BRIAN O'DWYER≈
GARY SILVERMAN
CHRISTOPHER DOWNES*
VICTOR GRECO
CODY K. McCONE
GARY P. ROTHMAN*
MARIANNA O'DWYER
J. P. DELANEY
JASON S. FUIMAN≈Δ*

STEVEN ARIPOTCH
M. GLADYS T. ORANGA
ANDREW R. GRABOIS
HELEN WROBEL
JOY K. MELE
ZACHARY R. HARKIN
BRADLEY L. WALDMAN

O'DWYER & BERNSTIEN, LLP
ATTORNEYS AT LAW
PAUL O'DWYER WAY
52 DUANE STREET
NEW YORK, N.Y. 10007
(212) 571-7100
(516) 248-4224
FAX (212) 571-7124

PAUL O'DWYER (1907-1998)
OSCAR BERNSTIEN (1885-1974)
FRANK DURKAN (1930-2006)

OF COUNSEL:
THOMAS J. HUGHES, JR.
ANNE M. PAXTON
MICHAEL CARROLL
CRAIG R. NUSSBAUM **
RAÚL GARCÍA
STEVEN C. KASARDA≈

* ALSO ADMITTED IN NJ
** ALSO ADMITTED IN CT
Δ ALSO ADMITTED IN PA
≈ALSO ADMITTED IN DC

WRITER'S DIRECT DIAL

July 7, 2011

VIA ECF
Hon. Allyne R. Ross
United States District Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: USAPA v. US Airways, Inc., et al., Docket No. 11-CIV-2579 (ARR)(SMG)

Dear Judge Ross:

This firm represents plaintiff in the above-referenced action, and submits this letter pursuant to your Honor's Individual Motion Practices and in response to defendants' letter of June 27, 2011 requesting a pre-motion conference.

Defendants seek permission to move this Court for dismissal of plaintiff's complaint pursuant to the Federal Rules of Civil Procedure Rules 12(b)(1) and 12(b)(6). As discussed below, this request should be denied in that the complaint contains sufficient factual matter, "accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)). In addition and notwithstanding the sufficiency of the complaint, plaintiff intends to exercise its right to amend the complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure.

The complaint seeks declaratory and injunctive relief against defendants pursuant to, *inter alia*, the Railway Labor Act ("RLA").

Counts I and II

Plaintiff alleges in Counts I and II that defendants violated the RLA by failing to maintain the status quo during the parties' ongoing "major" dispute.

"'Major disputes' are those involving the formation of collective bargaining agreements ("CBAs") or changes in the terms of existing agreements." Air Cargo, Inc. v. Local Union 851, Int'l Brotherhood of Teamsters, 733 F.2d 241, 245 (2d Cir. 1984); see also Elgin, Joliet and Eastern Railway Co. v. Burley, 325 U.S. 711,723, 65 S.Ct. 1281, 1289-90 (1945) (collective

bargaining negotiations constitute a "major" dispute). The RLA provides for a long, drawn out process for the resolution of "major" disputes. Detroit & Toledo Shore Line R.R. v. United Transp. Union ("Shore Line"), 396 U.S. 142, 148-51, 90 S.Ct. 294, 298-99 (1969); 45 U.S.C. §§ 152 (Seventh) and (Second); 45 U.S.C. § 155 (First). While this process is being exhausted, the parties are obligated to maintain the status quo. Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n ("Conrail"), 491 U.S. at 302-303, 109 S.Ct. 2477, 2480; 45 U.S.C. § 156. Federal courts have exclusive jurisdiction to enjoin a party from making any unilateral alterations that would disturb the status quo for the duration of these procedures. Id., at 303, 109 S.Ct. 2477, 2480.

The parties have been negotiating for a single integrated collective bargaining agreement governing all US Airways pilots since 2005, and are thus engaged in a "major" dispute. As such, the parties are obligated to maintain the status quo, which includes "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or relate to that dispute." Shore Line, 396 U.S. at 152-153, 90 S.Ct. 294, 301.

The complaint alleges that the actual objective working conditions and practices required to be maintained by defendants include the use of certain expedited dispute resolution practices that have been mutually agreed upon and acquiesced to by the parties (and with ALPA, the former certified bargaining representative for the US Airways pilots). Defendants have unilaterally abandoned these practices, which, the complaint alleges, constitutes a violation of the status quo.

The complaint also alleges that defendants' unilateral abandonment of the expedited dispute resolution practices constitutes a "major" dispute because it alters the parties' express and implied agreements as to the grievance and arbitration process. See Conrail, 491 U.S. at 311, 109 S.Ct. 2477, 2485 ("collective-bargaining agreements may include implied, as well as express, terms").

Contrary to defendants' assertion, their alteration of the grievance and arbitration process is not a "minor" dispute requiring interpretation of the CBAs. Plaintiff does not allege that defendants are not complying with specific provisions of the CBAs. To the contrary, plaintiff alleges that defendants' abandonment of the expedited dispute processes so alters the process as to abrogate those provisions (in circumvention of the RLA's collective bargaining process), and is thus a "major" dispute. See Int'l Longshoremen's Ass'n, Local 158 v. Toledo Lakefront Dock Co., 1977 WL 1809 (S.D. OH, Dec. 16, 1977) (employer's unilateral refusal to enforce the collective bargaining agreement's grievance and arbitration procedures constituted an abrogation of said procedures and was a major dispute.). The complaint's mere simple reference to the CBAs does not transform the parties' dispute into a "minor" one. See Carmona v. Southwest Airlines Co., 536 F.3d 344, 349 (5th Cir. 2008).

Counts III and IV

Plaintiff alleges in Counts III and IV violations of the duty imposed by Section 152 (First) of the RLA to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . arising out of the application" of an existing collective bargaining agreement. 45 U.S.C. § 152 (First). Count III alleges that defendants are violating Section 152 (First) by failing to bargain in good faith over a single integrated collective bargaining agreement. Count IV alleges defendants are violating Section 152 (First) by failing to "exert every reasonable effort . . . to settle all disputes" arising out of the collective bargaining agreements. The duties imposed by Section 152 (First) are legal obligations enforceable by the courts. Chicago & North Western Ry. Co. v. United Transp. Union, 402 U.S. 570, 577, 91 S.Ct. 1731, 1735 (1971).

Plaintiff has alleged sufficient facts to support its claims in Counts III and IV that defendants have violated their duty to bargain in good faith as required under Section 152 (First) of the RLA. As to Count III, plaintiff alleges facts which reasonably support the inference of defendants' "desire or intent not to enter into an agreement at all." American Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 169 F.Supp. 777, 794 (S.D.N.Y. 1958); see also Chicago & North Western Ry. Co. v. United Transp. Union, 402 U.S. 570, 578, 91 S.Ct. 1731, 1736 (1971) ("'The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with 'a desire not to reach an agreement'" (internal citations omitted)); Ass'n of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc., 976 F.2d 541 (9th Cir. 1992) (affirming the district court's finding, based on the cumulative evidence, that the airline breached its duty of good faith bargaining under 45 U.S.C. § 152 First); Railway Labor Executives' Ass'n v. Boston and Maine Corp., 664 F.Supp. 605, 615 (D.Me. 1987) ("[B]ad faith must usually be inferred from circumstantial evidence" (internal citations omitted)).

Plaintiff has similarly alleged facts sufficient to state a claim in Count IV that defendants' unilateral alteration of the grievance and arbitration process also violates Section 152 (First). The complaint alleges sufficient facts to show that defendants' unilateral and unjustified abandonment of long established expedited dispute resolution practices evidences bad faith of the defendants in violation of the RLA. See American Airlines v. Air Line Pilots Ass'n, Int'l, 169 F.Supp at 798 (in denying motion to dismiss, finding that "the complaint in my view, poses the question of whether there was good faith compliance on the part of the Union").

Respectfully yours,

O'DWYER & BERNSTIEN, LLP

/s/ Gary Silverman

GARY SILVERMAN (GS9287)