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