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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,

Plaintiff,

vs.

Don Addington, an individual, *et al*

and

US Airline Pilots Association,

Defendants

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

USAPA'S REPLY IN SUPPORT OF ITS RULE 21 MOTION

Defendant US Airline Pilots Association ("USAPA") respectfully submits this reply brief in support of its motion to drop the Addington co-defendants pursuant to Rule 21 (doc. # 35), and in opposition to US Airways' response brief (doc. # 60). Pursuant to LR Civ. P. 7.1(d)(2), USAPA incorporates by reference the arguments contained in its Reply in response to the Addington co-defendants' Rule 21 opposition. (*See* Doc. # 52).

The Company makes two basic points in response to the motion to drop the Addington co-defendants. First, they argue that, "unless the West Pilots are bound as parties, they will not be barred by the judgment from pursuing their threatened claims against US Airways – and US Airways will be deprived of the effective relief it seeks in this action." (Resp. 4:13).[1] Second, the West Pilots are a "necessary party under Rule 19 because their absence would preclude issuance of complete relief to US Airways." (Resp. 4:19). The Company cannot support either of these contentions.

I) DROPPING THE ADDINGTON CO-DEFENDANTS WILL NOT DEPRIVE THE COMPANY OF THE "EFFECTIVE" RELIEF IT SEEKS BECAUSE THAT DOES NOT REQUIRE RESOLUTION OF THE EMPLOYEES' DISPUTE.

The Company is not a party in the "dispute regarding the relative seniority of" the two pilots groups, East and West, which it concedes is "fundamentally a dispute between two groups of pilots, and not a dispute between pilots and their employer." (Doc. # 61 at 10:7). The Company has alleged that it is "neutral as to how the underlying seniority dispute is ultimately resolved." (Resp. 4:3). Moreover, the "effective" relief it seeks is all contained in Count III, which seeks blanket immunity from liability "under the Railway

[1] All page references are to ECF generated page numbers, not internal page numbers.

Labor Act" doled out by this Court for "enter[ing] into a collective bargaining agreement that does not incorporate the Nicolau Award." (Doc. # 1, 23:24-27). While the scope of such liability is unclear and undefined, what is clear is that, if granted, the Company will have erected around it a shield to any claims by any party, premised upon the inclusion or non-inclusion of Nicolau in any future CBA.

Under the blanket immunity sought by the Company, there is no need to resolve the employees' seniority dispute. Nor is there a need, nor is it proper, to define USAPA's rights. The Company's response, therefore, boils down to asking this Court for not one shield, but *two*. In so doing, it steps outside of the bounds of the Declaratory Judgment Act to have this Court define not its rights, but other parties' rights. Such a request is a direct affront to the Act, and is redundant.[2] One shield, that is Count III, will suffice.

In addition, the United States Supreme Court could grant the pending certiorari petition of the Addington co-defendants, and rule to remand the case back to the Ninth Circuit. The Company's response does not contemplate this scenario in asserting that it can bar the West pilots. That is an assumption that cannot be relied upon unless and until certiorari is denied.

II) THE ADDINGTON CO-DEFENDANTS ARE NOT NECESSARY TO THE "COMPLETE" RELIEF US AIRWAYS SEEKS.

The Company next argues that West Pilots are a "necessary party under Rule 19 because their absence would preclude issuance of complete relief to US Airways." (Resp. 4:19). The Company concedes, however, that "the West Pilots and USAPA are both

[2] Assuming, *arguendo*, that the Company even has a valid claim under the Declaratory Judgment Act.

combatants in the same seniority dispute." (Resp. 4:22). Thus, this is an internal union dispute between employees; it has but a tangential effect on the rights of the Company, and nothing to do with granting it blanket immunity. For that very reason, Count III is literally pled in the alternative to Counts I and II. It specifically disclaims resolution of the employees' dispute, and it asks the Court to provide the Company with blanket immunity.[3] Thus, for the Company to maintain that it is necessary to have Count I or II resolved for "meaningful" relief is not credible. (Resp. 7:8). In fact, the Company admits that Count III "does not seek to resolve the issue of USAPA's DFR or other liability." (Resp. 6:1).

III) ADDITIONAL POINTS REPLIED TO.

The Company asserts that the merits of the West pilots' claim are not material; all that matters is that they have "unequivocally threatened to sue." (Resp. 8 n. 2). The problem with this is that it would require the Court to give frivolous claims the same weight as non-frivolous claims. However, in a declaratory judgment context that is improper. "Any time parties are in negotiation ... the possibility of lawsuits looms in the background." *EMC v. Norand Corp*, 89 F.3d 807, 811 (Fed. Cir. 1996). Mere threats of future litigation – or mere history of past litigation – are not sufficient to create a justiciable controversy. *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

And the Company is wrong to assert that *its* rights were not considered in the prior litigation. (Resp. 11:23). The district court's findings and conclusion in *Addington*, which

[3] Of course, even the undefined blanket immunity will not shield the Company from lawsuits over the seniority term in the new contract. Rather, it would merely shield it from claims dependent on the omission of Nicolau. That is moot anyway because the Ninth Circuit has correctly observed that no injury may be shown simply by omission, and even if there was, such a claim is dubious on its merits. *Addington*, 606 F.3d at 1181 n. 3

were considered and vacated by the Ninth Circuit, specifically addressed hardship to the Company:

> Without an injunction, USAPA's seniority proposal inevitably impairs the collective bargaining process. For this same reason, denying judicial review would work a substantial hardship upon the parties, including the Airline. … In addition to depriving West Pilots of legitimate representation, USAPA's bargaining position leaves the Airline to decide between a lack of a single CBA and an unlawful single CBA.

Addington v. US Airline Pilots Ass'n, 186 L.R.R.M. 3087, at *70 (D. Ariz. 2009). On appeal, the Ninth Circuit found that the dispute arose in the context of unfinished bargaining with the Company and in the historical context of the Company's merger. 606 F.3d at 1177. Moreover, in addressing the fact that the district court "cannot fashion a remedy that alleviates Plaintiffs' harm" *id.* at 1180, the Ninth Circuit established that the determination of harm to any party must await the completion of the bargaining and ratification process.

After dismissal of the *Addington* plaintiffs' Count II, which accused the Company of negotiating toward an end result other than Nicolau, the grievance was scheduled for arbitration, but voluntarily abandoned and waived by the West pilots. (Doc. # 33).[4] The Company asserts that because it could not "compel the West pilots to pursue their grievance" therefore the Company "'gave up' nothing.'" (Doc. # 60 n. 5). That is disingenuous and of little help to this Court because the Company did not need to compel the West pilots to pursue their grievance to have the System Board hear any issue arising

[4] The *Addington* plaintiffs' Count I was also dismissed and it was later determined by a System Board Arbitrator that the Company's decision to disregard the Nicolau Award in furloughing West pilots in 2008 was in accordance with the contract. (Doc. # 68-1, Ex. A). The *Addington* plaintiffs were invited to participate in this grievance, but similar to their Count II, waived that opportunity as well.

under the Transition Agreement ("TA"). The Company has the right, under Section X.B. of the TA, to "raise [the] issue for resolution," and as the submitting party, the Company can, pursuant to Section X.C. of the TA, refer resolution of the issue "to a Board of Adjustment." (Doc. # 34-2 at 13).[5] Thereafter, it would be incumbent on the parties to give notice to affected pilots so that they could petition for party status. *See Steward v. Mann*, 351 F.3d 1338, 1346-47 (11th Cir. 2003).

The Company argues that USAPA's concern with the timing of its request for declaratory judgment is somehow undermined by the ripeness argument contained in USAPA's pending 12(b)(1) motion. (Resp. 12:13). The Company misses the point. The Company, through its actions, has contradicted itself. On the one hand, it now claims imminent harm sufficient to warrant issuance of declaratory relief. Yet, when the *Addington* litigation arose two years ago, instead of counterclaiming for declaratory relief, the Company fought to have itself dismissed on ripeness and jurisdictional grounds. (*See* 08-cv-01633, Doc. # 30). A peculiarity that was recently recognized by the district court in *Addington*:

> [T]he hardship to the Airline was there when they asked to be dismissed out of this case. They, for whatever reasons, rather than counterclaiming for declaratory venue, they decided they didn't want to be involved. But those facts, those circumstances were there and we have ample evidence in this case that the Airline is and always has been greatly distressed by its inability to complete its merger …

[5] The Company contradicts itself in stating on the one hand that, "[t]he issues on which US Airways seeks declaratory relief in this case, ... could not have been resolved in a labor arbitration ..." (Doc. # 60, 12:15), and on the other, allege in its Complaint just the opposite, i.e. that the TA (CBA) is violated. (Doc. # 1 at ¶ 39: "and is not in accord with the requirements of the Transition Agreement"). Consequently, the Company's point appears incomprehensible.

(Doc. # 67-1 at 14). Suspiciously enough, the Company filed this action after the appellate decision had been issued, co-defendants had exhausted all avenues of relief with the Ninth Circuit, and issuance of the mandate was imminent. The seniority-related litigation flames were fading. The Company was finally faced with negotiation unfettered by judicial obstruction. The prospect of finally negotiating toward a single contract with industry standard wages was too much for a Company benefiting from the pilots' divide by reaping record profits off the backs of bankruptcy-compensated labor. The Company's solution was to douse gasoline on dying litigation embers and extend the internal seniority dispute.

Finally, the Company seems to kowtow solely to the interests of the West pilots by arguing that there is "no reason for US Airways to sue [the East pilots] for declaratory relief." (Resp. 13:19). However, the Company completely ignores the continuing seniority-related litigation threats from the East pilots (doc. 39, ¶¶ 36-37), and the pending litigation in the Eastern District of New York, which presents a direct attack on the legality of the Nicolau award at issue here. *See Naugler v. Air Line Pilots Ass'n,* 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008).

The *Naugler* litigation is based upon plaintiffs' allegations that ALPA "knew of, and stipulated to, the introduction of an erroneous, previously-corrected seniority list during the [Nicolau] arbitration proceedings," which resulted in a tainted Nicolau Award. *Id*. at *50. Specifically, the *Naugler* litigation is based on the allegation that over 200 East pilots who were actively flying at the time of the merger for a division of US Airways, referred to as MidAtlantic Airways, were designated as furloughed during the Nicolau proceedings – a result that unjustly disintegrated these pilots' hard-earned years of seniority:

> [T]he arbitrator [Nicolau] treated US Airways pilots who had previously flown MidAtlantic aircraft as though they were still on furlough and did not credit MidAtlantic flying time as US Airways flying time. Ultimately, the [Nicolau] Award placed these pilots below all active America West pilots on the integrated list such that **the most junior America West pilots, hired in or about April 2005, was afforded greater seniority rights than any of the US Airways pilots who flew MidAtlantic aircraft, some of whom were hired 20 years ago**.

Id. at *46 (emphasis added).[6] Based on these allegations, the district court in *Naugler* granted plaintiffs' motion to supplement their complaint, noting that "plaintiffs have adequately alleged that their injuries were caused by [ALPA's] knowing stipulation to introduce an erroneous seniority list that they knew would adversely affect the careers and employment rights of their represented members." *Id*. at *51.

In addition to the substantive challenge that *Naugler* presents to the legal viability of Nicolau, the pendency of that action undermines the Company's request in Count I, which seeks a declaration that USAPA must, pursuant to its DFR and RLA duties, bargain for implementation of Nicolau. As recently argued by ALPA in *Naugler*, it raises the "prospect of inconsistent judgments," because *Naugler* could result in a finding that Nicolau was tainted by ALPA's DFR breach, while the Company currently asks this Court, in Count I, to declare that the list is valid and that USAPA is barred from negotiating for anything other than Nicolau. (*See* Granath Decl., Ex. A at 49).

The Company, in its current request for declaratory relief, asks this Court, through

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[6] The district court in *Addington* barred USAPA from presenting any evidence challenging the process, procedure, or decision of the Nicolau Award." (08-01633, Doc. # 362 at 2). This included evidence relating to the pending *Naugler* litigation. The ruling, contrary to established precedent, precluded USAPA from establishing why it "never accepted the arbitration decision in principle." *Associated Transport*, 185 N.L.R.B. at 633.

Counts I and II, to opine on whether or not Nicolau must be included in any future CBA.[7] Therefore, the Company seeks a resolution that will affect not only the West pilots, but the lives and careers of over 3,000 East pilots, who the Ninth Circuit found have already "expressed their intentions not to ratify a CBA containing the Nicolau Award." *Addington*, 606 F.3d at 1180. Yet, in the face of this, the Company somehow continues to argue that it is only the West pilots, and not the East pilots, who are necessary parties.

IV. CONCLUSION

USAPA respectfully requests that this Court grant its motion and order that the *Addington* defendants be dropped from this action.

Respectfully submitted:

Dated: November 1, 2010 By: ***/s/ Nicholas Granath***

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[7] ALPA, the union whose internal merger policy created the Nicolau Award, recently recognized that the Ninth Circuit's decision in *Addington*, determined that "implementation of a CBA that does not include the Arbitration Board's merged list would not necessarily be a breach of USAPA's DFR." (Granath Decl., Ex. B at 12, fn. 10).

CERTIFICATE OF SERVICE

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

I hereby certify that on this day of November 1, 2010, I electronically transmitted the foregoing document and all its attachments to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

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