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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,
Plaintiff,
v.
Don Addington, an individual; John Bostic, an individual; Mark Burman, an individual; Afshin Iranpour, an individual; Roger Velez, an individual; and Steve Wargocki, an individual, on behalf of themselves and all other similarly-situated individuals,
and
US Airline Pilots Association, an unincorporated association,
Defendants.

Case No.: 2:10-cv-01570-ROS

**US AIRLINE PILOTS
ASSOCIATION'S MOTION TO
CONDUCT DISCOVERY
PURSUANT TO RULE 56(d) OF
THE FEDERAL RULES OF
CIVIL PROCEDURE**

1 Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, Defendant US
2 Airlines Pilots Association (“USAPA”) hereby moves the Court for an order permitting
3 USAPA to conduct discovery on issues relevant to the duty of fair representation and on
4 certain statements of fact offered by Plaintiff US Airways and Defendant West Pilot
5 Class in the event that the Court denies USAPA’s motion for summary judgment or
6 determines that the statements offered by US Airways and/or the West Pilots are material
7 to the motion for summary judgment. This motion is supported by the accompanying
8 Declaration of Patrick J. Szymanski in Support of USAPA’s Motion to Conduct
9 Discovery pursuant to Rule 56 of the Federal Rules of Civil Procedure and the record
10 before this Court.

11 INTRODUCTION

12 Rule 56(d) of the Federal Rules of Civil Procedure provides:

13 **(d) When Facts Are Unavailable to the Nonmovant.** If a nonmovant
14 shows by affidavit or declaration that, for specified reasons, it cannot
15 present facts essential to justify its opposition, the court may:

- 16 (1) defer considering the motion or deny it;
- 17 (2) allow time to obtain affidavits or declarations or to take discovery; or
- 18 (3) issue any other appropriate order.

19 Fed. R. Civ. P. 56(d).¹

20 Prior to the Scheduling Conference and as set forth in USAPA’s portions of the
21 case management plan, USAPA sought limited discovery on a variety of topics. (Doc.
22 130, at pp. 15-17.) The Court ordered expedited briefing before ruling on whether
23 discovery is permissible. *See* Doc. , Transcript of Dec. 1, 2011 Status Conference, at p.
24 33. As set forth in USAPA’s motion for summary judgment, Doc. 152, USAPA believes
25 that the Court should grant summary judgment dismissing Counts I and III, and enter
26 judgment on Count II declaring that USAPA would not violate its duty to bargain under

27 ¹ In 2010, Rule 56(f) was renumbered as Rule 56(d). The Advisory Committee notes to
28 the 2010 amendments state, “Subdivision (d) carries forward without substantial change
the provisions of former subdivision (f).”

1 Section 2, First, of the RLA, by entering into a collective bargaining agreement that
2 contains a seniority system that differs from the Nicolau Award.

3
4 However, Plaintiff and Defendant the West Pilot Class have purported to assert on
5 summary judgment that USAPA would breach its duty of fair representation by offering a
6 seniority proposal other than the Nicolau Award. They have also asserted several
7 statements of fact as to which USAPA needs discovery in order to fully respond. “[A]
8 district court should continue a summary judgment motion upon a good faith showing by
9 affidavit that the continuance is needed to obtain facts essential to preclude summary
10 judgment.” *Cal. ex rel. Cal. Dep’t of Toxic Substances Control v. Campbell*, 138 F.3d
11 772, 779 (9th Cir. 1998). *See Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th
12 Cir. 2001) (“the Supreme Court has restated the rule as requiring, rather than merely
13 permitting, discovery ‘where the nonmoving party has not had the opportunity to
14 discover information that is essential to its opposition.’”) (quoting *Anderson v. Liberty*
15 *Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986)).

16 **I. Discovery on the Duty of Fair Representation Claim Involves Facts and**
17 **Circumstances Encompassing the Last Five Years**

18 USAPA has argued that, to the extent the other parties are urging the Court to
19 decide whether USAPA has breached its duty of fair representation by bargaining for
20 anything other than the Nicolau Award, the claims are not ripe and even if they were, US
21 Airways’ action would be untimely. The Ninth Circuit held in *Addington v. U.S. Airline*
22 *Pilots Ass’n*, 606 F.3d 1174 (9th Cir. 2010), that the plaintiffs’ claims regarding breach
23 of duty of fair representation could not be ripe until final negotiations and ratification are
24 complete and remanded the matter with directions to dismiss the action. In addition, it is
25 USAPA’s position that a seniority system based on length of service is a legitimate union
26 objective and in no way violates USAPA’s duty to represent *all* the pilots in the merged
27 pilot craft. Employee preference based on length of service is a recognized and inherent
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1 feature of any bona fide seniority system as evidenced by the fact that all of the other US
2 Airways' collective bargaining groups employ a date of hire seniority system.

3 Because the Ninth Circuit recognized that collective bargaining is a dynamic
4 process which is not yet complete, if the Court decides for some reason that the issue of
5 whether USAPA breaches or has breached its duty of fair representation is ripe and
6 determines to consider whether USAPA breached its duty of fair representation, USAPA
7 submits that it should be given the opportunity to conduct discovery on certain financial
8 and operational matters, including matters that have occurred since discovery closed in
9 the *Addington* case and on matters raised by the other parties that have not been the
10 subject of previous discovery and which are directly relevant to the allegation that
11 USAPA is breaching its duty of fair representation by deviating from the Nicolau Award.

12 In order to establish a breach of duty of fair representation in the context of
13 collective bargaining, a plaintiff must show that the union's conduct is "so far outside a
14 'wide range of reasonableness' . . . as to be irrational." *Air Line Pilots Ass'n v. O'Neill*,
15 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).
16 This is an intensely factual determination and depends on "the factual and legal landscape
17 at the time of the union's actions." *Id.* Because the legal and practical landscape here
18 encompasses the parties' actions during the present time in the current collective
19 bargaining negotiations, discovery concerning US Airways current condition, the events
20 that have transpired during the last five years, and efforts to obstruct and frustrate
21 USAPA's efforts to work cooperatively with West Pilots are clearly relevant. Among
22 the disputed facts are the following:
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24

25 (1) Whether USAPA's Conditions and Restrictions Proposal is "arbitrary," that is,
26 without any reasonable or rational basis; USAPA asserts the proposal is fair and
27 reasonable given the legitimate career expectations of the America West pilots and the
28 US Airways pilots and the financial and operational viability of the two operations

1 through the present. Additional discovery is necessary to rebut the West Pilot Class
2 claims regarding USAPA's proposal and US Airways' claims regarding the effect of
3 USAPA's proposal. See USAPA SOF ¶¶21-23, 38.

4 (2) Whether USAPA's proposal in fact would discriminate against former
5 America West pilots as West Pilots contend or whether the proposal and any
6 modification to the proposal that USAPA may make that differs from the Nicolau Award
7 may actually treat all pilots fairly and equitably by according each a position on the
8 merged seniority list based on his or her original date of hire, with significant protection
9 for the former America West pilots from having their normal domicile and work
10 assignments taken away by former US Airways pilots through a series of conditions and
11 restrictions. See USAPA SOF ¶38; USAPA Exs. 13-15, 25.

13 (3) Whether USAPA's proposal is "in bad faith," that is, that USAPA has some
14 sort of invidious motive or hostility for the proposal. The West Pilot Class claims that
15 the proposal is motivated by hostility against individual America West pilots. USAPA
16 asserts that there is no such motive, that the proposal is simply aimed at treating each
17 pilot fairly, respecting their legitimate pre-merger career expectations, and avoiding any
18 windfall at the expense of other pilots. See USAPA SOF ¶¶38, 46-51.

19 These disputed factual determinations are inappropriate for determination against
20 USAPA without an opportunity for discovery. Because any decision on whether USAPA
21 may in the future violate its duty of fair representation must be based on the facts and
22 circumstances existing at the time a collective bargaining agreement, including
23 ratification, is complete, in order to defend against a claim for breach of duty of fair
24 representation claim, USAPA would need to conduct discovery concerning relevant facts
25 and events occurring over the last five years since the Nicolau Award was issued and
26 since the *Addington* trial was held. In order to defend against any claim that its actions
27 today and in the future fail to comport with its duty of fair representation USAPA needs
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1 the opportunity to conduct discovery on US Airways' operational and financial matters,
2 including furloughs and recalls, aircraft population, hours of flying and the volume of
3 traditional East routes being flown by West pilots (and vice versa). For example,
4 USAPA has stated and believes that discovery will further assist in showing, among
5 other things, that over the last several years US Airways flight operations in the West
6 have been significantly reduced while flight operations in the East have remained steady,
7 undercutting one of the principal assumptions on which the Nicolau Award was based
8 and showing that continuing to promote the Nicolau Award would be unreasonable in
9 light of present day circumstances. See USAPA SOF ¶¶31, 35-36, 44, 53.

11 In addition, part of any defense USAPA would present would be based on
12 demonstrating the efforts by certain West Pilots and the "Army of Leonidas" to obstruct
13 and frustrate USAPA in its efforts to work with all members of the bargaining unit in
14 fulfillment of its role as the certified bargaining representative. If the Court determines
15 that judgment for USAPA under Count II should not be entered as a matter of law and
16 that litigation of the merits of a duty of fair representation claim can be conducted at this
17 time, USAPA would need to conduct discovery regarding communications and other
18 actions by the "Army of Leonidas" which were designed to frustrate repeated and
19 continuing attempts by USAPA to engage West Pilots in discussions and solicit input
20 from them regarding USAPA's seniority proposal. The "Army of Leonidas" is the
21 organization formed by several West Pilots, including some of the West Pilot Class
22 named representatives, to fund and control litigation including the *Addington* case and the
23 position of the West Pilots in the instant action. USAPA SOF ¶¶46-51.

25 **II. Specific Statements of Fact Cannot Be Controverted Without Discovery**

26 In addition to discovery relevant to USAPA's right to defend against any
27 allegations it has or is breaching its duty of fair representation, USAPA cannot controvert
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1 or respond adequately to certain statements of fact proffered by the Plaintiff's and West
2 Pilot Class as follows:

3 **A. Statements Regarding What Would Have Happened if the Nicolau Award**
4 **Had Been Implemented**

5 In US Airways Statement of Facts ¶ 36, US Airways asserts a conclusion
6 regarding what would have happened if the Nicolau Award had been implemented. As
7 asserted by USAPA in response to ¶ 36, there is no admissible evidence to support this
8 conclusion and the statement is argumentative and should be stricken. However, if the
9 Court determines to consider it, USAPA cannot fully respond to and oppose US Airways
10 Statement of Facts ¶ 36 without discovery, including discovery of relevant facts and
11 events occurring over the last five years since the Nicolau Award was issued and since
12 the *Addington* trial was held.

13 **B. Statements Regarding West Pilots' Alleged Threats if US Airways Accepts**
14 **USAPA's Seniority Proposal and Why US Airways Brought this Action**

15 In US Airways Statement of Facts ¶ 43, US Airways asserts what would happen if
16 US Airways "accepts USAPA's seniority demand." Without discovery, USAPA cannot
17 say whether the West Pilot Class would take the action asserted by US Airways or what
18 liability, let alone the claimed damages, could possibly ensue or whether, as USAPA has
19 asserted this action is pursued for the reasons alleged by Plaintiff or for other reasons
20 including economic advantage US Airways gains by further delay of the collective
21 bargaining process while it continues to pay industry substandard compensation.

22 Likewise, USAPA has no way of knowing and should be permitted an
23 opportunity through discovery to challenge whether this purported threat was the real
24 basis of US Airways bringing this litigation, as asserted by US Airways in US Airways
25 Statement of Facts ¶ 45 or whether it was because, as USAPA believes, the action was
26 filed to further delay negotiations and thereby to benefit US Airways economically by the
27 continued payment of substandard wages and benefits. USAPA further believes that this
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1 lawsuit is the product of collusion between Plaintiff and counsel for certain pilots and
2 The Army of Leonidas to circumvent the decision of the United States Court of Appeals
3 in *Addington*.

4 Accordingly, USAPA needs discovery of the facts and circumstances including
5 economic and other changes over the last five years, the actions taken by West Pilots to
6 thwart and frustrate USAPA's efforts to work with West Pilots, the claimed threat and
7 assertions and potential damages in a breach of duty of fair representation case and the
8 motivation of bringing this lawsuit and possible collusion in order to controvert US
9 Airways Statement of Facts ¶¶ 43 and 45.

11 **C. Statements Regarding the Pre-Merger Economic Conditions of the Airlines**

12 In the West Pilot Class's Statement of Facts ¶ 2, the West Pilot Class asserts that
13 at the time of the merger, US Airways had recently come out of bankruptcy. However, to
14 the extent that this information could be relevant, USAPA submits that America West's
15 pre-merger financial condition would be equally relevant. USAPA submits, on
16 information and belief, that at the time the merger was announced America West was
17 about to file its own petition for reorganization under the Bankruptcy Code and was able
18 to avoid that filing because of the merger. USAPA ACF ¶1; Second Mowrey Dec., at
19 ¶5. If the Court determines that West Pilot Class's Statement of Facts ¶ 2 is material,
20 USAPA should be allowed to conduct discovery on this purported fact offered by the
21 West Pilots Class.

22
23 **CONCLUSION**

24 For the foregoing reasons, USAPA respectfully requests that, to the extent the
25 Court determines not to grant USAPA's motion for summary judgment or intends to
26 consider facts asserted by US Airways about West Pilots as set forth above, a ruling on
27 Plaintiff's and West Pilot Class's motion for summary judgment be continued under Rule
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1 56(f) of the Federal Rules of Civil Procedure until USAPA has been afforded a
2 reasonable opportunity to conduct discovery.

3 Respectfully submitted this 21st day of February 2012.
4

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CERTIFICATE OF SERVICE

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I hereby certify that on February 21, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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