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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

US AIRWAYS, INC., a Delaware corporation, *et al.*, *Plaintiff*, vs. Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA, on behalf of themselves and the certified WEST PILOT CLASS, and US AIRLINE PILOTS ASS'N, an unincorporated association, *Defendants*.	CASE NO. 2:10-cv-01570-PHX-ROS **WEST PILOTS' RESPONSE IN OPPOSITION TO USAPA'S MOTION FOR SUMMARY JUDGMENT** (Oral argument requested)

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, Steve WARGOCKI, Michael J. SOHA, Rodney Albert BRACKIN, and George MALIGA, on behalf of themselves and the certified WEST PILOT CLASS (collectively, the "West Pilots"), respond in opposition to USAPA's Motion for Summary Judgment, Doc. 152.

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I. Issues

USAPA is not entitled to summary judgment because the two issues that it raises in its motion must be decided against USAPA. These issues are as follows.

1. USAPA must have an objectively legitimate purpose, such as obtaining a benefit for the bargaining unit as a whole, to justify dishonoring the Nicolau arbitration. USAPA fails to identify any such purpose. Should the Court deny USAPA's motion because USAPA would violate the duty of fair representation if it were to dishonor the Nicolau arbitration?

2. The Court previously held that Counts I and II ask whether, in the future, the Airline and USAPA would be liable if they were to implement a non-Nicolau contract. But in its motion, USAPA addresses the ripeness of whether, in the past, it violated its duty of fair representation when it refused to bargain to implement the Nicolau arbitration. Does USAPA raise a valid challenge to the ripeness of Count II?

II. Factual Background

The parties do not dispute any fact material to deciding USAPA's motion. Those facts are recounted below. That these facts are uncontroverted is demonstrated by citation to USAPA's Statement of Facts ("USAPA SOF") (Doc. 153). Additional facts that cannot be controverted but are ignored by USAPA in its statement of facts are noted parenthetically with citation to the West Pilots' Statement of Facts ("WP SOF") (Doc. 151).

This litigation concerns a dispute about pilot seniority integration following the 2005 merger of two airlines. USAPA SOF at ¶ 1. In May 2005, US Airways was in Chapter 11 bankruptcy for the second time in two years. *Id.* at

¶ 10; *see also* WP SOF at ¶¶ 1, 3 (explaining that the Chapter 11 confirmed plan directed the airlines and ALPA to implement the merger). At the time of the merger, including pilots on furlough, East Pilots outnumbered West Pilots, 5,100 to 1,900. USAPA SOF at ¶¶ 8-9. All of the West Pilots were active (had flying jobs). *Id.* at ¶ 9. In contrast, approximately 1700 of the East Pilots were on furlough. *Id.* at ¶ 8.

The Transition Agreement provided that the pilot groups would integrate their seniority lists according to ALPA Merger Policy. *Id.* at ¶ 14. Pursuant to ALPA Merger Policy, the single integrated seniority list would be created by two Merger Committees. *Id.* If the Merger Committees could not negotiate seniority integration they were to proceed to arbitration. *Id.* at ¶¶ 15-16; *see also* WP SOF at ¶¶ 18-19 (explaining that the stated purpose of such arbitration is to determine a "final and binding" seniority integration).

Because the two committees could not agree, they proceeded to arbitration. USAPA SOF at ¶ 17. The arbitrator, Mr. Nicolau, issued his decision on May 1, 2007, in a document referred to as the Nicolau Award. *Id.* at ¶ 18. The Nicolau Award placed approximately 500 senior East Pilots at the top of the list. *Id.* At the other end, it placed all East Pilots who were on furlough when the airlines merged at the bottom. *Id.* On December 20, 2007, the Airline accepted this integrated seniority list. *Id.* at ¶ 32.

The East Pilots appealed to ALPA's Executive Committee to overturn the Nicolau arbitration. *Id.* at ¶ 21; *see also* West Pilot SOF at ¶¶ 36-38) (explaining that, after it considered the East Pilot appeal, ALPA ordered the East Pilots to implement the arbitration). The East Pilots also challenged the validity of the arbitration in court. USAPA SOF at ¶ 23. That claim was later dismissed. *Id.*

East Pilots created USAPA to oust ALPA. *Id.* at ¶ 27. A representation election was held, USAPA won, and it began to represent a bargaining unit comprised of both pilot groups on April 18, 2008. *Id.* at ¶ 33. Later in 2008,

USAPA presented, and to this day has not withdrawn, a date-of-hire seniority proposal to the Airline. *Id.* at ¶ 38; *see also* WP SOF at ¶¶ 65-70 (explaining that USAPA's seniority list puts hundreds of West Pilots at risk of furlough ahead of the East pilots who were on furlough at the time of the merger).

All other facts advanced by USAPA are immaterial because it is far too late to review the Nicolau arbitration. If East Pilots "thought the arbitration award invalid because rendered in violation of the union's constitution and merger policy statement, the way to raise the point was to challenge the award in court, which they had six months to do." *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213 (7th Cir. 1990).

III. Legal Argument

In their motion for summary judgment (Doc. 150), the West Pilots directly and fully refute the arguments that USAPA makes in its motion for summary judgment (Doc. 152). The West Pilots, therefore, incorporate their arguments here by reference and respond only briefly to USAPA.

A. The Court should deny USAPA's motion because USAPA fails to prove that it would not violate the duty of fair representation if it were to dishonor the Nicolau arbitration.

USAPA must have an objectively legitimate purpose, such as obtaining a benefit for the bargaining unit as a whole, to justify dishonoring the Nicolau arbitration. USAPA fails to identify any such purpose. The Court, therefore, should deny USAPA's motion because USAPA would violate the duty of fair representation if it were to dishonor the Nicolau arbitration.

1. USAPA must have an objectively legitimate purpose, such as obtaining a benefit for the bargaining unit as a whole, to justify dishonoring the Nicolau arbitration.

USAPA ignores the well-established law that a union must have an objectively legitimate purpose to justify disregarding an agreement to abide by

a neutral arbitrated seniority integration. The question is not, as USAPA would have it, whether as a labor union USAPA has freedom to contract. Rather, the question is whether it can use that freedom to a wrongful end—whether USAPA can use the principle of freedom of contracting to dishonor the bargaining unit's commitment to honor the Nicolau arbitration as final and binding. To say that USAPA's freedom of contracting is not constrained by that commitment flies in the face of common sense and established law.

As a general rule, changing a bargaining representative is akin to changing an attorney or changing the name of a corporation, at least to the extent that such change does not alter the existing obligations of the bargaining unit. *See Parker v. Metro. Transp. Auth.*, 97 F. Supp. 2d 437, 451 (S.D.N.Y. 2000) ("successor labor organizations" are "held liable for the discriminatory acts of their predecessors, according to the same factors used to determine successor liability of corporations."); *see also NLRB v. Laborers' Int'l Union*, 882 F.2d 949, 951-52 (5th Cir. 1989) (successor bound by judgment in favor of workers against predecessor).

The duty of fair representation exists to constrain the majority from oppressive use of its power. *See Air Wisconsin*, 909 F.2d at 216 ("Minority rights imply a limitation on the rights of the majority. . . ."). The duty would impose no practical limit on the majority if the majority could evade any such limit by using its power to change the representative. The duty would exist only to the extent permitted by the majority. That cannot be right.

USAPA offers no authority that holds otherwise. To start, it cites no authority that allows a union to use its freedom of contracting to evade the duty of fair representation. Instead, it cites two decisions that address freedom of contracting by non-union entities. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *Gulf Trading & Transp. Co. v. M/V Tento*, 694 F.2d 1191, 1196 n.8 (9th Cir. 1982). As a general principle, such freedom is not disputed.

USAPA's position that labor unions are free to contract without regard to existing seniority commitments ignores established law that is directly contrary. USAPA is wrong to state that *Rakestraw v. United Airlines*, 989 F.2d 944 (7th Cir. 1993), recognizes such unconstrained freedom to contract. To the contrary, *Rakestraw* held that "a union may not juggle the seniority roster for no reason other than to advance one group of employees over another." *Id.* at 1537. In so doing, it affirmed a line of decisions holding that a union must "show some objective justification" when it makes a seniority decision that benefits "a stronger, more politically favored group over a minority group." *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 796 & 800 (7th Cir. 1976) (cited favorably in *Rakestraw*, 989 F.2d at 947).

USAPA is also wrong to state that ALPA was free to deviate from its merger policy. USAPA Mot. at 9:19. To the contrary, *Air Wisconsin* stated in a closely analogous context: "If ALPA were free to ignore the merged seniority list, the employees of the post-merger airline would have very little job security" and "disputes over seniority would fester—as they have done in this case." 909 F.2d at 217. And *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th Cir. 1989), affirmed a district court that compelled ALPA to integrate seniority lists in a mareger "according to ALPA's own internal procedures." *Id.* at 218.

Finally, USAPA gets no support from *Baker v. Newspaper & Graphic Commc'ns Union, Local 6*, 628 F.2d 156 (D.C. Cir. 1980). In fact, *Baker* proves USAPA wrong. The union there was not allowed to deviate from a prior commitment on seniority integration because it had an unconstrained power to do so. Rather, it was allowed to make such a deviation because it plainly did so to "save jobs." *Id.* at 166. The court explained, "trying to save jobs was a legitimate exercise of trade union judgment." *Id.* In contrast to the situation here, the employer in *Baker*, "the Star," threatened to shut down operations

completely unless the union agreed to change the seniority scheme called for in the merger agreement:

> Given the Star's insistence on dovetailing in order to keep the newspaper going, the union's negotiators understandably considered themselves to be in a no-win situation. They determined that the workers' losses would be minimized if the dovetailing proposal were accepted — the loss of work for some being deemed preferable to job losses for all if the Star closed down. Under these circumstances, the union's conduct was eminently reasonable.

Id.

In other words, the union in *Baker* was allowed to reorder seniority because it had a legitimate reason that overall benefitted the bargaining unit as a whole.[1]

Baker, *Rakestraw*, *Barton Brands, Air Wisconsin*, and *Bernard*, therefore, all stand for the same proposition—that a union must have an objectively legitimate purpose, such as obtaining a benefit for the bargaining unit as a whole, to justify reordering existing seniority or deviating from an agreed upon neutral process to decide a seniority dispute. USAPA, therefore, must have an objectively legitimate purpose, such as obtaining a benefit for the bargaining unit as a whole, to justify dishonoring the Nicolau arbitration.

2. USAPA fails to identify an objectively legitimate purpose to dishonor the Nicolau arbitration.

USAPA does not argue that it would have an objectively legitimate purpose to dishonor the Nicolau arbitration. Instead, it argues (wrongly) that it would not need such a purpose. It argues that it merely must act with a "good reason." Its good reason, however, would be nothing more than an argument

[1] An overall benefit to the bargaining unit as a whole need not benefit the whole bargaining unit. Because seniority is a zero-sum situation there are always winners and losers when it is reordered. But if there is a net gain in jobs, pay or bargaining leverage, there is an overall benefit to the bargaining unit as a whole.

that Mr. Nicolau got the wrong result. But good reasons to argue that Mr. Nicolau made a mistake are not good reason to disregard the pilots' commitment to treat his decision as final. A good reason for that requires an unusual circumstance where doing so would benefit the bargaining unit as a whole. In *Rakestraw*, that was an increase in the union's bargaining leverage. 981 F.2d at 1532. In *Baker* it was "trying to save jobs." *Id.* at 166. Here, there would be no such good reason. The Court, therefore, must find that USAPA fails to identify an objectively legitimate purpose to dishonor the Nicolau arbitration.

3. The Court must deny USAPA's motion.

As shown above, USAPA must have an objectively legitimate union purpose, such as obtaining an overall benefit to the bargaining unit as a whole, to dishonor the Nicolau arbitration. Yet, it would have no such purpose here. Indeed, it denies that it must have such a purpose. USAPA, therefore, fails to prove that it would not breach its duty of fair representation if it were to implement a contract that disregarded the seniority list created by the Nicolau arbitration. Consequently, it is not entitled to summary judgment on Count Two. The Court, therefore, must deny USAPA's motion.

B. USAPA does not raise a valid challenge to ripeness.

The Court previously held that Counts I and II ask whether, in the future, the Airline and USAPA would be liable if they were to implement a non-Nicolau contract. But in its motion, USAPA attacks the ripeness of a different question that asks whether, in the past, it violated its duty of fair representation when it refused to bargain to implement the Nicolau arbitration. USAPA, therefore, does not address the ripeness of Count II.

1. Counts I and II ask whether, in the future, the Airline and USAPA would be liable if they were to implement a non-Nicolau contract.

This Court decided that Counts I and II are ripe because they ask whether in the future, the Airline and USAPA would be liable if they were to implement a non-Nicolau contract. *See* Order, 8:22 to 8:23 (Jun. 1, 2011) (Doc. 85). Reconsideration of that ruling is governed by L.R.Civ. 7.2(g)(2), which precludes a response by the West Pilots unless ordered by the Court.

2. In its motion, USAPA addresses the ripeness of whether, in the past, it violated its duty of fair representation when it refused to bargain to implement the Nicolau arbitration.

USAPA argues that Count II (and Count I) and raise the same question that the Ninth Circuit held was not ripe. *See* Doc. 152 at 23:9 to 23:10 ("The alternative judicial declarations US Airways seeks in Counts I, II, and III require a decision on whether USAPA violated its DFR.") (emphasis added). That was the question raised in the *Addington* case before Judge Wake. It is not the question raised here.

3. USAPA does not raise a valid challenge to ripeness.

Because Count II does not ask the Court to decide the issue addressed by USAPA—whether USAPA has already breached the duty of fair representation—USAPA does not raise a valid challenge to ripeness.

IV. Conclusion

USAPA fails to demonstrate that it would not breach its duty of fair representation if it were to implement a collective bargaining agreement that dishonored the Nicolau arbitration by using a date-of-hire seniority list. And it fails to bring a valid challenge to ripeness. The West Pilots, therefore, respectfully ask the Court to deny USAPA's motion for summary judgment on Count II (Doc. 152).

Dated this 21st day of February, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February 2012, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/Andrew S. Jacob
By _____