 (1969). Furthermore, US Airways recently argued that invocation of the NMB's mediation services (a necessary first step to any self-help) would not be "fruitful" because "the chasm between the parties' bargaining positions [was] so dramatic." (DiOrio Decl. ¶ 15, Ex. A). Moreover, the Company's refusal to supply data necessary to reconcile costing differences between the parties and its take-it-or-leave-it bargaining approach have, in the past two years, resulted in "little, if any, progress" on the major high cost sections of the contract (DiOrio Decl. at ¶ 9). Given that the parties' bargaining positions are miles apart on the major non-seniority contract sections and that the NMB only recently invoked its mediation jurisdiction, any allegation that the seniority issue in and of itself presents the possibility of an *imminent* work stoppage is utterly without merit.

E. Prudential Concerns Under The Declaratory Judgment Act Warrant Dismissal.

"District courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co*., 515 U.S. 277, 288 (1995). In this context, "the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton,* 515 U.S. at 288. If a party contests the prudence of the court's exercise of discretion to hear a declaratory judgment claim, the court must articulate the factual circumstance supporting the award. *Government Employees Insurance Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). USAPA contests it:

Even if this case were justiciable, prudential reasons warrant dismissal:

First, there is related litigation pending that is far better suited to address the alleged case and controversy here. "Parallel proceedings and piecemeal litigation are both disfavored under the Declaratory Judgment Act." *Luther v. Countrywide Fin. Corp*., 2009 U.S. Dist. LEXIS 100138, at *10 (C.D. Cal. Oct. 9, 2009) (*citing Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 672 (9th Cir. 2005)).

The *Addington* plaintiffs – on whose behalf the Company advances this litigation – have stated their intent to file a petition for certiorari with the Supreme Court seeking review of the DFR claim recently dismissed by the Ninth Circuit. (Doc. No. 19-4 at 1). Until the Supreme Court denies the petition, or grants it and rules on the merits, the matter is pending. Also pending is a Rule 60(b) motion that seeks to re-open the evidentiary record in the *Addington* litigation.

Due to the potential for inconsistent results, pending litigation is a classic prudential ground to decline requests for declaratory relief because such suits serve no useful purpose. *See Mcgraw-Edison Co. v. Preformed Line* 362 F.2d 339, 342 (9th Cir. 1966) ("it is well settled, however, that a declaratory judgment may be refused ... where it is being sought merely to determine issues which are involved in a case already pending ...); *Great Am. Ins. Co. v. Houston Gen. Ins. Co.,* 735 F. Supp. 581, 584 (S.D.N.Y. 1990) (dismissal is appropriate "particularly when there is a pending proceeding in another court, state or federal ...").

Second, a "declaratory judgment should issue only when it will serve a useful purpose." *Int'l Harvester Co. v. Deere & Co*., 623 F.2d 1207, 1218 (7th Cir. 1980). Therefore, a "court properly acts within its discretion by dismissing a claim for declaratory

relief if 'a declaratory judgment would serve no useful purpose.'" *AIU Ins. Co. v. Acceptance Ins. Co.*, 2008 U.S. Dist. LEXIS 95694, at *7 (N.D. Cal. Nov. 17, 2008) (*quoting Wilton*, 515 U.S. at 288). The declaratory relief sought by US Airways will serve no useful purpose, *at this time*, in "clarifying and settling the legal relations between the parties." *Los Angeles County Bar Ass'n v. Fong*, 979 F.2d 697, 703 (9th Cir. 1992).

For the reasons set forth herein regarding ripeness,[18] the declaratory relief sought in Count I will serve no useful purpose. Specifically, any declaration that USAPA must bargain for implementation of its predecessor's seniority proposal is nothing more than a reincarnation of the recently vacated injunction in *Addington*, which would force USAPA to bargain for a "contract [that] would undoubtedly be rejected by its membership." *Addington*, 606 F.3d at 1180 n.1. When this *failed* ratification occurs, USAPA would be forced to return to this Court on a motion brought pursuant to Fed. R. Civ. P. 60(b) in order to obtain relief from the declaratory judgment. The only thing that would have been achieved by the declaration, as explained by the Ninth Circuit in *Addington*, is an unnecessary prolonging of the "present impasse." *Id*.

Alternatively, a declaration pursuant to Count II, that it is not a violation of law to bargain for something other than Nicolau, also serves no useful purpose. The Ninth Circuit has already commented that "USAPA's final proposal may yet be one that does not work the disadvantages [the West Pilots] fear, **even if that proposal is not the Nicolau Award**." *Id*. at 1180 (emphasis added). Therefore, a declaration from this Court reiterating that very concept is unnecessary. As the Ninth Circuit instructed at the conclusion of its decision,

[18] *See supra* at § III. A.

USAPA and US Airways are left to *bargain* and upon completion of negotiations, "the final agreement could be acceptable to [the West Pilots]." *Id*. at 1184. That final agreement, if tested by a future DFR action, will be evaluated under the "wide range of reasonableness" standard applied to labor unions that are required to resolve disputes within their ranks – and not simply by its inclusion or non-inclusion of the Nicolau Award. For these reasons, any declaration issued pursuant to Counts I and II simply serves no useful purpose and for that reason this Court should exercise its broad discretion under the Declaratory Judgment Act to dismiss the action.

Third, while the parties have been engaged in collective bargaining for over two years, they have yet to bargain over seniority. The reality is that the *Addington* plaintiffs commenced their litigation *prior* to USAPA's development of its seniority proposal. While the *Addington* suit was in progress, USAPA and US Airways negotiated over other contractual sections and, with that suit's dismissal, USAPA expected to finally receive a response from the Company. Instead, having successfully dodged full participation in the *Addington* litigation for over two years, the Company now effectively seeks to renew that litigation. Under these circumstances, strong precedent exists to avoid court interference with unfinished bargaining. "Allowing declaratory actions in these situations can deter settlement negotiations and encourage races to the courthouse ... this is something to which our system of justice should not and does not aspire." *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742, 747 (S.D.N.Y. 1977); *Pan Am. World Airways v. Int;l. Bhd. of Teamster*, 275 F. Supp. at 993 (S.D.N.Y. 1967) ("it is plain ... that under the statutory scheme of the [RLA] Congress has circumscribed the role of the courts"); *Indep. Fed'n of*

Flight Attendants v. Trans World Airlines, 1981 U.S. Dist. LEXIS 9857 (W.D. Mo. Sept. 9, 1981) ("public interest does not require that the federal courts referee every tactical move in labor negotiations under the [RLA]").

Fourth, entertaining Count I of the Company's Complaint would bring this Court not only headlong in conflict with the decision of the Ninth Circuit in *Addington,* but also with several other settled principles of applicable law:

- § 152, Fourth of the RLA, allows employees to choose their representatives without employer interference. Here, the pilots chose to decertify ALPA, in part, because its seniority proposal was not capable of ratification. But Count I effectively retaliates against the employees' choice, which is also in violation of the RLA. In addition, the Company's determination to certify a class of a sub-group of the represented pilots runs afoul of its "affirmative duty ... to treat only with the true representative." *Barthelemy*, 897 F.2d at 1007.

- Count I is calculated to, or has the effect of, dictating a substantive term of a collective bargaining agreement in violation of Supreme Court precedent. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970). Moreover, the substantive term at issue is the proposal of a de-certified predecessor – ALPA – which even ALPA itself had effectively abandoned.

- Apart from its substance, the relief sought pursuant to Count I constitutes interference by the Court in internal union governance. *Local No. 48, United Bhd. of Carpenters & Joiners of America v. United Bhd. of Carpenters & Joiners of America*, 920 F.2d 1047 (1st Cir. 1990).

- Count I will, or risks, invading the jurisdiction of the National Mediation Board to oversee mediated negotiations as mandated by the RLA. *See*, *e.g.*, *Switchman's Union v. National Mediation Board*, 320 U.S. 297, 303 (1943).

F. No Claim Is Stated Under The Railway Labor Act.

To avoid dismissal under a Rule 12(b)(6) for failure to state a claim, a plaintiff must allege enough facts to raise claims beyond the level of speculation and the court need not accept as true bald assertions or legal conclusions that are "couched" or "masquerading" as

facts. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (plausibility standard); *Williston v. Exclusive Leasehold*, 524 F.3d 1090, 1096 (9th Cir. 2008). Regarding claims of violation of § 152, First of the RLA, the Supreme Court has warned that, "great circumspection should be used" by courts to avoid "risk[ing] infringement with the substantive terms of collective bargaining agreements." *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 (1971); *Regional Airline Pilots Ass'n v. Wings West Airlines, Inc.*, 915 F.2d 1399, 1402 (9th Cir. 1990) (federal courts' obligation is "not to be involved in particulars of the bargaining process"). The Ninth Circuit has described the duty under § 152, First in this way:

> Courts must resist finding violations of the RLA based solely on evidence of hard bargaining, inability to reach agreement, or intransigent positions. At the same time, the duty imposed by the RLA to exert every reasonable effort to reach an agreement 'at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences.'

Ass'n of Flight Attendants v. Horizon, 976 F.2d 541, 545 (9th Cir. 1992).

The facts establish that it is US Airways, and not USAPA, that has failed to make every reasonable effort to reach an Agreement. The sole allegation that USAPA "currently" violates its obligation under § 152, First is at most actually evidence of just the opposite, of its bargaining, otherwise it is merely evidence of hardened opinion.[19]

The Complaint asserts that USAPA is "inalterably opposed" to the Nicolau list and has conveyed this opposition to its members. (¶ 32). Nevertheless, the mere expression of opinion, collateral to or in bargaining, is not *per se* actionable. *Fed. Express v. ALPA*, 67

[19] As addressed, *supra* at § II, B, this Court has already determined that the "good faith" bargaining claim is a contract-based dispute within the exclusive jurisdiction of the System Board.

F.3d 961, 964 (D.C. Cir. 1995) ("hard bargaining is encouraged by the RLA"; parties "can be expected to take aggressive bargaining positions and freely threaten dire consequences ..."). Merely holding 'inalterably' to a bargaining position taken in good faith is also not actionable. *See Flight Attendants v. Trans World Airlines*, 878 F.2d 254 (8th Cir. 1988), *cert. denied*, 493 U.S. 1044 (being adamant about its proposals not a violation); *Kankakee-Iroquois Cnty. Emlyrs. Ass'n v. NLRB*, 825 F.2d 1091 (7th Cir. 1987) (union did not bargain in bad faith when it refused to recede from its position, advanced and maintained in good faith); *Trans Int'l Airline v. Teamsters*, 650 F.2d 949, 958 (9th Cir. 1980) *cert. denied*, 449 U.S. 1110 ("robust, bare-knuckled bargaining" permissible).

At its most specific, the lone allegation is that USAPA's pre and post injunction proposal for a seniority term does not contain the Nicolau list. True, but it does not precisely for the reason indicated by the Ninth Circuit, which is that the Nicolau list is *not ratifiable* (603 F.3d at 1180), a fact the Complaint does not challenge. Indeed, a superior Section 2, First claim would exist if USAPA were to deliberately pursue an agreement that USAPA, the Company, and the Ninth Circuit have all determined to be *non*-ratifiable. Such a futile gesture would be manifestly inconsistent with the obligation to make "every reasonable effort" to reach an agreement.

Simply making a non-Nicolau proposal is not remotely close to a failure to bargain. In the first instance, extending proposals *is* bargaining. In the second, a date-of-hire term is at least facially valid, particularly in view of the fact that every other unionized employee

group on the property combined their seniority lists on a date-of-hire basis.[20] Third, date-of-hire has repeatedly been upheld as the *preferred* method to integrate merged work groups in the Ninth Circuit and elsewhere. *Laturner v. Burlington N., Inc*., 501 F.2d 59, 5993 (9th Cir. 1974), *cert denied*, 419 U.S. 1109 (1975) (*citing Humphrey v. Moore*, 375 U.S. 335, 347, (1964) ("it has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs"); *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 137,143 n. 10 (D.C. Cir. 1967) (date of hire is the standard by which all other methods of seniority integration are judged, therefore "the condemnations of refusal to dovetail are legion"). Fourth, merely because some members are disadvantaged by a seniority term in no way substantiates a DFR claim. *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992) (date-of-hire "serves the interests of labor as a whole ... Majority rule is the norm. Equal treatment does not become forbidden because the majority prefers equality, even if formal equality bears more harshly on the minority"); *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962). Fifth, US Airways endorsed strict date-of-hire agreements amongst its other employee groups as "fair and equitable" even where – in sharp contrast with USAPA's proposal – these integrations afforded no conditions or restrictions protecting the respective West employee groups. (Mowrey Decl. ¶ 9-10).

Moreover, the Company presents its RLA claim with unclean hands. It has yet to

[20] Even the district court in *Addington* recognized that, "[t]here is nothing wrong with bargaining for seniority integration based upon date of hire [and that] date-of-hire seniority integration is generally an equitable and feasible solution to the problem of merging seniority lists." *Addington v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 61724, at *31 (D. Ariz. July 17, 2009).

ever bargain with USAPA on seniority and now refuses not only to respond to USAPA's proposal, but even to take a position on the subject (its "neutral"). Even so, the Company admits it *does* have a duty to bargain over seniority which requires it to "bargain with USAPA *now*" (Complaint, ¶¶ 1; 5). *Now*, too, it seeks a court order in Count I premised on forcing USAPA to return to its predecessor's discarded bargaining proposal that cannot be ratified. There is no sufficient allegation, nor could there be a genuine dispute, that USAPA has breached its duty under § 152, First, hence no claim is stated. Instead, the Company has merely raced to the Courthouse to circumvent the Ninth Circuit's admonition to bargain a solution to the seniority issue. *Addington*, 606 F.3d at 1180, fn. 1.

G. No Claim Is Stated for Violation of the Duty of Fair Representation.

To state a claim for breach of the duty of fair representation a plaintiff must allege a union's conduct toward a member is "arbitrary, discriminatory, or in bad faith" (the 'tripartite standard'). *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (*quoting Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). In the context of bargaining, a claim is not ripe until there is a "final product of bargaining." *Addington*, 606 F.3d at 1182 (*citing O'Neil* 499 U.S. at 78 *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). If a union acts within a "wide range of reasonableness" its actions are not arbitrary. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("the complete satisfaction of all who are represented is hardly to be expected"). Discrimination based on per se unlawful categories such as race violates the Duty, but not when based on seniority. *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1359-60 (10th Cir. 1994) ("a union does not engage in invidious discrimination when it negotiates a contract whose terms vary according to seniority")

(*citing Steele v. Louisville & Nashville R. Co*., 323 U.S. 192, 203 (1944)); *Rakestraw*, 981 F.2d at 1533. And bad faith requires a showing of "substantial evidence of fraud, deceitful action or dishonest conduct.'" *Beck v. United Food & Commercial Workers Union*, 506 F.3d 874, 880 (9th Cir. 2007) (*citing Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 299 (1971)).

Controlling precedent makes any future DFR claim groundless, if not frivolous:

Prior to ratification there is no risk of a non-frivolous DFR suit, because according to the Ninth Circuit, until then there is no ripe claim. *Addington*, 606 F.3d at 1180. After ratification, the Complaint suggests a hybrid DFR claim will be commenced, but that is of no significance now unless the Company also demonstrates an "objectively reasonable fear of imminent suit" not merely the potential for a frivolous one sometime in the future. *North Am. Airlines*, 2005 U.S. Dist. LEXIS 4385, at *47 (*citing EMC Corp v. Norand Corp*., 89 F.3d 807, 811 (Fed. Cir. 1996)) ("any time parties are in negotiation ... the possibility of a lawsuit looms in the background"). But the Company cannot show that a non-frivolous suit is inevitable or that if one occurs that it will reasonably expose the Company to liability:

First, as stated herein above, ratification between these parties is uncertain; there are contingencies that could well prevent ratification. No ratification, no contract, no suit – ever.

Second, as the Ninth Circuit observed, even with ratification there may never be any *injury* and this is true even if the Nicolau list is excluded. (Indeed, following ratification the parties might reasonably agree to delay implementation of the seniority integration term in order to seek a declaratory judgment after ratification and this too would be before any

possible injury).

Third, by any objective measure a re-do of the *Addington* DFR claim is doomed, whether it is solely against USAPA or under the pretense of a hybrid claim. This Court need look no further than the Ninth Circuit's *Addington* decision in this regard because while it did not *rule* on the merits of the *Addington* plaintiffs' theory of entitlement to Nicolau, the Court did *comment* on it. It left no room to doubt that the mere fact that Nicolau is not included in a new contract would not, per se, state a DFR claim.[21] In fact, the majority in *Addington* made it a point to fault the dissent for its implicit "assum[ption] that the Nicolau Award, the product of the internal rules and processes of ALPA, is binding on USAPA." 606 F.3d at 1181 n.3.

Moreover, buttressing the Ninth's comments are settled lines of precedent upholding: i) that seniority is not a vested right but one that can be negotiated by unions; ii) even after a 'binding arbitration' and; iii) affirming date-of-hire as a fair solution in mergers. *See e.g.*, *Hass v. Darigold Dairy Prod. Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985) (seniority rights are creatures of contract which unions may renegotiate); *Associated Transport*, *Inc*., 185 N.L.R.B. 631 (1970) (notwithstanding prior arbitration union free to renegotiate seniority); *Laturner,* 501 F.2d at 599 (date of hire affirmed as "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in wake of a merger).

Fourth, even if the Court were to conclude that *USAPA* has a risk of liability, that

[21] "USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award" (606 F.3d at 1181), and "USAPA is at least as free to abandon the Nicolau Award as was its predecessor" *Id*., fn 3.

does not mean the *Company* does. Its fears can easily be discounted at this juncture. There can be no dispute that the Company already prevailed on Counts I and II in the *Addington* lawsuit, and the grievance alleging breach of contract was forever waived. Exposure on a straight contract claim is thus nil. The Company nevertheless conjures up the specter of a collusion theory – which the *Addington* plaintiffs never alleged – but that would predictably fare no better.[22]

To prevail on a collusion claim against the Company the plaintiffs would also have to prevail on the DFR claim against the Union, since there can be no collusive liability without the Union DFR liability as a necessary predicate. *DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983). Even if the necessary DFR predicate could be established, to show collusion plaintiffs would have to show intentional conspiracy to breach the duty. *Crusos v. United Transp. Union, Local 1201*, 786 F.2d 970, 973 (9th Cir. 1986), *cert. denied*, 479 U.S. 934 (1986). That is not possible, however, because the Company acknowledges in its pleadings that it does *not know* if exclusion of Nicolau would violate USAPA's duty.[23] Without the intent to breach the duty, there is no possible act of conspiracy to form the basis for collusion. The current USAPA proposal is lawful on its face and made in good faith, and the Company openly admits that acceptance would "not be the result of

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[22] The Company also mistakenly alleges that the *Addington* plaintiffs pled a discrimination-DFR claim. (Compl. ¶ 57). This is false. No such claim was ever pled, even after amendment. In fact, *Addington* lead counsel went further to affirmatively waive it, on the record, the first day of trial: "We believe it's only on the bad faith side. So we're not making a discrimination claim." (Trial Transcript, Day 1, April 28, 2009, at 136:4).

[23] *See* Complaint, ¶ 5 (the company "must have clarification as to the parties' respective rights, constraints, and obligations").

actionable 'collusion.'"[24]

H. Plaintiffs Failed to Join a Necessary Party Under Rule 19.

Fed. R. Civ. P. 12(b)(7) allows dismissal of an action for failure to join a necessary and indispensable party under Fed. R. Civ. P. 19.

> "The application of Rule 19 entails a practical two-step inquiry. First, a court must determine whether an absent party should be joined as a 'necessary party' under subsection (a). Second, if the court concludes that the nonparty is necessary and cannot be joined for practical or jurisdictional reasons, it must then determine under subsection (b) whether in 'equity and good conscience' the action should be dismissed because the nonparty is 'indispensable.'"

Greenberg v. Fireman's Fund Ins. Co., 2007 U.S. Dist. LEXIS 86621, at *3 (D. Ariz. Nov. 16, 2007) (*quoting Va. Sur. Co. v. Northrop Grunman Corp.,* 144 F.3d 1243, 1247 (9th Cir. 1998)).

The East pilots individually, or as a proposed class, are improperly excluded. The premise of the Company's sprint to the courthouse on the occasion of the mandate of the Ninth Circuit in *Addington* is its worry over a hybrid-suit against USAPA over a new seniority term, which they say the "West Pilots ... have made clear that they will challenge in a future litigation" just as they did in *Addington*. (Complaint, ¶ 3). Left out by the Company, however, are the East pilots who *also* have sued USAPA over seniority, in *Breeger vs. US Airline Pilots Ass.*, 2009 U.S. Dist. LEXIS 40489 (W.D. N.C. May 12, 2009). The *Breeger* plaintiffs' case was dismissed on ripeness grounds at the district court level but their issue, the retroactive application of date-of-hire seniority, remains. Also left out from the Company's lawsuit is the group of East pilots currently engaged in litigation

[24] *See* Complaint ¶ 58 (correctly citing to *Rakestraw v. United Airlines, Inc.,* 765 F. Supp. 474, 493 (N.D. Ill. 1991), *aff'd in relevant part and rev'd on other grounds*, 981 F.2d 1542 (7th Cir. 1992) and *Kozera v. IBEW*, 892 F.Supp. 536 (S.D.N.Y 1995).

against ALPA based on ALPA's introduction of an erroneous East pilot list, which prejudiced their standing on the Nicolau list. *See Naugler*, 2008 U.S. Dist. LEXIS 25173. Were USAPA forced into a Nicolau term, the *Breeger* and *Naugler* plaintiffs (or other East pilots) cannot reasonably be expected to sit on their hands. Surely *they* are as necessary as the West pilots.

Also, conspicuously absent are:

- Those East pilots who stridently oppose *any* conditions and restrictions on strict-date-of hire, and who presently threaten legal action in recent correspondence to the Merger Committee;[25]

- Furloughed *junior West* pilots who will not be recalled under the existing contract, but would be entitled to recall prior to more junior East pilots, under USAPA's proposal;

- *Senior* West pilots who, under USAPA's proposal, would obtain immediate access to sought-after widebody flying that exists only in East operations.

With the selective inclusion of only the *Addington* defendants – the obvious collaborators with Count I – the Company's case is imbalanced and subject to dismissal under rule 12(b)(7).[26]

I. Venue Is Improper.

Under Fed. R. Civ. P. 12(b)(3), a defendant may move to dismiss or transfer a complaint for improper venue. When deciding a Rule 12(b)(3) motion, unlike a Rule 12(b)(6) motion, the Court need not accept the pleadings as true and may consider facts outside the pleadings. *See R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). Once a defendant raises an objection to venue, the plaintiff bears the burden of

[25] *See supra* at fn 3. (*citing* Mowrey Decl. ¶ 37, Ex. F).
[26] Assuming USAPA's Rule 21 motion is not granted.

establishing that the selected venue is proper. *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002).

Here, the plaintiff has gone forum shopping. This action is subject to dismissal because the Company chose a venue for its tactical advantage that prejudices, or risks prejudice, to USAPA. The current venue is the *only* venue possible where: it is the same venue chosen by the *Addington* plaintiffs; the possibility of transfer within the venue will undermine a fair trial (for reasons set forth in Attachment A to Doc. # 29), and which was calculated or had the effect of forcing USAPA to litigate that issue; where West pilots are domiciled in great numbers but almost no East pilots are; and where US Airways is headquartered but thousands of miles from where USAPA is, and from where the NMB is located. Particularly, in declaratory judgment actions, such forum shopping is grounds for dismissal. *See e.g.*, *Essex Group, Inc. v. Cobra Wire & Cable, Inc.,* 100 F. Supp. 2d 912, 916 (N.D. Ind. 2000) ("regardless of whether Indiana is the more appropriate venue for the resolution of these issues, it is inappropriate for the Plaintiffs to file for a declaratory judgment for the purposes of forum-shopping"). This is particularly so here where plaintiff had the opportunity to consult with USAPA about the choice of venue but instead chose to run to court with no notice. A more appropriate venue, considering the NMB's jurisdiction over pending negotiations, would be the District of Columbia where the NMB is headquartered.

III. RELIEF.

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' Complaint with prejudice.

Respectfully submitted:

Dated: September 7, 2010 By: ***/s/ Lee Seham***

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CERTIFICATE OF SERVICE

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

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

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

ADDENDUM

27 of 96 DOCUMENTS

NORTH AMERICAN AIRLINES, INC., Plaintiff, -v- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO and TEAMSTERS LOCAL 747, AIRLINE DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, Defendants.

Case No. 04 Civ. 9949 (KMK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2005 U.S. Dist. LEXIS 4385

March 20, 2005, Decided
March 21, 2005, Filed

SUBSEQUENT HISTORY: Stay denied by N. Am. Airlines, Inc. v. Int'l Bhd. of Teamsters, Local 747, Airline Div., 2005 U.S. Dist. LEXIS 6819 (S.D.N.Y., Apr. 18, 2005)

DISPOSITION: **[*1]** Defendants' motion to dismiss granted.

COUNSEL: Evan J. Spelfogel, Esq., Steven M. Latino, Esq., Epstein Becker & Green, P.C., New York, New York, Counsel for Plaintiff.

Barry I. Levy, Esq., Bary S. Cohen, Esq., Shapiro, Beilly, Rosenberg, Aronowitz, Levy & Fox, LLP, New York, New York, Counsel for Defendants.

William R. Wilder, Esq., Baptiste & Wilder, P.C., Washington, D.C., Counsel for Defendants.

JUDGES: KENNETH M. KARAS, UNITED STATES DISTRICT JUDGE.

OPINION BY: KENNETH M. KARAS

OPINION

OPINION AND ORDER

KENNETH M. KARAS, District Judge:

On December 17, 2004, Plaintiff North American Airlines ("North American" or "Company" or "Airline") filed this action against the International Brotherhood of Teamsters ("IBT" or "Union") principally seeking a declaratory judgment that North American may unilaterally change the terms and conditions of employment of its pilots under the status quo provisions of the Railway Labor Act ("RLA"), and that IBT must refrain from threats of self-help and/or legal action against North American for engaging in such allegedly lawful conduct. (Compl. at 17-18)

The Court is presented with a number of interrelated motions. Specifically, IBT seeks to dismiss the action **[*2]** for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Alternatively, IBT argues that to the extent North American maintains that it filed this action in response to a "direct threat" of litigation by IBT, the action should be dismissed under the "apparent anticipation" doctrine, an exception to the first-filed rule. North American opposes this motion, and seeks a preliminary injunction to bar the prosecution of a related action, *International Brotherhood of Teamsters v. North American Airlines, Inc.,* C 05-00126 (TEH), pending in the Northern District of California ("California Action").

IBT's motion raises two related but distinct questions. The first question is whether the Court has jurisdiction under Article III of the Constitution to hear this case, that is, whether North American's Complaint states

an actual controversy. The second question is whether, independent of Article III jurisdiction, the Court should exercise its discretion under the Declaratory Judgment Act to grant the requested relief. The Court answers both questions in the negative.

The first question is addressed in Section II.B. North American claims that the case **[*3]** is justiciable for three reasons. First, it suggests that the dispute is ripe because the two sides had adopted firm positions regarding North American's "right" to adopt unilateral changes under the status quo provisions of the RLA. Second, North American claims that IBT's threats of legal action to challenge the "right" claimed by North American created a sense of reality and immediacy to the dispute. Third, North American cites to evidence that IBT members were threatening to engage in self-help, i.e., work slowdowns that required immediate relief.

The Court rejects all three arguments tendered by North American. The abstract question of North American's "right" to adopt unilateral changes is not ripe for consideration in the absence of North American adopting any particular set of such changes. *See, infra,* Sec. II.B.2.a. Additionally, North American's second and third arguments regarding the alleged threats of legal action and self-help are of a kind typically made in heated labor negotiations and are not objectively sufficient to create an adequate level of apprehension or uncertainty to make this a justiciable case.

The second question is addressed in Section II.C. Even **[*4]** if North American's Complaint stated an actual controversy, the Court declines to exercise its discretion to grant North American its requested relief. This determination is uniquely discretionary, for the Declaratory Judgment Act is cast in terms of permissive, rather than mandatory, authority. In determining whether to exercise its authority, the Court considers the litigation as a whole and the extent to which the exercise of judicial authority is appropriate under the circumstances. Here, the Court declines to exercise its discretion because the lawsuit will not settle the legal dispute between the parties, and because it rewards North American for abandoning the collective bargaining process prematurely and racing to the courthouse.

Therefore, for the reasons set forth herein, the motion to dismiss is granted. [1]

1 Because the Court grants IBT's motion to dismiss this action, the Court does not address North American's cross-motion for a preliminary injunction, or IBT's alternative basis for dismissal under the apparent anticipation doctrine.

[*5] I. Background

A. Facts

The relevant facts described herein are, unless otherwise noted, undisputed. North American is a Delaware Corporation with its principal place of business at JFK International Airport in Queens, New York. (Declaration of Steve Harfst in Support of North American Airlines, Inc.'s Motion to Dismiss. 1/24/05, P 2) ("Harfst Decl.") North American, which is owned entirely by Dan McKinnon, is certified to conduct passenger flights, internationally scheduled and charter service, domestically scheduled and charter service, and supplementary operations under the Federal Aviation Act. (Harfst Decl. P 3; Compl. P 9(b)) North American employs 124 pilots, most of whom are based at the JFK facility. (Harfst Decl. P 4) [2] In all, North American employs approximately 589 employees, including ground maintenance, office, clerical, sales and management workers, in addition to pilots, flight attendants, and dispatchers. (Harfst Decl. P 5) North American is a "carrier" as that term is defined in Sections 201 and 202 of the RLA, 45 U.S.C. ß 181-182. (Declaration of Ernest F. Sowell, 2/16/05, P 3) ("Sowell Decl.")

2 North American represents that only approximately 7% of its staff live and work near the Oakland facility used by North American. (Harfst Decl. P 5)

[*6] Defendant IBT is an unincorporated labor organization with its headquarters in Washington, D.C. (Sowell Decl. P 2) Before 2004, North American's pilots were not represented by any union. (Harfst Decl. P 6) However, on January 16, 2004, the National Mediation Board ("NMB") certified IBT to represent North American's pilots for the purposes of collective bargaining under the RLA. (Harfst Decl. P 7; Sowell Decl. P 2; Ex. A to Compl.) Local 747 and Sowell were designated by IBT to negotiate with North American on behalf of IBT, while the law firm of Epstein Becker & Green, P.C. was designated to represent North American. (Harfst Decl. PP 7-8) [3]

3 In a letter dated January 22, 2004, Don Treichler, Director of the Airline Division of IBT, wrote Dan McKinnon to advise him of IBT's status as the certified representative of North American's pilots. (Ex. B to Compl.) In this letter, Treichler advised McKinnon that Sowell will serve as "principal spokesperson" for IBT in Treichler's absence during any negotiations. (Ex. B to Compl.)

[*7] Negotiation towards a collective bargaining agreement began on April 6, 2004. (Sowell Decl. P 5; Harfst Decl. P 10) Additional bargaining sessions were

held on June 22-23, July 28-29, September 22-24, November 9-11, December 7-9, and January 11-12, 2005. (Sowell Decl. P 5; Harfst Decl. P 10)

On November 5, 2004, North American notified IBT that it was scheduling changes to the compensation, working conditions and benefits of the pilots, effective January 1, 2005. (Compl. P 3; Harfst Decl. P 11) In the November 5, 2004 letter to Sowell on behalf of IBT, North American stated that "without waiving our position that the Airline has the legal right under the RLA to implement changes unilaterally, we would be pleased to discuss at our meetings next week in San Francisco any questions or suggestions you might have concerning these matters, to the extent they relate to pilots." (Letter from Evan Spelfogel to E.E. Sowell of 11/5/04, attached as Ex. E to Compl.) [4]

4 In this letter, Spelfogel indicated that some changes would apply to other North American employees, including senior management.

[*8] IBT's formal response to these proposed unilateral changes came in a November 11, 2004 letter from Sowell. In this letter, Sowell challenged North American to provide an economic justification for the proposed unilateral changes to the pilots' work conditions and compensation. (Letter from E.E. Sowell to Evan Spelfogel of 11/11/04, attached as Ex. F to Compl.) Suggesting that there was no economic rationale for the changes, IBT alleged that the changes were "but a veiled attempt to undermine the Union," and that the changes were not reflective of "good faith" bargaining by North American. (Letter from E.E. Sowell to Evan Spelfogel of 11/11/04, at 1) IBT nonetheless noted, for example, that it would "treat the revised Pilot Scheduling Guidelines as a global Section 6 proposal by the company and we will respond accordingly." (Letter from E.E. Sowell to Evan Spelfogel of 11/11/04, at 2)

North American immediately responded to this letter, stating in its own letter that it need not provide any economic justification for the proposed changes, and that it had the right to make such unilateral changes under the RLA during bargaining for a first collective bargaining agreement. (Letter **[*9]** from Evan Spelfogel to E.E. Sowell of 11/11/04, attached as Ex. G to Compl.) However, North American suggested that having "listened closely to [IBT's] objections and suggestions . . . [it] probably [would] be modifying the revisions to the Pilot Scheduling Guidelines," and that the other proposed unilateral changes were not scheduled to go into effect until January 1, 2005, thus leaving more than six weeks for ongoing dialog [sic] on the matter." (Letter from Evan Spelfogel to E.E. Sowell of 11/11/04, at 2) [5]

5 On November 30, 2004, North American announced to all its eligible employees changes to its 401(k) plan, and on December 10, 2004, it disclosed to all of its eligible employees changes to the health benefits plan. (Supplemental Declaration of Steve Harfst, 2/19/05, P 19, Ex. B) ("Harfst Supp. Decl.")

It is the negotiation session that occurred between December 7 and December 9, 2004 where there is a factual dispute. According to North American, Sowell and Spelfogel had a series of contentious **[*10]** conversations about North American's right to make unilateral changes to the terms and conditions of the pilots' employment while negotiating the first collective bargaining agreement, and IBT's lawful ability to respond in kind with varying degrees of self-help. In particular, on December 9, 2004, the last day of the scheduled bargaining session, Spelfogel allegedly presented Sowell with an email from Dan McKinnon to all employees of North American, in which McKinnon discussed "reports" that many pilots were "talking about conducting a slowdown in operations and were refusing to answer their phones to avoid being called in for last minute flight assignments[] to 'make some kind of statement.'" (Harfst Supp. Decl. P 11. Ex. A) Sowell admitted that the "talk among employees about the pilots refusing to work, engaging in a slowdown . . . or other illegal activity," merely reflected "'customary Union tactics and perfectly permissible lawful Union activity.'" (Harfst Supp. Decl. P 9) Furthermore, during the December bargaining session, North American claims that there were several conversations between Spelfogel and Sowell about the legal battle that allegedly loomed over North American's **[*11]** efforts to make unilateral changes. According to North American, for example, Sowell repeatedly threatened that IBT "would take action to block [North American]." (Harfst Supp. Decl. P 13) In fact, according to North American, when Spelfogel purportedly insisted that the Supreme Court and "the federal courts in New York" had upheld North American's right to adopt unilateral changes pre-finalization of a collective bargaining agreement, Sowell "expressly stated that he believed that the courts in New York were wrong and he looked forward to an early opportunity to bring the case before them so that they could change their mind." (Harfst Supp. Decl. P 14) Finally, according, to North American, when the parties left the bargaining session on December 9, 2004, all of IBT's representatives "knew without a doubt that effective January 1, 2005, the Company would be making changes that would reduce their compensation substantially." (Harfst Supp. Decl. P 17)

IBT offers a different version of events. For example, IBT asserts that neither Sowell nor any other member of IBT's negotiating committee threatened North

American with any litigation to block the proposed unilateral changes, or to **[*12]** engage in any "self-help activity." (Declaration of Douglas Marotta, 2/15/05, P 3) ("Marotta Decl.") In particular, IBT denies that Sowell ever said that IBT would "take action" to block the unilateral changes (Marotta Decl. P 4), or that he ever conceded that work slowdowns would be adopted as "'customary Union tactics and permissibly lawful Union activity.'" (Second Declaration of Douglas Marotta, 2/24/05, P 4) ("Marotta Second Decl.") IBT also rejects as false the claim that Sowell said that IBT wished to litigate North American's right to adopt unilateral changes in "the New York courts." (Marotta Second Decl. P 6) Finally, IBT insists that it did have doubts about the unilateral changes that North American would adopt, even after the December 9 bargaining session. According to IBT, "the pilot negotiating committee believed that so long as the Airline was bargaining over its proposal it would not implement it." (Marotta Second Decl. P 7) As support, IBT points to the fact that on December 15, North American elected not to change the bid schedule it previously had used for its pilots, which, according to IBT, was a change from North American's bargaining position, and which led **[*13]** IBT to believe that North American was not going to implement any other unilateral changes to the pilots' working conditions. (Marotta Second Decl. PP 8-12)

These disagreements to the side, the parties appear not to dispute that, as of December 9, 2004, the two sides had agreed to continue their negotiations on December 29-30, 2004 and January 10-12, 2005. (Compl. P 20(c)) Further, on December 10, 2004, IBT wrote to the NMB seeking mediation to break the "deadlocked" collective bargaining negotiations. (Letter from Don Treicher to Mary L. Johnson, General Counsel, NMB, of 12/10/04, attached as Ex. J to Compl.; Sowell Decl. 18) North American responded to IBT's plea for mediation by insisting that the request was "premature and inappropriate" given that there had been many "tentative agreements" reached on various sections of the proposals. North American represented that there were then "at least eleven new proposals from the union that were presented for the first time during the December sessions and as to which the company will be responding at upcoming sessions," and that there were "at least a dozen topics as to which neither party has yet made proposals and as to which the **[*14]** company intends to make proposals at the upcoming meetings." (Letter from Evan Spelfogel to Lawrence E. Gibbons, Director, Office of Mediation Services, of 12/15/04, attached as Ex. C to Compl.) NMB accepted the plea for mediation, assigned a mediator, and reminded the parties of the "status quo provisions" of the RLA. (Ex. 10 to Spelfogel Decl.) On the same day the mediator was assigned, and two days after North American represented to NMB that there were "a dozen topics" left to negotiate, North American filed this action. Eleven days thereafter, on December 28, 2004, it officially notified IBT of certain unilateral changes it was adopting, effective January 1, 2005, to change the terms and conditions of the employment of the pilots and other employees of North American. (Sowell Decl. P 22) December 28 was also the first day that North American notified IBT of this lawsuit. (Sowell Decl. P 23)

B. Procedural History

North American initiated this case on December 17, 2004. The Complaint asserts jurisdiction is proper in this Court under 28 U.S.C. ß 2201 and 2202 (the "Declaratory Judgment Act"), as well as 28 U.S.C. ß 1331 and **[*15]** 1337. (Compl. P 12(b)) The Complaint recites the ongoing negotiations between North American and IBT, including the unilateral changes North American had proposed on November 5, 2004. The Complaint notes that none of the changes noticed on November 5, 2004 had, at the time of the filing of the Complaint, been adopted. (Compl. P 24) The Complaint also notes that while "tentative agreements" had been reached on some issues during bargaining. (Compl. P 41(b)), other issues were still in active negotiation, (Compl. P 41(c)). Furthermore, the Complaint asserts that North American *"intends"* to notify IBT and pilots that, "based upon many of the objections, comments and suggestions made by the Union and the Pilots' Committee at the bargaining table," it is withdrawing plans to implement many of the changes presented at previous negotiations and will adopt certain unilateral changes to the conditions of employment by North American. (Compl. P 42(a)-(e) (emphasis added)) In the end, however, the Complaint merely seeks judgment declaring that: (i) North American's unilaterally changing the terms and conditions of employment of the pilots does not violate the RLA, including but not limited **[*16]** to, 45 U.S.C. ßß 152. First, 156, or any other provision of the RLA; (ii) the status quo provisions of the RLA do not restrict North American from unilaterally changing terms and conditions of its pilots' employment where there is no pre-existing collective bargaining agreement; (iii) IBT's alleged threats of self-help or legal action against North American are preventing North American from effectively conducting its operations; (iv) IBT is not entitled to injunctive relief against North American to restrain North American from unilaterally changing rates of pay, rules, and other conditions of employment. (Compl. at 17-18) [6] As drafted, the Complaint does not seek a judgment declaring that the specific unilateral changes that North American "intends" to notify IBT it will adopt are lawful under the RLA.

6 The Complaint also seeks an award of damages if IBT engages in a strike or work slowdown. (Compl. at 18)

IBT filed suit against North American on January 7, 2005, in the Northern **[*17]** District of California. The Complaint in the California Action alleges that North American violated Section 2, First, 45 U.S.C. ß 152, First, of the RLA by unilaterally implementing its bargaining proposal prior to exhaustion of the RLA's mandatory procedures for negotiation of collective bargaining agreements (Count One), and violated Section 2, Fourth, 45 U.S.C. ß 152, Fourth, by imposing reductions on its unionized pilots in retaliation for their unionization (Count Two). Aside from taking issue with the unilateral adoption of North American's bargaining proposals, IBT alleges that North American's actions, when compared to its position towards its non-union employees, make out a *prima facie* case of retaliation and discrimination against IBT. For example, IBT's Complaint alleges that North American did not impose permanent compensation reductions on North American's non-union employees, (Compl. P 19), and, in fact, announced that it would not reduce wage rates, work hours or over-guarantee flying for flight attendants (as it had with the pilots), (Compl. 20). Instead, according to the Complaint, North American only implemented a **[*18]** "freeze on longevity increases for flight attendants effective January 1, 2005." (Compl. P 20)

On January 13, 2005, pursuant to this Courts Individual Practices, IBT submitted a letter seeking a pre-motion conference in anticipation of its motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the declaratory judgment action filed by North American did not present a case or controversy under Article III. (Letter of Barry I. Levy to the Court of 1/13/05) North American responded on January 19, 2005, opposing IBT's claim, noting that the "contemporaneous" filing of the California Action demonstrated that there was a live case or controversy. (Letter of Evan J. Spelfogel to the Court of 1/19/05) [7]

7 On February 3, 2005, IBT filed a supplemental pre-motion conference statement, arguing that to the extent North American maintains that it filed its declaratory judgment action in the face of a "direct threat of litigation" by IBT, the Complaint should be dismissed under the "apparent anticipation" doctrine, an exception to the first-filed rule. (Letter of William R. Wilder to the Court of 1/3/05)

[*19] On January 14, 2005, IBT filed a motion for a preliminary injunction against North American in the California Action seeking to enjoin North American's unilateral imposition of its bargaining proposals. Accompanying the preliminary injunction motion was a statement to the district judge in the California Action, Judge Henderson, about this action. On the same day, North American filed a motion to dismiss or to transfer venue in the California Action. The competing motions in that case are now fully submitted. Judge Henderson has indicated that he will hold a hearing on North American's motion to dismiss or transfer venue after this Court resolves the motions pending in this case.

II. Discussion

A. Procedural Considerations

"A motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction can raise *facial* challenge based on the pleadings, or a *factual* challenge based on extrinsic evidence." *Guadagno v. Wallack Ader Levithan Assocs.,* 932 F. Supp. 94, 95 (S.D.N.Y. 1996) (emphasis in original). Regardless of which type of challenge is tendered, "a court may dismiss a case for lack of subject matter jurisdiction pursuant **[*20]** to Fed. R. Civ. P. 12(b)(1) at any time, and may consider factual evidence beyond the pleadings in doing so . . . ." *Arculeo v. On-Site Sales & Mktg., LLC,* 321 F. Supp. 2d 604, 609 n.8 (S.D.N.Y. 2004) (citing *Kruman v. Christie's Int'l, PLC,* 284 F.3d 384, 390 (2d Cir. 2002), *cert. dismissed,* 539 U.S. 978, 156 L. Ed. 2d 690, 124 S. Ct. 27 (2003)). Indeed, "the court may conduct whatever further proceedings are appropriate to determine whether it has jurisdiction." *Guadagno,* 932 F. Supp. at 95; *see also Dow Jones & Co. Inc. v. Harrods, Ltd.,* 237 F. Supp. 2d 394, 404 (S.D.N.Y. 2002), *aff'd,* 346 F.3d 357 (2d Cir. 2003). "It can, for example, decide the matter on the basis of affidavits or it can hold an evidentiary hearing." *Guadagno,* 932 F. Supp. at 95; *see also Dow Jones,* 237 F. Supp. 2d at 404. The court also has discretion to defer final determination of the [jurisdictional] dispute until the time of trial, thus conserving judicial resources." *Guadagno,* 932 F. Supp. at 95 (internal citations omitted). "A party seeking a declaratory judgment bears the burden of **[*21]** proving that the district court has jurisdiction." *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.,* 241 F.3d 154, 177 (2d Cir. 2001). In determining whether the burden has been met, "no presumptive truthfulness attaches to the complaint's jurisdictional allegations." *Guadagno,* 932 F. Supp. at 95; *see also Dow Jones,* 237 F. Supp. 2d at 404.

The Court has carefully reviewed the affidavits and other exhibits submitted by the parties in this case and does not see the need for an evidentiary hearing. While there are differences of opinion as to certain matters, and in particular the extent to which, if at all, IBT threatened legal or other self-help measures to block North American from adopting certain unilateral chances to the pilots'

working conditions, resolution of these differences is unnecessary to settle the question of the Court's Jurisdiction. Instead, the Court assumes for the purposes of this motion the veracity of North American's claims regarding IBT's posture during the collective bargaining negotiations. As such, there is no need for further fact-finding. *See Zappia v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir. 2000) **[*22]** ("The conclusory allegations in Mr. Zappia's affidavit were not sufficient to create a material issue of fact."). [8]

8 While another option may be to defer the jurisdictional question until trial, *see Guadagno,* 932 F. Supp. at 95, as discussed further below, the Court finds that to do so would be an unwise use of judicial resources given the pendency of the California Action.

B. Article III Limits to Jurisdiction Under the Declaratory Judgment Act

In this action, North American principally seeks a declaratory judgment that it may unilaterally change the terms and conditions of the employment of its unionized pilots under the RLA, and that IBT's threats of coercive legal action and self-help constitute had faith bargaining that hinders North American from conducting its business operations. While the Complaint lists unilateral changes North American *intends* to notify IBT it will implement, the Complaint does not seek a judgment that any particular change is lawful; nor does it seek **[*23]** injunctive relief against any particular act of self-help by IBT. [9]

9 The Complaint also seeks a judgment awarding North American damages *if* IBT engages in a strike, work slowdown, or "any other self help measures that interfere with the operation of North American's business." (Compl. at 18) While not critical to deciding the instant motion, the Court notes that the weight of authority suggests that a company may not seek monetary damages for violations of the RLA, including unlawful self-help conduct. *See CSX Transp., Inc. v. Bhd. of Maint. of Way Employees,* 327 F.3d 1309, 1330 (11th Cir. 2003) (holding that employer could not recover compensatory damages under RLA for economic damages suffered from surprise strike); *CSX Transp. v. Marquar,* 980 F.2d 359, 381 (6th Cir. 1992) (holding that employer could not recover monetary damages under RLA for harm allegedly caused by illegal strike by union); *Piedmont Airlines, Inc. v. Air Line Pilots Ass'n,* 863 F. Supp. 212, 216 (E.D. Pa. 1994) ("No federal court has ever allowed an employer to maintain an action against a union for monetary relief."). *But see Consol. Rail Corp. v. United Transp. Union Gen. Comm. of Adjustment,* 908 F. Supp. 258, 264 (E.D. Pa. 1995) (ruling that monetary damages may be awarded under RLA to carrier damaged by illegal strike over a "minor dispute"). In any event, given that the Complaint conditions the requested relief on conduct that the Complaint does not allege has occurred, or is even likely to occur, the Court's decision regarding the declaratory relief sought by North American is diapositive regarding this form of requested relief.

[*24] IBT seeks to dismiss the Complaint pursuant to Rule 12(b)(1) on the grounds that the Court does not have subject matter jurisdiction over the declaratory judgment action.

1. Applicable Standards

The Declaratory Judgment Act provides that in "a case of actual controversy," a court may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. ß 2201(a). As such, the Act provides no independent basis for subject matter jurisdiction. *See Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians,* 94 F.3d 747, 752 (2d Cir. 1996); *Dana Corp. v. Colfax Corp.,* 2004 U.S. Dist. LEXIS 3973, No. 03 Civ. 7288, 2004 WL 503742, at *3 (S.D.N.Y. Mar. 12, 2004). Instead, the Act, "in its limitation to 'case of actual controversy,' manifestly has regard to the constitutional provision [Article III, ß 2] and is operative only in respect to controversies which are such in the constitutional sense." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41, 81 L. Ed. 617, 57 S. Ct. 461 (1937). "If no actual case or controversy exists between the parties regarding the subject on which declaratory judgment is sought, **[*25]** the court lacks subject matter jurisdiction." *Dr. Reddy's Labs., Ltd v. AaiPharma Inc.,* 2002 U.S. Dist. LEXIS 17287, No. 01 Civ. 10102, 2002 WL 31059289, at *5 (S.D.N.Y. Sept. 13, 2002).

Generally, the presence of an "actual controversy" under the statute hinges on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941); *see also Niagara Mohawk Power Corp.,* 94 F.3d at 752. As the Supreme Court has emphasized, "the disagreement must not be nebulous or contingent but must have taken a *fixed and final shape* so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Serv.*

Comm 'n of Utah v. Wycoff Co., 344 U.S. 237, 244, 97 L. Ed. 291, 73 S. Ct. 236 (1952) (emphasis added); *see also Gen. Comm. of Adjustment, GO-386 v. Burlington N. and Santa Fe Ry. Co.,* 353 U.S. App. D.C. 70, 295 F.3d 1337, 1341 (D.C. Cir. 2002) **[*26]** ("In actions for declaratory judgment invoking the RLA, jurisdiction of the court is limited by general declaratory judgment law, and that a dispute appropriate for resolution under the declaratory judgment act 'must not he nebulous or contingent, but must have taken on fixed and final shape.'") (*quoting Atlas Air, Inc. v. Air Line Pilots, Ass'n,* 344 U.S. App. D.C. 1, 232 F.3d 218, 227 (D.C. Cir. 2000)); *Dana Corp.,* 2004 U.S. Dist. LEXIS 3973, 2004 WL 503742, at *3 ("An actual case or controversy is one that is real and substantial . . . admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (internal citations and quotations omitted) (alterations in original).

While these principles are clear, their application is less precise. "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." *Md. Cas.,* 312 U.S. at 273. Accordingly, **[*27]** there is no bright line rule for determining whether a dispute presents "an actual controversy," and the question is one determined on a case by case basis. *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.,* 925 F.2d 556, 562 (2d Cir. 1991); *Dana Corp.,* 2004 U.S. Dist. LEXIS 3973, 2004 WL 503742, at *3.

"The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 830, 104 L. Ed. 2d 893, 109 S. Ct. 2218 (1989). This is true of declaratory judgment actions as well. *See Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace and Agric. Implement Workers of Am., Int'l Union,* 523 U.S. 653, 660, 140 L. Ed. 2d 863, 118 S. Ct. 1626 (1998) ("The only question is whether the parties had any concrete dispute over the contract's voidability at the time the suit was filed."); *W. Interactive Corp. v. First Data Res., Inc.*. 972 F.2d 1295, 1297 (Fed. Cir. 1992) (noting that question of justiciability in declaratory judgment action is determined based on "the facts at the time the complaint is filed"); *Conmed Corp. v. ERBE Electromedizin GmbH,* 129 F. Supp. 2d 461, 464-65 (N.D.N.Y. 2001) **[*28]** (explaining that "this court has subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. ß 2201, only if a case of actual controversy existed between the parties at the time the complaint was filed").

2. Application

Where a declaratory plaintiff asserts a claim of nonliability as to a defendant, "a court must look beyond the declaratory judgment allegations and determine whether a substantial federal question arises either from the defendant's threatened action, . . . or from the complaint when viewed as a request for coercive relief apart from the defendant's anticipated suit." *W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp.,* 815 F.2d 188, 194 (2d Cir. 1987) (internal citations omitted).

North American asserts that its action raises a substantial federal question under the RLA. First, as North American has put it: "It is abundantly clear from the repeated written and verbal exchanges between the parties going back at least seven months that on December 17, 2004 there was an actual case or controversy ripe for judicial intervention: Does the Company have the right to make unilateral changes." (Pl.'s Supp. Mem. **[*29]** Law at 3-4) North American believes that it does, arguing that the relevant provisions of the RLA do not require North American to maintain working conditions within the status quo, and that IBT's categorical rejection of North American's right to adopt *any* changes makes this an actual controversy. According to North American, resolution of this conflict is at the heart of North Americans Complaint. Thus, while the Complaint seeks a judgment that adoption of unilateral changes does not violate any provision of the RLA, a fair reading of the Complaint and the arguments North American has made in support of its justiciability, demonstrate that the focus of this action is on the status quo provisions of the RLA, *see* 45 U.S.C. ßß 152, First, 152, Seventh, 156, and the concurrent duty of IBT to bargain in good faith under these same provisions even after North American adopts any unilateral changes.

North American's second and third arguments are that its request for declaratory relief was ripe for adjudication based on threats of "a lawsuit and/or work disruptions and other forms of IBT directed employee 'self help.'" (Pl.'s Supp. Mem. Law at 4) According **[*30]** to North American, IBT threatened to take all necessary action to block North American from implementing any unilateral changes, including filing coercive legal action within the Second Circuit and engaging in work slowdowns. North American's claims for jurisdiction, however, misconstrue the full extent of the potential legal controversy between the parties, arise from an unsubstantiated and exaggerated threat of any immediate economic or legal action against North American, and ignore the fluid collective bargaining negotiations that were interrupted by this lawsuit.

a. North American's Right to Make Unilateral Changes

North American argues that there was an actual controversy as of the filing of its Complaint because the parties had reached an "impasse" by each taking contrary positions on the question of North American's "absolute right under the RLA rulings of the Supreme Court and this Circuit to take unilateral action." (Pl.'s Supp. Mem. Law at 4) Contrary to North American's attempt to frame the boundaries of the legal dispute, the potential controversy between North American and IBT about the legality of unilateral changes is not limited merely to the abstract right **[*31]** of North American to depart from the status quo and adopt unilateral changes to the terms and conditions of the unionized pilots prior to the first collective bargaining agreement. [10] While that is one of the potential legal issues arising from the imposition of any unilateral changes, there are others as well. For example, there is the question of whether any *actual* changes ultimately implemented constitute bad faith by North American in its negotiations with IBT, and the potentially related question of whether any such *actual* changes, particularly when compared to North American's contemporaneous treatment of the non-union employees, constitutes discriminatory conduct against union employees in retaliation for their union activity. In other words, the legal judgment that North American seeks in its Complaint--that a company has the absolute right, under the RLA, to impose unilateral changes from the status quo during negotiation towards a first collective bargaining agreement--is dispositive only if there are no possible allegations of bad faith or discrimination made by IBT. *See Aircraft Mechs. Fraternal Assoc. v. Atl. Coast Airlines, Inc.,* 125 F.3d 41, 44-45 (2d Cir. 1997) **[*32]** *("AMFA II")* (noting that union cannot strike in response to unilateral changes "in the absence of bad faith by the Airline"); *Aircraft Mechs. Fraternal Assoc. v. Atl. Coast Airlines, Inc.,* 55 F.3d 90, 93 (2d Cir. 1995) *("AMFA I")* ("Aside from the disputed unilateral changes, the Union does not contend that the Airline has bargained in bad faith."). [11] Thus, as the D.C. Circuit has explained, "the lack of a status quo obligation under the RLA does not mean that *any* change in the status quo is *per se* legal. A carrier's action may violate other rights or obligations fixed by the RLA." *Atlas Air,* 232 F.3d at 223 (emphasis in original). [12]

10 The applicable "status quo" provisions of the RLA include Section 2, First, Section 2, Seventh, and Section 6, codified at 45 U.S.C. ßß 152 First, 152 Seventh, 156.

Section 2, First provides in pertinent part that "it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . . ."

Section 2, Seventh provides in pertinent part that "no carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in [45 U.S.C. ß 156] of this Act."

Section 6 provides in relevant part that "carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements . . .," and that in "every case where . . . the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by [45 U.S.C. 155] . . . ."

[*33]

11 Though the jurisdiction question was not explicitly discussed, the Court in *AMFA I* noted that the district court had jurisdiction over the union's action for injunctive relief, which was filed only after the company had adopted certain unilateral changes to the terms and conditions of the employment. *See AMFA I,* 55 F.3d at 92.

12 North American attempts to distinguish *Atlas Air* on the argument that the company in that case had sought declaratory relief in order to implement unilateral changes that had not been finalized at the time the case was initiated. However, the holding in*Atlas Air* did not rest solely or even primarily on this deficiency in the declaratory plaintiff's action. Instead, the primary basis for the court's ruling was the fact that the company's position wrongly assumed that the only legal issue that required a declaratory judgment was the extent to which the status quo provisions of the RLA permitted the company to adopt the unilateral changes it did. That is precisely the same position that is fatal to North American's assertion of jurisdiction in this case.

[*34] "The lack of an enumerated obligation to maintain the status quo pending the negotiation of a collective bargaining agreement does not absolve an employer from its obligation to refrain from activities which undermine employees' rights." *Id.* Other sections of the "RLA bar[] employers from engaging in discriminatory actions designed to impede or inhibit employees' exercise of their right to organize for collective bargaining purposes." *Id.* at 223-24. For example, Section 2, Third provides that employees may choose their bargaining representatives "without interference, influence, or coercion" of "any" kind, while Section 2, Fourth prohibits a carrier from denying "in any way . . . the right of its employees

to join, organize, or assist in organizing the labor organization of their choice," or from influencing or coercing employees "in an effort to induce them to join or remain or not to join or remain members of any labor organization." 45 U.S.C. ßß 152, Third, 152, Fourth. "These provisions prohibit employers from interfering with, coercing or influencing the representational choice of workers and from interfering with the right of employees to organize **[*35]** in labor unions." *Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc.,* 274 U.S. App. D.C. 202, 863 F.2d 891, 893 (D.C. Cir. 1988). Thus, "'the real question' in cases challenging an employer's post-certification pre-agreement conduct is whether 'the carrier has discriminated against its employees because they have engaged in activities protected by the RLA.'" *Pinnacle Airlines, Inc. v. Nat'l Mediation Bd.,* No. Civ. 03-1642, 2003 WL 23281961, at *4 (D.D.C. Nov. 5, 2003) (quoting *Atlas Air,* 232 F.3d at 224).

Answering the "real question" of whether a company's unilateral changes contravene portions of the RLA other than those governing the status quo obligations of North American is a fact-specific inquiry that can be accomplished only if North American actually adopts or implements any such changes. *See Atlas Air,* 232 F.3d at 225 ("Atlas Air adopted a facially discriminatory policy that penalized employees by terminating their participation in profit sharing for no other reason than their decision to unionize."); *Int'l Assoc. of Machinists & Aerospace Workers v. Northwest Airlines,* 673 F.2d 700, 710 (3d Cir. 1982) **[*36]** ("If . . . Northwest's actions were found to constitute an effort by Northwest to destroy or undermine the IAM's representation of Northwest's employees, then the district court properly could assume jurisdiction over IAM's suit.");*Local Union 808, Int'l Bhd. of Teamsters v. P & W.R.R. Co.,* 576 F. Supp. 693, 703 (D. Conn. 1983) ("Unlike charges of unlawful discipline, which can be resolved by an existing administrative body, acts of intimidation cannot be remedied by administrative means and, if proved, could establish a jurisdictional basis for judicial intervention."). Yet, at the time North American filed its lawsuit. North American had not adopted a full roster of unilateral changes as a final and fixed position, but only asserted in its Complaint that it *intended* to *notify* IBT that it would adopt certain measures at a later point. However, because North American had to that point been negotiating with IBT about these changes, and, in fact, had altered its position as to some of these changes during the bargaining process (such as the Pilot Scheduling Guidelines), there was no fixed set of employee policies and conditions that could be legally challenged **[*37]** by IBT until nearly two weeks after North American initiated this lawsuit. [13] A court ruling, then, on the "right", of a company to adopt unilateral changes in such a vacuum would be purely advisory as it would merely resolve a philosophical dispute between two adversaries engaged in a dynamic and fluid labor negotiation, and, therefore, not be Justiciable. *See Consol. Rail Co. v. Bhd. of Maint. of Way Employees,* 847 F. Supp. 1294, 1305 (E.D. Pa. 1994) ("The differences of opinion reflected in this suit are not ripe for determination and are too nebulous and contingent for classification as part of a declaratory judgment.").

> 13 Counsel for North American admitted at oral argument that the changes first proposed by North American on November 5, 2004, were not exactly the same as those ultimately adopted by North American on December 28, 2004. (Tr. 20-21)

North American seeks to strengthen its position by arguing that IBT "knew the specifics of some of these [unilateral] changes and the generalities **[*38]** of others" that North American was contemplating before it brought this lawsuit. (Pl.'s Supp. Mem. at 12) Yet, in the context of a labor negotiation, and given the rigors of establishing that there is an actual controversy, more is required: that North American finalize its position regarding the specifics of the unilateral changes. *Cf. Consol. Rail Corp.,* 847 F. Supp. at 1305 ("In the present case, this court is ill-equipped to rule upon eleven general issues that are still being reviewed, in more specific forms than articulated in the BMWE strike memorandum, under the parties' established grievance procedures."). Anything less would involve a vain and improper attempt to apply a judicial remedy to a moving target. *See Airline Prof'ls Assoc. of the Int'l Bhd. of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.,* 332 F.3d 983, 988-89 (6th Cir. 2003) ("It is possible that Defendant will never behave in a manner that would violate Side Letter 8, even assuming that agreement binds Defendant. Consequently, the only injury Plaintiff will definitely suffer is abstract uncertainty about whether the arbitration clause binds Defendant. Plaintiff had **[*39]** to allege more."); *Atlas Air,* 232 F.3d at 227 ("The district court correctly dismissed Atlas's additional claims for lack of subject matter jurisdiction on the grounds that it 'must not speculate as to future unilateral changes Atlas may wish to make and whether those changes would be lawful under the RLA.'") (quoting *Atlas Air, Inc. v. Air Line Pilots Assoc.,* 69 F. Supp. 2d 155, 164 (D.D.C. 1999)): *Consol. Rail Co.,* 847 F. Supp. at 1305-06 ("It is highly problematical whether any useful purpose would be achieved by passing upon these parties' present contentions."). [14] Moreover, because North American had not yet adopted the changes. IBT had no opportunity at the time North American brought this action to challenge North American's conduct, for example, by comparing any changes imposed on the unionized pilots and the other, non-unionized employees of North American. *See Altas Air,*

232 F.3d at 225-26 (explaining that "while carriers retain the right to make unilateral changes in status quo working conditions, so long as there is no collective bargaining agreement, they may not make such changes which selectively penalize **[*40]** unionized employees so as to interfere with, coerce, or influence their decision to exercise their rights under the RLA"). This asymmetric posture is precisely the type that normally spells jurisdictional doom for a declaratory judgment action. *See Connecticut Gen. Life Ins. Co. of New York v. Cole,* 821 F. Supp. 193, 197 (S.D.N.Y. 1993) ("The Declaratory Judgment Act . . . provides that federal jurisdiction in a declaratory judgment action exists if the defendant against whom the declaratory judgment is sought could have brought a coercive action in federal court to enforce his rights."). [15]

14 For similar reasons, North American's claim that "when the parties left the bargaining session on December 9 in New York, the union officials and pilot negotiating committee members knew without a doubt that effective January 1, 2005 the Airline would be making changes that would substantially reduce pilot compensation," is unpersuasive. First, North American offers no support for its assertion regarding IBT's state of mind, and there is direct evidence to the contrary. (Marotta Second Decl. P12)("The [Pilot Scheduling guidelines that the Company announced on December 15 would not change for January] led me to believe in mid-December 2004 that the Company was not going to implement unilateral changes to the pilots [sic] rates of pay, rules and working conditions.") Second, there is nothing in North American's assertion that reflects what the final position of North American was, as of December 9, 2004, with respect to the *specific* changes it ultimately adopted regarding its employees' conditions of employment *after* North American initiated this lawsuit. Thus, the record, taken in a light most favorable to North American, is that after the December 9 bargaining session, IBT believed that the parties were still negotiating the specific changes North American wanted to make to the pilot working conditions and rates of pay.

[*41]

15 At oral argument, counsel for North American conceded that under its theory of jurisdiction, it could have brought this action earlier in the negotiations--as far back as November 11, 2004, when IBT indicated its opposition to any unilateral changes--than IBT could have brought its own declaratory judgment action. (Tr. 16-17) The fact that North American takes this view only underscores how much it misapprehends the requirements for a justiciable declaratory judgment action as it ignores the fact that between November 11, 2004 and December 17, 2004, North American proposed additional changes to the terms and conditions for its employees in that brief time period. *See, supra,* note 5.

North American further argues, however, that any ambiguity regarding the unilateral changes was clarified to the extent the Complaint "addresses" specific changes it intended to inform IBT it will adopt. (Pl.'s Supp. Mem. at 15 ("North American's declaratory judgment complaint addresses *specific* changes it planned to implement on January 1, 2005.") (emphasis in original)) This argument fails on several **[*42]** levels. First, the Complaint does not seek a declaratory judgment that the specific changes North American intended to disclose to IBT were lawful under all pertinent provisions of the RLA. On the contrary, North American has itself described the three "objectives" of this lawsuit, two of which deal with the general right of North American to impose unilateral changes, the third of which deals with IBT's obligation to refrain from any self-help to protest the adoption of any such changes. (Harfst Decl. P 17; Compl. at 17) Nothing in these objectives depends on the specifics of North American's changes that it says it intended, after it tiled its lawsuit, to disclose to IBT. Moreover, though the Complaint reads as though it seeks a broad judgment that nothing in the RLA bars North American from adopting any unilateral changes, North American does not (because it cannot) cite to all the relevant provisions of the RLA that North American contends are implicated by this claim, in the absence of any actual changes. Thus, given the context in which this lawsuit arose, and how it is justified by North American--that the parties differ over North American's right to make any unilateral changes **[*43]** to the conditions and terms of employment--the requested relief is not broad enough to encompass provisions of the RLA other than those governing the status quo obligations of North American. As such, the action is not ripe for adjudication of the full legal dispute, such as it was, between the parties as of December 17, 2004.

Second, even if the Complaint sought judicial imprimatur of the changes North American *intended* to notify IBT it would adopt, the Complaint would not present an actual controversy. "A declaratory judgment act today with respect to the [listed changes] could result in a change in their phraseology and a request for a new declaratory judgment tomorrow." *Consol. Rail Corp.,* 847 F. Supp. at 1306. In the context of an ongoing labor negotiation. It is particularly inappropriate to have courts opine on the legality of certain proposals by a party to the dispute.*Id.* at 1305 ("The courts must hesitate to

make rulings which may be used subsequently by the parties, mediators or arbitrators, as interpretations of collective bargaining agreements."). Indeed, judicial intervention in such an instance is improper because it is contingent on further **[*44]** developments that were not in existence at the time the action was initiated. *Wycoff,* 344 U.S. at 244. [16] Therefore, North American's Complaint did not present an actual controversy and should be dismissed.

16 North American has claimed that proof of the ripeness of its action is found in the contemporaneous filing" of the California Action by IBT, which is also described as a "mirror image" of North American's Complaint. (Letter of Evan J. Spelfogel to the Court of 1/19/05, at 1) This is unpersuasive as IBT's California Action postdates the present action by three weeks and was not filed until North American adopted its unilateral changes. This is significant not because of the amount of time between the filing of the two actions, but the intervening fact that North American formally adopted as a fixed and final position its changes to the terms and conditions of the employment of its personnel.

b. Threatened Legal Action by BT

North American further attempts to demonstrate that its **[*45]** Complaint is justiciable because of alleged threats of legal action and self-help by IBT. However, even taking everything North American alleges as true, North American's claim fails. [17] For example, North American cites to the November 11 letter from Sowell wherein he states that IBT will "respond accordingly" to some of North American's proposed unilateral changes. At various times, North American has interpreted this letter as threatening to "take action" in response to the proposal of unilateral changes, alternately describing this as a threat to initiate legal action or to engage in other self-help activities. (Harfst Decl. P 13; Letter of Even J. Spelfogel to the Court of 1/19/05, at 3) North American also cites to alleged comments of Sowell at the December 7-9 bargaining sessions--made in response to North American's claims that under decisions from "the courts in New York" North American had the right to make unilateral changes--that IBT "looked forward to having the courts in New York overturn or reverse what he believed to be their bad case law." (Harfst Supp. Decl. P 19) Thus, North American's version is that IBT threatened to bring a legal challenge to North American's **[*46]** unilateral changes in the "courts in New York."

17 As noted, the Court is keenly aware that IBT vehemently disputes North American's allegations about self-help and threatened legal action during the bargaining history, and makes no findings as to which version is truthful. The allegations are only taken as true for purposes of this motion.

A declaratory plaintiff, to establish that an actual case or controversy, must demonstrate that at the time the action was initiated there was an objectively real and reasonable apprehension of litigation. *See Points of Light, Inc. v. Calypso Worldwide Mktg., Inc.,* 2002 U.S. Dist. LEXIS 20506, No. 02 Civ. 0118, 2002 WL 31413682, at *2 (S.D.N.Y. Oct. 25, 2002); *Dunn Computer Corp. v. Loudcloud, Inc.,* 133 F. Supp. 2d 823, 827, 259 B.R. 472 (E.D. Va. 2001) (citing *Md. Cas.,* 312 U.S. at 273). "While direct evidence of threatening contacts initiated by the defendant or a background of litigation between the parties is strong evidence of a reasonable apprehension of litigation, **[*47]** an objectively reasonable apprehension of imminent litigation must be determined from the totality of the circumstances." *Dunn Computer Corp.,* 133 F. Supp. 2d at 827.

Under the totality of the circumstances, North American has failed to establish an objectively reasonable fear of imminent litigation at the time it filed its Complaint. "Any time parties are in negotiation . . ., the possibility of lawsuit looms in the background." *EMC Corp. v. Norand Corp.,* 89 F.3d 807, 811 (Fed. Cir. 1996). This holds as true in collective bargaining as in any negotiation. *See Fed. Express Corp. v. Air Line Pilots Assoc.,* 314 U.S. App. D.C. 267, 67 F.3d 961, 964-65 (D.C. Cir. 1995). Indeed, it is precisely in the circumstance of heated collective bargaining that the courts discount threats to take "all appropriate action" as typical posturing and not the type of threat that creates an Article III case or controversy, even in a declaratory judgment action. *See, e.g., id,* at 965 ("We do not believe [the Air Line Pilots Association's] statement that it would 'take all appropriate action,' in the context of the ongoing negotiations, could reasonably **[*48]** be viewed as a direct threat to file a lawsuit in the immediate future."). [18] Moreover, there is nothing to suggest that IBT would file any lawsuit until it knew about North American's final and fixed position. Indeed, IBT continued to bargain, even while making adamant statements that North American's position was contrary to law, and, in fact, did not sue (in California, and not in a federal court in New York) until after North American formally adopted its unilateral changes. As such, whatever fear North American faced was objectively too murky to trigger a live case or controversy as of December 17, 2004. *See Indep. Fed'n of Flight Attendants v. TWA,* 1981 U.S. Dist. LEXIS 9857, No. 81-6064, 1981 WL 2430, at *5 (W.D. Mo. Sept. 9, 1981) ("Subsequent communications . . . show that TWA is currently committed to negotiations. The particularly offensive reference to 'divisive rituals,'

interpreted by the union as a renunciation of collective bargaining, would appear more likely to be a needling phrase seeking expedited negotiations instead of lengthy haggling from extreme positions."). [19] Lastly, North American's assertion that IBT allegedly threatened to sue North American in the very jurisdiction **[*49]** where North American believes the law is most favorable to its position significantly undermines its claim that it faced a real and crippling threat of litigation that, objectively speaking, justified a declaratory judgment action. *See Dow Jones,* 237 F. Supp. 2d at 408 ("Dow Jones' own express confidence that any judgment rendered against it in the London Action would be summarily dismissed in any United States court works against its strenuous assertions that it faces a real, sufficiently direct and immediate threat of injury."). Accordingly, North American has failed to satisfy its burden of demonstrating that it faced an objectively real apprehension of legal action that would create an actual controversy.

18 North American attempts to distinguish *Federal Express* by arguing that there was only a single threat to "take all action" by the union representative in that case, and that the threat did not come, as it did from IBT in this case, from a lawyer for the union. (Pl.'s Supp. Mem. at 14; Letter of Evan J. Spelfogel to the Court of 1/19/05, at 3). However, what defeated the company's claim in *Federal Express* was not the isolated nature of the alleged threat, but the context in which the non-specific threat was made. The same can be said of the statement in Sowell's letter, regardless of how often it was repeated. Moreover, North American's suggestion that Sowell's letter should be treated as a "lawyer's letter" is particularly unpersuasive given the evidence that Sowell, while a lawyer, was designated by IBT's president to be the chief spokesperson for IBT during the collective bargaining negotiations with North American. *See, supra,* note 3. Further, the claim is ironic that North Americans chief bargaining representative appears himself to be a lawyer employed by an outside law firm who is representing North American in this action.

[*50]

19 That IBT later filed a lawsuit, after North American finally implemented its unilateral changes, does not substantiate North American's claim that it faced an imminent threat of coercive legal action. *See Federal Express Corp.,* 67 F.3d at 271 n.5 ("The subsequent lawsuit is not relevant to whether FedEx faced a threat of litigation at the time it filed this lawsuit. The question of justiciability must be decided on the facts in existence *at the time the suit was filed."*) (emphasis in original).

c. Threatened Self-Help by IBT

Finally, North American contends that its request for declaratory relief is ripe because of various threats of self-help by IBT. Again, taking the facts in a light most favorable to North American, the evidence of self-help is far from convincing that North American was under an imminent threat of self-help by IBT. Instead, what the record reveals is much posturing and bravado of a type that is often found in labor negotiations and does not make for a case or controversy. North American points to no evidence that IBT had called for, or scheduled, **[*51]** a strike by its members. Nor does North American provide any evidence that IBT had organized a work slowdown. Instead, North American has presented some evidence that some pilots had discussed engaging, and sporadically did engage in conduct protesting North American's proposed changes. For example, North American has alleged in its Complaint that pilots and their spouses reported to North American officials that IBT representatives were "discussing" self-help efforts to block North American from adopting any unilateral changes. (Compl. P 33(b)) [20] North American also has averred that IBT's negotiators admitted that the "talk among employees about the pilots refusing to work, engaging in a slowdown ... or other illegal activity," merely reflected "'customary Union tactics and perfectly permissible lawful Union activity.'" (Harfst Supp. Decl. P 9)

20 Other evidence of this is found in an email from Dan McKinnon to all employees in North American, which appears to have been sent on the afternoon of December 8, 2004, the day before the last day of the three-day bargaining session in December. This email was presented by North American's negotiator to an IBT representative on December 9. In this email, McKinnon mentions unspecified "reports" that many pilots were "talking about conducting a slowdown in operations and were refusing to answer their phones to avoid being called in for last minute flight assignments[] to 'make some kind of 'statement.'" (Harfst Supp. Decl. P 11 (citing Ex. A)) While the timing and self-serving nature of the email may raise some eyebrows, the Court accepts it as true for purposes of this motion. At most, however, it is cumulative of the other, equally non-specific claims made by North American that some union members discussed and may have participated in sporadic self-help activities.

[*52] As with the threats of legal action, North American's claim of self-help threats must be viewed in

the context of collective bargaining, which is a robust and dynamic negotiation process where leverage is sought through posturing. *See generally NLRB v. WPIX, Inc.,* 906 F.2d 898, 902 (2d Cir. 1990) ("Both sides engaged in some exaggeration, posturing and dilatory tactics, as might be expected in labor negotiations."). "Hard bargaining is encouraged by the RLA," and, therefore, "employers and unions can be expected to take aggressive bargaining positions and freely threaten dire consequences when they are rejected." *Federal Express,* 67 F.3d at 964-65. What North American has described is a hotly contested collective bargaining negotiation, and nothing more. The vast bulk of the evidence North American has presented merely suggests IBT members discussed measures that might be taken to fight North American's efforts to impose the unilateral changes that were on the bargaining table. Moreover, there is no evidence of an actual strike occurring, nor is there any evidence that flight cancellations resulted from any widespread self-help. Thus, North American's **[*53]** evidence in this regard is inadequate. *Compare Piedmont Airlines,* 863 F. Supp. at 214 ("According to Piedmont's complaint, the program had its intended result: it forced Piedmont to cancel dozens of flights, which resulted in a substantial loss of profits for the company."); *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters,* 275 F. Supp. 986, 993 (S.D.N.Y. 1967) ("There is a bona fide dispute between the Clerks and Pan Am as to their respective legal rights and obligations under a statute of the United States. The parties have taken firm adverse positions with respect to the duty and obligation of Pan Am to negotiate with the Clerks Union under the unusual circumstances existing in this case. That there is nothing hypothetical about the controversy is made plain by the strike called by the Clerks Union to compel Pan Am to negotiate."), *aff'd, Bhd. of Ry., Airline & Steamship Clerks, Freight Handlers, Express and Station Employees v. Pan Am. World Airways, Inc.,* 404 F.2d 938 (2d Cir. 1969), *with Consol. Rail Corp.,* 847 F. Supp. at 1306 ("Because we find that there is no immediate threat of a strike by the BMWE **[*54]** against plaintiff, we decline to pass judgment on the declaratory judgment claims brought by Conrail in this action until all voluntary processes of negotiation, conciliation and mediation have run their Course."). [21] Thus, what is left is that North American does not wish to be threatened during labor negotiations with the possibility of future self-help, something which does not by itself make this a justiciable case. *See Atlas Air,* 232 F.3d at 227 ("That a union may posture in labor negotiations or otherwise threaten to respond to future changes is insufficient to create the reasonable apprehension of litigation necessary for an RLA claim to be justiciable.").

21 It bears noting that North American did not seek and has not sought any injunctive relief barring IBT from leading a strike by its pilots. This remedy would be available to North American if it could establish that the threat of such self-help was imminent. *See Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employees,* 481 U.S. 429, 445-46, 95 L. Ed. 2d 381, 107 S. Ct. 1841 (1987) (noting that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to enjoin compliance with the RLA);*Consol. Rail Corp.,* 847 F. Supp. at 1306 ("Of course, should plaintiff's worst fears materialize and a strike become imminent, this court would then review the specific dispute and determine whether the Union was resorting to a precluded form of self-help.").

[*55] North American claims that it need not offer proof that union self-help is imminent to substantiate declaratory relief, citing *Norfolk and W. Ry. Co. v. Bhd. of R.R. Signalmen,* 164 F.3d 847, 856 (4th Cir. 1998). (Pl.'s Supp. Mem. at 13-14) [22] This case, however, actually contradicts North American's position. In *Norfolk and Western Railway,* the railway companies had executed an agreement to purchase and divide another railway company. *Norfolk and W. Ry.,* 164 F.3d at 849. In the face of union efforts to renegotiate the labor contract under the RLA, the railway companies sought declaratory relief establishing that the Surface Transportation Board ("STB") had exclusive jurisdiction over the terms of the transaction under the Interstate Commerce Act ("ICA"), thus precluding the unions from challenging the transaction under the RLA. Separately, the railway companies also sought injunctive relief to bar the unions from engaging in any self-help, which had been threatened, to ensure that no unilateral changes would be made to the collective bargaining agreement after the transaction was consummated. *Id.* at 851. The district court granted **[*56]** both requests and the unions appealed. On appeal, the Fourth Circuit upheld the entry of the declaratory relief, but reversed the injunctive relief. Contrary to North American's characterization of the ruling, the Fourth Circuit did not find declaratory relief appropriate even in the absence of an imminent threat of a strike. In fact, the court noted that if the railroads had sought only injunctive relief, their case would have been dismissed for lack of standing owing to the absence of an imminent threat of self-help, even though the unions had, in fact, made statements that they had the legal right to engage in self-help if the companies adopted any unilateral changes to the collective bargaining agreement in place. *Id.* at 856. Indeed, the court went on to hold that such threats of self-help were "a form of advocacy" reflecting the unions' belief that they had the legal right to strike under the RLA. *Id.* at 856-57. Moreover, as is true of this case, the court further held that even if the threats

of self-help were "taken at face value, their promise was conditioned on the railroads' adoption of the proposed changes." *Id.* at 857. **[*57]** [23] Thus, the absence of any imminent, or even likely, threat of self-help had nothing to do with the Fourth Circuit's decision to uphold the declaratory relief granted by the district court. Instead, as the court observed, the "railroads' request for an injunction was ancillary to the remedy they sought on their central claim -- a declaratory judgment that the ICA supersedes the RLA in connection with the approval of a railroad merger or acquisition." *Id.* at 856. That question was ripe not because the companies had announced an intention to conduct the transaction, but because it "was an agreed-to deal which would be closed after appropriate approvals from the STB were obtained." *Id.*

22 North American also disputes IBT's contention that jurisdiction must be established by clear and convincing evidence, claiming instead, that its burden is a preponderance of the evidence. (Pl.'s Supp. Mem. at 14) The Court will assume that North American is right and evaluate North American's claim under this lower burden of proof.

23 The court also took note of the absence of any evidence that the unions intended to strike or had acted on a plan to strike. *Norfolk and W. Ry.,* 164 F.3d at 857.

[*58] Therefore, the Court concludes that North American has not demonstrated that it faced an imminent threat of self-help conduct that makes this action an actual case or controversy. Thus, dismissal for lack of jurisdiction is required.

C. Prudential Limits to Jurisdiction Under Declaratory Judgment Act

The Declaratory Judgment Act encompasses both constitutional and prudential concerns. A lawsuit seeking federal declaratory relief must first present an actual case or controversy within the meaning of Article III. It must also fulfill statutory jurisdictional prerequisites. Thus, even if the suit passes constitutional and statutory muster, the court must also be satisfied that entertaining the action is appropriate. This determination is discretionary, for the Declaratory Judgment Act grants permissive, rather than mandatory, authority for judicial intervention. In this instance, even if North American's Complaint was justiciable under Article III, the Court does not believe it prudent to exercise its discretion under the Declaratory Judgment Act to hear this case. Accordingly, the Court also dismisses the Complaint on this independent basis.

1. Applicable Standards

The **[*59]** Supreme Court has "repeatedly characterized the Declaratory Judgment Act as 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant.'" *Wilton v. Seven Falls Co.,* 515 U.S. 277, 288, 132 L. Ed. 2d 214, 115 S. Ct. 2137 (1995) (quoting *Wycoff,* 344 U.S. at 241). "By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Id.* at 288; *see also id.* at 286 ("Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants."). Indeed, by its terms, the Act provides that a court "may" declare the rights and other legal relations of any sufficiently interested party seeking declaratory relief. 28 U.S.C. ß 2201. In this context, "the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton,* 515 U.S. at 288. **[*60]** At a minimum, this means that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Id.* at 282. This is true "particularly when there is a pending proceeding in another court, state or federal, that will resolve the controversies between the parties." *Great Am. Ins. Co. v. Houston Gen. Ins. Co.,* 735 F. Supp. 581, 584 (S.D.N.Y. 1990). Therefore, "a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment ...." *Wilton,* 515 U.S. at 288.

In the exercise of its broad discretion, however, a district court "cannot decline to entertain [a declaratory judgment] action as a matter of whim or personal disinclination." *Pub. Affairs Associates, Inc. v. Rickover,* 369 U.S. 111, 112, 7 L. Ed. 2d 604, 82 S. Ct. 580 (1962). "Nor can a district court dismiss a declaratory judgment action merely because a parallel ... suit was subsequently filed in another district." *EMC Corp.,* 89 F.3d at 813. But, it also is true **[*61]** that "courts take a dim view of declaratory plaintiffs who file their suits mere days or weeks before the coercive suits filed by a 'natural plaintiff' and who seem to have done so for the purpose of acquiring a favorable forum." *AmSouth Bank v. Dale,* 386 F.3d 763, 788 (6th Cir. 2004). "Allowing declaratory actions in these situations can deter settlement negotiations and encourage races to the courthouse, as potential plaintiffs must file before approaching defendants for settlement negotiations, under pain of a declaratory suit." *Id.* This is something to which our system of justice should not and does not aspire. *See Columbia Pictures Indus., Inc. v. Schneider,* 435 F. Supp. 742, 747 (S.D.N.Y. 1977) ("As federal court calendars become

increasingly burdened, attorneys should exercise a correspondingly increased responsibility to attempt to resolve disputes without using limited judicial resources to decide issues which might, by responsible discussions between reasonable people, be settled out of court."). *aff'd.* 573 F.2d 1288 (2d Cir. 1978); *Int'l Union v. Dana Corp.,* 1999 U.S. Dist. LEXIS 22525, No. 3:99 CV 7603, 1999 WL 33237054, at *5 **[*62]** (N.D. Ohio Dec. 6, 1999) ("The timing of Dana's suit, which was filed even before Dana gave the union any other answer to the union's inquiries about its intentions, strongly suggests a preemptive purpose."); *Davox Corp. v. Digital Sys. Int'l, Inc.,* 846 F. Supp. 144, 148 (D. Mass. 1993) (finding dismissal proper where "it would be inappropriate to reward -- and indeed abet -- conduct which is inconsistent with the sound policy of promoting extrajudicial dispute resolution, and conservation of judicial resources").

More particularly, as North American has observed in the California Action, (Sowell Decl., Ex. 16 at 4), the law discourages court intervention in ongoing labor negotiations governed by the RLA. *See Pan Am. World Airways,* 275 F. Supp. at 993 ("It is plain ... that under the statutory scheme of the [RLA] Congress has circumscribed the role of the courts."). Indeed, "the RLA was passed 'to encourage collective bargaining ....'" *Alton & Southern Ry. v. Brotherhood of Maintenance of Way Emples.,* 883 F. Supp. 755, 759 (D.D.C. 1995) (quoting *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union,* 396 U.S. 142, 148, 24 L. Ed. 2d 325, 90 S. Ct. 294 (1969)), **[*63]** *amended on other grounds,* 899 F. Supp. 646 (D.D.C. 1995), *aff'd,* 72 F.3d 919 (D.C. Cir. 1995). Accordingly, "the courts should think hard and long before undertaking to pass upon all differences of opinion which arise during the grievance process between the representatives of labor and management." *Consol. Rail Corp.,* 847 F. Supp. at 1305. Judicial caution in this arena reflects not only deference to the scheme Congress enacted in the RLA, but a recognition that the "public interest does not require that the federal courts referee every tactical move in labor negotiations under the [RLA]." *Indep. Fed'n of Flight Attendants,* 1981 U.S. Dist. LEXIS 9857, 1981 WL 2430, at *4. In fact, as is particularly relevant here, "the public interest would seem to require that the parties proceed to negotiations under the auspices of the National Mediation Board, with minimal outside interference." *Id.* The more responsible course in this context, then, is to await not only the formation of an actual controversy, but an irreconcilable breakdown of the negotiations before exercising jurisdiction under the Declaratory Judgment Act. *See N. Shore Gas Co. v. Salomon, Inc.,* 152 F.3d 642, 647 (7th Cir. 1998) **[*64]** (noting that where settlement discussions had reached an acknowledged impasse, declaratory judgment action filed one month after last contact between the parties was not "racing to the courthouse"); *Phillips Plastics Corp. v. Kato Hatsujou Kabushiki Kaisha,* 57 F.3d 1051, 1053-54 (Fed. Cir. 1995) ("When there are proposed or ongoing license negotiations, a litigation controversy normally does not arise until the negotiations have broken down."); *Consol. Rail Corp.,* 847 F. Supp. at 1305 ("The courts must hesitate to make rulings which may be used subsequently by the parties, mediators or arbitrators, as interpretations of collective bargaining agreements.").

"The Second Circuit has articulated two criteria to assist district courts in exercising the broad discretion conferred by the [Declaratory Judgment Act]: "'(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations at issue; and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'"" *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Int'l Wire Group, Inc.,* 2003 U.S. Dist. LEXIS 9193, No. 02 Civ. 10338, 2003 WL 21277114, **[*65]** at *4 (S.D.N.Y. June 2, 2003) (quoting *Continental Cas. Co. v. Coastal Sav. Bank,* 977 F.2d 734, 737 (2d Cir. 1992) (quoting *Broadview Chem. Corp. v. Loctite Corp.,* 417 F.2d 998, 1001 (2d Cir. 1969))); *see also Gilbert. Segall and Young v. Bank of Montreal,* 785 F. Supp. 453, 463 (S.D.N.Y. 1992) ("In deciding whether to render declaratory relief, a court should be guided by the[se] criteria."). If either of these objectives can be promoted, the action "should be entertained." *Broadview Chem. Corp.,* 417 F.2d at 1001. A court's discretion, however, is not "constricted or guided solely by these two criteria." *Dow Jones,* 237 F. Supp. 2d at 433; *see also Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 2003 U.S. Dist. LEXIS 9193, 2003 WL 21277114, at *4. [24] Moreover, how these factors are to be balanced is a matter for the district court's discretion. *See Dow Jones,* 346 F.3d at 360. "When all is said and done," the Supreme Court has advised, "'the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning **[*66]** the functions and extent of federal judicial power.'" *Wilton,* 515 U.S. at 287 (quoting *Wycoff,* 344 U.S. at 243); *see also Great Am. Ins. Co.,* 735 F. Supp. at 585 (noting that a court "must look at the litigation situation as a whole in determining whether it is appropriate for the court to exercise its jurisdiction over the declaratory judgment action before it").

24 In *Dow Jones,* the district court considered three additional factors that other circuits had suggested should be evaluated in determining the proper exercise of discretion under the Declaratory Judgment Act.237 F. Supp. 2d at 432. These other factors include: (1) whether the declaratory remedy is being used merely for "procedural fencing" or a "race to res judicata"; (2) whether

the use of a declaratory judgment would increase friction between "our federal and state courts" and encroach upon state jurisdiction; and (3) whether there is a better or more effective remedy. *Id.* In affirming the district court's decision to decline jurisdiction over the declaratory action in *Dow Jones,* the Second Circuit approved, but did not require, consideration of these additional factors, which have been described as being "built upon" the two-factor analysis traditionally used by the Second Circuit.346 F.3d at 359-60. Indeed, while there is not unanimity, the courts within this circuit, even after *Dow Jones,* have continued to apply the two-factor test in determining the bounds of their discretion under the Declaratory Judgment Act. *See Bristol-Myers Squibb Co. v. SR Int'l Bus. Ins. Co. Ltd.,* 354 F. Supp. 2d 499, 506 n.44 (S.D.N.Y. 2005) (applying two-factor test) (citing *Dow Jones,* 346 F.3d at 359) (additional citations omitted); *Conn. Office of Prot. and Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.,* 355 F. Supp. 2d 649, 2005 U.S. Dist. LEXIS 1770, 04 CV 1338, 2005 WL 310437, at *2 (D. Conn. Feb. 7, 2005) (applying two-factor test) (citing *Continental Cas. Co.,* 977 F.2d at 734) (additional citations omitted); *Baskerville v. Cunningham,* 2004 U.S. Dist. LEXIS 8016, No. 01 CV 0606, 2004 WL 941639, at *2 (W.D.N.Y. Jan. 13, 2004) (applying two-factor test) (citing *Dow Jones,* 346 F.3d at 359) (additional citations omitted). *But see Gordon v. Amica Mut. Ins. Co.,* 2005 U.S. Dist. LEXIS 768, No. 3:03 CV 1134, 2005 WL 123851, at *3 (D. Conn. Jan. 20, 2005) (applying five-factor test) (citing *Dow Jones,* 346 F.3d at 359-60); *Gulf Underwriters Ins. Co. v. The Hurd Ins. Agency,* 2004 U.S. Dist. LEXIS 25439, 03 CV 1277, 2004 WL 2935794, at *1 (D. Conn. Dec. 16, 2004) ("The Second Circuit has approved at least five factors for consideration when deciding whether to exercise jurisdiction over a declaratory judgment action.") (citing *Dow Jones,* 346 F.3d at 360); *DePalma v. Nike, Inc.,* 341 F. Supp. 2d 178, 180 (N.D.N.Y. 2004) ("Factors which guide district courts' exercise of this discretion include whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; whether a judgment would finalize the controversy and offer relief from uncertainty; whether dismissal would prevent 'procedural fencing'; and whether the question to be decided is of public importance.") (citing *Dow Jones,* 346 F.3d at 359). In any event, as will be discussed further, consideration of these three additional factors does not change the result in this case -- that the Court believes it would be an inappropriate and unnecessary use of the court's discretion to hear this case.

[*67] 2. Application

Looking at the legal dispute between North American and IBT as a whole, the Court finds, in the exercise of its discretion, that this declaratory judgment action should be dismissed. First, permitting a party to a collective bargaining negotiation, such as North American, to seek reprieve in the courts in the midst of the bargaining process, i.e., before there is an impasse in negotiations and on the eve of mediation efforts, would frustrate the purposes of the RLA and undermine the well recognized interest in encouraging non-judicial remedies to disputes. Second, this action does not serve a particularly useful purpose in clarifying and settling the legal relations between the parties, nor will it terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the action. The California Action is more comprehensive as it was filed only after North American had begun implementing its final and fixed position regarding the terms and conditions of the employment of all its personnel. This factual posture will allow the parties to litigate more fully, under all the relevant provisions of the RLA, the respective rights of each party.

[*68] Regarding the threat to the bargaining process, the undisputed record makes clear that North American and IBT were still engaged in ongoing and intense labor negotiations when this action began. Moreover, while these negotiations had been proceeding for nearly seven months, only four negotiating sessions had been completed before the specific proposals regarding the terms and conditions of the pilots' employment had been introduced, which itself was only a little more than one month before North American filed its Complaint. Thus, it is unsurprising to learn that the record demonstrates that when North American filed its Complaint, the parties had already scheduled two later negotiating sessions (December 29-30, 2004 and January 10-12, 2005). Furthermore, while IBT insisted that North American had no legal right to adopt any unilateral changes, it also treated North American's early statements regarding these unilateral changes as negotiating proposals to which it would make counter-proposals at later negotiating sessions.

While it appears that the bargaining session that immediately preceded the initiation of this lawsuit did not go smoothly, the negotiating process envisioned **[*69]** by the RLA was hardly at an end, as the NMB had just agreed to be brought into the process. Interestingly, in response to IBT's claim for the need of mediation to resolve the impasse between the parties, North American advised the NMB that IBT's request was "premature and

inappropriate" given that there had been many "tentative agreements" reached on various sections of the proposals, and that the parties had just begun a dialogue regarding numerous other new proposals. On the same day the mediator was assigned, which was just two days after North American represented to NMB that it was premature to declare an impasse, and eleven days before it adopted a final and fixed position on the unilateral changes, North American filed this action.

This chronology leaves little doubt that North American prematurely abandoned the collective bargaining process embodied in the RLA to seek refuge in the courts. Indeed, North American has justified this strategy by claiming that the parties had reached an impasse, not over the terms discussed in the negotiation, but over the philosophical question of whether North American has the right to make unilateral changes after certification of IBT, but **[*70]** before finalization of a collective bargaining agreement. According to North American, therefore, this action was ripe as far back as November 11, 2004, when IBT first indicated its belief that the proposed unilateral changes disclosed on November 5, 2004 were illegal *per se.* (Tr. 16-17) If allowed to frame the dispute so narrowly, however, either side in a collective bargaining negotiation could disrupt the negotiations by simply adopting a resolute philosophical position as to the legality of any one aspect of the negotiation and then run to court to obtain declaratory relief. The hazards of such legal maneuvering are obvious as parties could attempt to use the courts to manipulate the negotiating process, *see Indep. Fed 'n of Flight Attendants,* 1981 U.S. Dist. LEXIS 9857, 1981 WL 2430, at *4, or the real legal dispute surrounding the negotiating process. *Cf. Ry. Labor Executives' Ass'n v. Boston & Maine Corp.,* 808 F.2d 150, 157 (1st Cir. 1986) ("The framing of the Maine Central issue in such terms is obviously a red herring. No one, except Maine Central in its obfuscation of the questions presented, claims that is an issue or that Maine Central lacks the power to abolish **[*71]** jobs pursuant to the collective bargaining agreement after the Presidential Order of May 20, 1986.... The real question as respects the Maine Central controversy is whether a claim that the carrier has discriminated against its employees because they have engaged in activities protected by the RLA falls within the jurisdiction of the adjustment boards, or whether such an allegation may be brought in the courts."). Either way, the courts should decline the invitation to be involved in such gamesmanship. *See Eli's Chicago Finest, Inc. v. The Cheesecake Factory, Inc.,* 23 F. Supp. 2d 906, 909 (N.D. Ill. 1998) ("If the Court were to allow such maneuvering, litigants would have no alternative but to quickly file suits in the forum of their choice. Delay caused by a good faith effort at negotiation could deprive a litigant of a favorable venue. Such an incentive system would be highly inefficient."); *Consol. Rail Corp.,* 847 F. Supp. at 1306 (ruling that declaratory judgment inappropriate until "all voluntary processes of negotiation, conciliation and mediation have run their course").

Perhaps recognizing the egg-shell strength of this position, North American **[*72]** suggested at oral argument that it might be limited as to how early in the negotiating process it could impose unilateral changes by the RLA requirement that it bargain in good faith. (Tr. 16) However, this only further highlights the weakness of North American's jurisdictional argument that the lawsuit was ripe merely because the parties had adopted diametrically opposite positions on North American's abstract right to make *any* unilateral changes. The details of the changes and the timing of their adoption and implementation might be essential to the question of the legality of North American's actions, beyond its general "right" to make such changes. Yet, this only reinforces the importance of waiting until the parties have adopted final and fixed positions regarding the actual changes to be implemented. *Cf. Int'l Ass'n of Machinists and Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos, S.A.,* 924 F.2d 1005, 1011 (11th Cir. 1991) ("During the course of bargaining and after refusing to bargain further with [the union], [the company] fired numerous employees and unilaterally made changes in working conditions .... Such action by [the company] **[*73]** could only serve to undermine the union members' confidence in [the union], their bargaining representative, and to undermine the ability of [the union] to bargain on a fair and equal basis with management."). And, as discussed above, there is the separate question of whether the actual changes adopted, particularly when compared to North American's treatment of its non-union employees at the time the unilateral changes are adopted, reflect any effort or intent by North American to discriminate against IBT by retaliating for its efforts to represent the employees. *See Atlas Air,* 232 F.3d at 225 ("Upon learning of [the Air Line Pilots Association's] election, Atlas immediately fulfilled its threat and terminated the profit-sharing plan before the results [of the union election] had even been certified.").

The risks presented by the logical consequence of North American's position could potentially be tolerated if the lawsuit otherwise served either a useful purpose in clarifying and settling the legal relations between the parties, or if it might terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the action. *See* **[*74]** *Bristol-Myers Squibb Co.,* 354 F. Supp. 2d at 506. But, when evaluated in the context of the California Action, it cannot be said that this lawsuit promotes either of these two factors the Court is to consider. *See Great Am. Ins. Co.,* 735 F. Supp. at 585 ("The Court ... must look at more than just the mechanical ap-

plication of the declaratory judgment standard. The Court must look at the litigation situation as a whole in determining whether it is appropriate for the Court to exercise its jurisdiction over the declaratory judgment action before it."). To begin, it is clear that the California Action is more comprehensive than the one before this Court. As noted, the California Action was filed after North American formally adopted, and even implemented, some of the unilateral changes it had earlier disclosed. As such, the broader legal dispute between the parties is more thoroughly presented in the California Action, encompassing not just the abstract question of North American's right to change the status quo, but the real question of whether the changes actually adopted with respect to the unionized pilots violate other relevant provisions of the RLA.

[*75] North American responds by arguing that the discrimination and bad faith questions "would have to be considered or resolved in the New York Action regardless of whether [they] were submitted as ... counterclaim[s]." (Pl.'s Supp. Mem. at 23). According to North American, if "the Union were to prove that North American implemented its changes intentionally to discriminate or retaliate against unionized pilots, bad faith may be shown." (Pl.'s Supp. Mem. at 23) However, at the time the Complaint was filed, IBT could not make any such claim because North American had not yet adopted its unilateral changes. While North American did adopt and implement some of the changes within two weeks of the filing of the Complaint, that circumstance should not be used to condone what was clearly a sprint to the courthouse. Moreover, because the legal position of North American embodied in its Complaint can be vindicated by interposing its own counterclaim in the California Action, this case can be dismissed without prejudice to North American's legal interests. *See Great Am. Ins. Co.,* 735 F. Supp. at 586 ("Plaintiff's interests can be adjudicated in the pending Texas action, for **[*76]** the subject of that coercive action is the same as that which plaintiff seeks a declaration on from this Court."). [25]

> 25 The Court is also aware that North American believes that it is prejudiced by the purported inconvenience of being a defendant in California. However, that question can be, and has been, addressed in the California Action. *See Natural Gas Pipeline Co. of Am. v. Union Pac. Res. Co.,* 750 F. Supp. 311, 315 (N.D. Ill. 1990). Moreover, the question of venue is secondary to the threshold question before this Court, which is the propriety of North American bringing its declaratory action when it did. *See Essex Group, Inc. v. Cobra Wire & Cable, Inc.,* 100 F. Supp. 2d 912, 916 (N.D. Ind. 2000) ("Regardless of whether Indiana is the more appropriate venue for the resolution of these issues, it is inappropriate for the Plaintiffs to file for a declaratory judgment for the purposes of forum-shopping.").

Described another way, there is nothing that North American can **[*77]** hope to achieve in this action that it could not attempt to gain in the California Action. On the other hand, because of the limited nature of this action, and its premature timing, there is reason to question whether IBT could in this case vindicate all of the interests it is pursuing in the California Action. *See Koch Engineering Co. v. Monsanto Co.,* 621 F. Supp. 1204, 1208 (E.D. Mo. 1985) ("Koch contends that Monsanto will be required to raise all the claims against Koch as compulsory counterclaims pursuant to Rule 13 of the Federal Rules of Civil Procedure. Regardless of whether this is true or not, Koch's request for an injunction is premature until such time as this Court is convinced that this suit will completely resolve the controversy."). Even if North American has the theoretical right to make unilateral changes to the terms and conditions of its employees' employment, that right is not absolute and can, depending on how it is exercised, be limited by the RLA. That is the overarching question in this case and it is not addressed, and could not be addressed, by North American's Complaint. Thus, in light of the California Action, granting North American **[*78]** the relief it requests will not serve a sufficiently useful purpose in settling the legal relations between the parties, or eliminate the uncertainty, insecurity, and controversy giving rise to this action. This, combined with the deleterious effects of encouraging parties to a labor dispute to race to the courthouse at the earliest opportunity, makes for an ill-advised exercise of federal judicial power. Accordingly, the Court declines to exercise its discretion under the Declaratory Judgment Act and therefore dismissal of this action is warranted. [26]

> 26 The Court's conclusion is not altered even if the three other factors discussed in *Dow Jones* are considered here. *Dow Jones,* 346 F.3d at 359 (noting that the three additional factors are "built upon" the two factors that long have governed the analysis). For example, one factor is whether the declaratory judgment action is being used for "procedural fencing" or a "race to res judicata." *Id.* As already described, the Court finds that this action, which was brought in a forum North American has described as being favorable to its legal position, undermines and delays the negotiation process and therefore **[*79]** is precisely the type of action that courts eschew as an inappropriate procedural maneuver. *See AmSouth,* 386 F.3d at 790 ("The practical effect of FTB's and AmSouth's participation in settlement negotiations and affirmative representations of that

participation was to lull the Receivers into believing that amicable negotiation was still possible, and that the filing of these declaratory actions was an effort to engage in procedural fencing to secure the Banks' choice of forum."). The other factors that can be considered are the potential friction between this and other courts, and the existence of a more effective remedy than the one sought in this action. These factors are appropriately evaluated together in this case given the pendency of the California Action. Here, dismissal is appropriate both to avoid any conflict between the two federal courts handling these cases, and because the California Action, since it is more comprehensive than this case, represents a superior means of resolving the full legal dispute between the parties. *See Koch,* 621 F. Supp. at 1208 ("It is quite obvious to this Court even at this early stage of the proceedings that **[*80]** Monsanto's suit in the Southern District of Texas will fully resolve the controversy between the parties. By dismissing Koch's petition for declaratory judgment, this Court avoids both the uncertainty of a possibly premature injunction and/or the burden and expense on the courts and the parties associated with duplicate lawsuits."). Thus, consideration of these additional factors further supports dismissal of this action.

III. Conclusion

For the reasons set forth above, the motion to dismiss is granted.

SO ORDERED.

Dated: March 20, 2005

New York, New York

KENNETH M. KARAS

UNITED STATES DISTRICT JUDGE