UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

US AIRLINE PILOTS ASSOCIATION *Plaintiff/Counter-Defendant*, v. US AIRWAYS, INC., AMERICAN AIRLINES, INC. and THE ALLIED PILOTS ASSOCIATION *Defendants/Counter-Plaintiffs.*	)	Case No. 14-CIV-00328 (BAH)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT
MOTION FOR A PROTECTIVE ORDER TO STAY ALL DISCOVERY

Plaintiff US Airline Pilots Association ("USAPA") opposes defendants' motion to stay all discovery pending resolution of their non-dispositive motions to compel arbitration and, should those motions be resolved in defendants' favor, to stay all discovery until an arbitration is concluded. (Doc. 32) Their motions to compel arbitration are non-dispositive because defendants concede that this Court, and not an arbitrator, must resolve the claims and counterclaims of the parties arising under the McCaskill-Bond Amendment, 49 U.S.C. § 42112, Note 117 ("McCaskill-Bond"). (Carriers' Mot. To Compel Arbitration, Doc. 30, at 7; APA Mot. To Compel Arbitration, Doc. 31, at 19; Company Counterclaims I and II, Doc. 13, at 40-45; APA Counterclaims I, II and III, Doc. 12, at 34-42). And it is likewise undisputed that the Company defendants' "bad faith" bargaining counterclaim against USAPA arising under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First (Doc. 13, at 45-46), is a civil action arising under federal law within this Court's

jurisdiction and thus also subject to the federal rules of civil procedure. *Chicago & N.W. Ry. v. UTU*, 402 U.S. 570 (1971); Fed. R. Civ. P. 1.

Like their motions to compel arbitration, grounded in the false premise that the parties' statutory McCaskill-Bond claims and counterclaims involve a contract interpretation dispute, their motion for a protective order to stay all discovery is predicated on the immaterial assertion that an arbitrator, and not this Court, has exclusive authority to determine the availability of discovery concerning the non-existent contract interpretation dispute invented by defendants. There is no contract dispute. Plaintiff does not contend that the parties' failure to agree upon a seniority integration protocol agreement renders the MOU paragraph 10 provisions providing for a three-member arbitration board and the timing of a seniority integration arbitration hearing null and void "as a contractual matter." Rather, plaintiff contends the unambiguous MOU provisions are insufficient to qualify the MOU as a valid agreement that makes *Allegheny-Mohawk* Section 13(a) inapplicable to the parties' pilot seniority list integration dispute, and thus the MOU's failure to comply with McCaskill-Bond renders the paragraph 10 provisions "null and void." An arbitrator's opinion on these statutory issues of contract validity "as a contractual matter" is simply immaterial to the plaintiff's McCaskill-Bond claim and defendants' McCaskill-Bond counterclaims in this action. An arbitrator cannot render an opinion on the issue of whether the MOU complies with McCaskill-Bond. Even in actions under the Railway Labor Act, when a contract validity issue arises, the Act does not "provid[e] for arbitration where the board of adjustment could only render something in the nature of an advisory opinion that might assist a court in deciding an issue of legality confided to it." *Seaboard World Airlines, Inc. v. Transport Workers Union, 425 F.2d 1086, 1090 (2d Cir. 1970)*; *Airline Pilots Assoc. v. UAL Corporation,* 874 F.2d 439, 444-45 (7th Cir. 1989).

The cases cited by defendants to avoid the requirements of the Federal Rules of Civil Procedure are inapposite. *Pacific Fruit Exp. v. Union Pacific R.R.*, 826 F.2d 920, 923 (9th Cir. 1987), did not involve a motion to stay discovery in litigation concerning claims of statutory rights or contract validity, but an attempt by a union to obtain a court order directing a carrier to produce information during the parties' bargaining over layoffs. ("Pacific Fruit's interpretation of Section 2 First would place the courts at the heart of the bargaining process whenever either side in a railway labor dispute sought information about the other."). *Air Line Pilots Ass'n v. Trans World Airlines, Inc.*, 729 F. Supp. 888, 890 (D.D.C. 1989), also did not involve discovery in litigation concerning statutory claims or a contract's validity, but the union's effort to force disclosure of information after the arbitrator hearing a grievance refused to order its disclosure. ("The arbitrator, after examining the disputed document in camera and receiving TWA's pledge that it would not rely on the policy to justify its disciplinary action, declined to order TWA to disclose it."). This case, in contrast, exclusively involves federal statutory claims within this Court's jurisdiction to which the Federal Rules of Civil Procedure apply. The scope of discovery applicable to these claims is governed by Fed. R. Civ. P. 26(b) as determined by this Court, not by an arbitrator.

Defendants further argue that proceeding now with discovery would "waste…resources" because "the parties cannot know what disputed factual and legal issues, if any, will remain before the Court until the motions to compel arbitration are decided and, if those motions are granted, until the outcome of the arbitration is known." Def. Jt. Mot., Doc. 32 at 3. On this point, defendants' motion nowhere explains how an arbitrator's decision on their asserted contract interpretation dispute may clarify or limit the statutory issues this Court must decide. USAPA certainly knows,

and the defendants should know, what the disputed factual and legal issues are in this lawsuit. As in all civil actions, the issues are framed by the pleadings.

The issues raised in plaintiff's complaint and in defendants' first two counterclaims that this Court must decide is not the meaning of paragraph 10 of the MOU, but rather its validity under the McCaskill-Bond Amendment, 49 U.S.C. § 42112, Note 117 ("McCaskill-Bond"), as either an agreement that provides "for the protections afforded by sections 3 and 13 of the *Allegheny-Mohawk* provisions," i*d*., at Note 117(a)(2), or an agreement that specifies an "alternative method for dispute settlement" within the meaning of *Allegheny-Mohawk* Section 13(b), thereby making *Allegheny-Mohawk* Section 13(a) inapplicable to the parties' seniority integration dispute. Defendant APA's claim in Count III of its counterclaim alleges that "[p]ursuant to McCaskill-Bond, Sections 3 and 13 of the *Allegheny-Mohawk* LPPs, and the January 10, 2014 Order in the Arizona Lawsuit, if and when the NMB decertifies USAPA as the collective bargaining representative for US Airways pilots, USAPA will not be entitled to party status in the seniority integration arbitration." Doc. 12, at 41, ¶ 107. The defendant Carriers' claim in Count III of their counterclaim alleges that USAPA has bargained over a seniority integration protocol agreement and filed this lawsuit in "bad faith" in violation of its duty under Section 2, First, of the RLA, 45 U.S.C. § 152, First, to "exert every reasonable effort to make and maintain agreements." Doc. 13, at 46, ¶ 69.

There is also the disputed arbitrability issue raised by defendants' motions to compel arbitration. Although USAPA has argued that MOU paragraph 10(e) unambiguously establishes that the parties agreed not to arbitrate the pilots' McCaskill-Bond rights,[1] if it does not, there are

[1] MOU Paragraph 10(e) states: "The obligations contained in this Paragraph shall be specifically enforceable on an expedited basis before a System Board of Adjustment in accordance with

disputed facts concerning the arbitrability issue evidenced by the conflicting declarations filed by the parties and the nearly 50 exhibits filed by defendants in connection with those motions. There is no dispute among the parties that the arbitrability issue is exclusively for the Court to resolve, not an arbitrator. Defendants cite to *PCH Mutual Ins. Co. v. Casualty & Surety, Inc.,* 569 F. Supp. 2d 67, 77-78 (D.D.C. 2008) (Doc. 32, at 5), a case arising under the Federal Arbitration Act, 9 U.S.C. 1, *et. seq.*, which stayed discovery related to the merits of that lawsuit pending a resolution of the threshold arbitrability issue. But defendants fail to mention that the district court in *PCH Mutual Ins. Co.* did not stay discovery related to the arbitrability issue, ordering: "[t]he parties may, however, conduct discovery related to the issue of arbitrability, if such discovery is appropriate in proceeding to a trial of the issue." *Id.,* at 78.

A decision to stay discovery is, of course, within the court's discretion. But that discretion should be exercised from the beginning premise that, "[a]s a general matter, discovery under the Federal Rules of Civil Procedure should be freely permitted." *Edmond v. United States Postal Serv. Gen. Counsel*, 292 U.S. App. D.C. 240, 949 F.2d 415, 426 (D.C. Cir. 1991); *see also Weil v. Markowitz*, 264 U.S. App. D.C. 381, 829 F.2d 166, 174 n. 17 (D.C. Cir 1987) ("A total stay of civil discovery pending the outcome of related criminal matters is an extraordinary remedy appropriate for extraordinary circumstances."). And it is equally true that it is defendants' burden to establish justification for a stay of discovery. *US v. Honeywell International, Inc.*, 2013 U.S. Dist. LEXIS 172571, *6 (D.D.C. Dec. 9, 2013) (“[T]he proponent of a stay bears the burden of establishing its need.”) (quoting *Clinton v. Jones*, 520 U.S. 681, 708, 117 S.Ct. 1636, 1651 (1997)). "[M]ere allegations that resources will be conserved by granting the stay" are insufficient to meet this burden. *People With Aids Health Group v.*

Paragraph 20, provided that the obligations imposed by McCaskill-Bond may be enforced in a court of competent jurisdiction.” Pl. 7(h), Doc. 28-1, ¶ 2.

Burroughs Wellcome Co., 1991 U.S. Dist. LEXIS 14389 at * 2 (D.D.C 1991). Defendants' motion to stay discovery only offers "mere allegations." Defendants' motion doesn't even bother to explain what discovery might be unnecessary if an arbitrator resolves the "contract interpretation dispute" defendants claim to be at issue. Moreover, defendants have already submitted numerous documents in support of their motions to compel – documents which are responsive to USAPA's document demand, thus discrediting their claim that proceeding with discovery at this time is premature and would be an unnecessary waste of their resources. *See* Docs. 26-3 to 26-22, 30-2 to 30-29.

Even if defendants' motions to compel arbitration were potentially dispositive of claims in this case, which they are not, the decision to stay discovery should be based on the facts and practical circumstances presented by the litigation. *Hachette Distribution, Inc. v. Hudson County News Company, Inc.*, 136 F.R.D. 356, 358 (S.D.N.Y. 1991). It can be said with certainty in this case that an arbitration, if compelled, will not dispose of a single claim. A stay of discovery is rarely appropriate when a pending motion to dismiss will not dispose of the entire case. *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988). And discovery concerning the arbitrability issue itself may also be needed. As such, a stay of discovery is not warranted, and will simply delay resolution of the parties' claims. This is especially the case given that defendants have represented that they reserve the ability to raise objections to USAPA's document requests after a stay of discovery is lifted. Under the circumstances of this case, discovery will inevitably go forward; the only question is when. Not doing discovery now will simply prolong this litigation. *Simpson,* 121 F.R.D. at 263 ("motions [to stay discovery] are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems.")

CONCLUSION

For the foregoing reasons, the defendants' joint motion for a protective order to stay all discovery should be denied.

Dated: June 26, 2014.

Respectfully submitted,

/s/ William R. Wilder
William R. Wilder
BAPTISTE & WILDER, P.C.
1150 Connecticut Avenue, N.W., Suite 315
Washington, D.C. 20036
Telephone: (202) 223-0723
Facsimile: (202) 223-9677
wwilder@bapwild.com

Gary Silverman (*pro hac vice*)
Joy K. Mele (*pro hac vice*)
O'DWYER & BERNSTIEN, LLP
52 Duane Street, 5th Floor
Paul O'Dwyer Way
New York, New York 10007
Telephone: (212) 571-7100
Facsimile: (212) 571-7124
gsilverman@odblaw.com
jmele@odblaw.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on counsel for the Defendants via the Court's Electronic Case Filing System on June 26, 2014.

/s/William R. Wilder
William R. Wilder