UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:11-CV-00371-RJC-DCK

US AIRWAYS, INC.,

Plaintiff,

v.

US AIRLINE PILOTS ASSOCIATION and MICHAEL J. CLEARY,

Defendants.

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

PRELIMINARY STATEMENT

US Airways, Inc. ("US Airways") seeks a Temporary Restraining Order ("TRO") under the Railway Labor Act, 45 U.S.C. § 151 *et seq*. (the "RLA") against the US Airline Pilots Association ("USAPA") and Michael J. Cleary (collectively, "Defendants"), to prohibit them from engaging in an unlawful slowdown significantly disrupting US Airways' operations — and causing irreparable harm to the traveling public and US Airways each day it continues.

On July 29, 2011, US Airways filed a Complaint and a Motion for Preliminary Injunction ("Motion") against Defendants as a result of the substantial harm that Defendants are causing by their slowdown campaign. An immediate TRO was not sought at that time, even though US Airways was, and with each passing day still is, suffering significant irreparable injury to its operations and its reputation; rather, the Motion sought preliminary injunctive relief on an expedited basis in order to afford Defendants an opportunity to review and respond. But instead of cooperating in arranging for a prompt resolution of the Motion, Defendants have sought to delay any hearing concerning this matter, while at the same time repeating and reinforcing the unlawful behavior that forced US Airways to initiate this action.

The Motion demonstrated concerted, illegal action by USAPA to interfere with and slow down US Airways' operations — a breach of the requirement to maintain the status quo under Section 2, First, of the RLA. Since US Airways filed its Motion, USAPA's illegal slowdown has continued, with East pilots causing nine to ten flight cancellations a day (just as had been occurring prior to the filing of the Motion), which means that approximately 11,750 members of the traveling public have had their flights cancelled during the last ten days. And this does not include the tens of thousands of passengers whose travel plans are being disrupted each day by late arriving flights and subsequent missed connections and whose baggage has not arrived as scheduled. During this same time, however, all operational metrics for West pilots remain normal. Thus, USAPA's continuing claim that its campaign is about legitimate "safety" concerns is not credible.

Further, since July 29, USAPA and Defendant Cleary have not only failed to take all reasonable steps to stop the slowdown as required by the RLA, they have actually continued to issue communications encouraging the slowdown. On August 3, 2011, USAPA issued a "Legal Update" to all pilots asserting that US Airways did not file the lawsuit "because of any actions of its pilots" but "to muzzle" USAPA's safety concerns — signaling to USAPA's members that they should continue engaging in the same delay tactics. Then, on August 6, 2011, USAPA's President, Defendant Cleary, in response to a Company policy that prohibits pilots from wearing the "Safety First, I'm on Board" lanyards, issued a message to all pilots, stating: "You may absolutely be assured that very soon you will be provided numerous alternative methods of showing support for your union. Thank you for your strong conviction and for staying engaged." These messages demonstrate that USAPA's instigation and encouragement of the slowdown campaign is continuing unabated.

The stickers and e-mails from individual pilots encouraging the slowdown are also continuing unabated, as is the harassment and intimidation of pilots who refuse to participate in the slowdown. In one particularly offensive e-mail (dated August 4, 2011), pilots not participating in the slowdown are identified by name, position, and aircraft, with one pilot referred to as a "whore" and another as a "back stabbing piece of monkey shit." The e-mail also threatens pilots who forward e-mails encouraging the slowdown to US Airways' management, stating: "You better hope we never find out who YOU are."

When US Airways filed this action on July 29, it did not seek an immediate TRO, but sought an expedited schedule on its Motion (with Defendants' opposition brief to be filed by August 15) and a hearing as soon as possible upon completion of the briefing. US Airways did this in order to provide Defendants with a reasonable period to analyze the data and other evidence submitted in support of its Motion and prepare an opposition. But now ten days later, and despite US Airways' multiple attempts to reach agreement with Defendants on an expedited schedule, no agreement has been reached. Defendants have failed to offer any definitive schedule for completion of their briefing and scheduling of an expedited hearing on the Motion. Instead, in discussions with US Airways' counsel, the most Defendants have done is offer to file an opposing brief a *full five weeks* after service (on September 2), while specifically indicating that preparation of their expert report could delay briefing beyond September 2. In the meantime, the illegal slowdown continues unabated, and the irreparable harm continues to grow.

Defendants' efforts through their lawyers to avoid an expedited hearing while they continue their illegal campaign to pressure US Airways in contract negotiations leaves US Airways with no choice but to seek a TRO. The current situation is untenable for US Airways, the traveling public, and the pilots who refuse to accede to the threats and intimidation. And

there can be no claim of harm to USAPA or its members in issuing a TRO because it would simply prohibit them from engaging in illegal activity. For the reasons set forth below, US Airways is entitled to a TRO until an expedited hearing can be held on its Motion for Preliminary Injunction.[1]

STATEMENT OF FACTS AND ARGUMENT

US Airways incorporates by reference its Complaint, Brief in Support of Plaintiff's Motion for Preliminary Injunction, the supporting Declarations of Sloane Giddon, E. Allen Hemenway, Kerry F. Hester, Lyle Hogg, and Paul Morell, and the Expert Report of Dr. Darin N. Lee (Docket Nos. 1, 11-13, 14-16, and 19 (collectively, the "Opening Papers")).

I. US Airways Has Made Repeated Attempts to Reach Agreement with Defendants Regarding an Expedited Schedule to No Avail, While the Slowdown Continues

In an attempt to balance US Airways and the traveling public's need for prompt action from this Court with Defendants' right to prepare their case, US Airways did not initially seek a TRO, but sought a preliminary injunction under an expedited hearing schedule. Specifically, US Airways proposed that, consistent with the timing requirements in Local Rule 7.1(E), Defendants respond to its Motion within 14 days of service (August 15), that US Airways then file its reply within five days (August 20), and a hearing be held as soon thereafter as possible. Defendants have balked at that proposed schedule and seek to delay their opposition brief until September (and perhaps longer for an expert report), while continuing to encourage the slowdown.

A. US Airways' Principal Counsel's Attempts to Reach Agreement on an Expedited Schedule

Concurrently with filing its Motion on July 29, 2011, Robert Siegel of O'Melveny & Myers LLP, principal counsel for US Airways, e-mailed courtesy copies of all papers filed that

[1] Although the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* ("NLGA"), limits TROs in labor actions to five days, unions may stipulate to an extension of that period when they want a longer period of time to prepare for a preliminary injunction hearing.

day to USAPA's General Counsel whose firm regularly represents Defendants in other matters. In response, Mr. Siegel was informed that Gary Silverman of O'Dwyer & Bernstien, LLP in New York, New York would be representing Defendants. Accordingly, also on July 29, Mr. Siegel e-mailed courtesy copies of all papers to Mr. Silverman and asked to consult with Mr. Silverman regarding US Airways' motion for an expedited schedule over the weekend or on Monday.

On that Monday (August 1, 2011), Mr. Silverman contacted Mr. Siegel and stated that he would need another day to consider US Airways' motion for an expedited schedule and would call the next morning. On Tuesday morning August 2, Mr. Silverman and Mr. Siegel spoke, but Mr. Silverman did not make a proposal on an expedited briefing schedule, stating that he would call back later that day to finish the discussion. Mr. Silverman did not call back that day. Accordingly, Mr. Siegel called him and left a voicemail reiterating that US Airways needed to speak about its request for expedited scheduling. The next day, August 3, Mr. Silverman called and stated that Defendants could file an opposition brief by September 2, 2011 — a *full five weeks* after service of the Motion — though preparation of Defendants' expert report could delay briefing beyond that date. By failing to commit to a date for submission of an expert report, even the September 2 date is not a concrete proposal for a briefing schedule.

Mr. Siegel advised Mr. Silverman that, given the substantial impact to US Airways' operations and resulting harm to the public during this peak summer travel season, Defendants' proposal was not a viable option. US Airways, however, did offer an extension of four days, up to and including August 19, 2011, for Defendants to file their opposition and any supporting reports/declarations. Mr. Silverman rejected this offer. Subsequently, Mr. Siegel offered to allow Defendants until September 2, 2011 to respond if Defendants would agree to a consent

injunction requiring Defendants to make all reasonable efforts to stop the slowdown until a decision on US Airways' Motion for Preliminary Injunction. But Mr. Silverman did not accept that proposal.[2]

B. US Airways' Local Counsel's Attempts to Reach Agreement on an Expedited Schedule

Local counsel for US Airways, Jonathan Heyl of Smith Moore Leatherwood LLP, also had multiple communications regarding US Airways' motion for expedited scheduling with local counsel for Defendants, John Gresham of Tin Fulton Walker & Owen. On the afternoon of August 4, 2011 (following calls earlier that day), Mr. Heyl called Mr. Gresham and asked if Mr. Gresham would participate in a joint call to the Court Clerk at that time to inquire about setting a status conference to resolve the scheduling issues. In that call, Mr. Gresham agreed to participate in a joint call to the Court Clerk to try to schedule a status conference and set briefing deadlines, but stated that he wanted to first file his notice of appearance. Mr. Gresham stated that he had to attend to other matters that afternoon, but he would file his notice of appearance the next morning and call Mr. Heyl so they could jointly contact the Court.

Mr. Heyl did not receive a call from Mr. Gresham on the morning of August 5 nor did Mr. Gresham file his notice of appearance. Accordingly, Mr. Heyl called Mr. Gresham. In that call, Mr. Gresham proposed that they jointly call the Court Clerk and suggest that an initial status conference be scheduled sometime during the week of August 15 — a date far too late to address

[2] In conjunction with these calls, Mr. Silverman stated that USAPA needed access to the data relied on by US Airways' expert (Dr. Lee) and that USAPA would submit document requests to that effect by Friday, August 5. Mr. Siegel responded that document requests were not necessary, and that US Airways would immediately make such data available so long as USAPA agreed to treat certain proprietary data confidentially. After that conversation, on August 3, 2011, US Airways sent an e-mail asking Mr. Silverman to confirm that US Airways' proprietary information relied upon by Dr. Lee would not be disclosed to the public. Mr. Silverman did not respond to the e-mail until the afternoon of August 5 (and only after further prompting by counsel for US Airways). Immediately upon his agreement to treat the data confidentially, US Airways provided access to all information and data sources relied upon by Dr. Lee.

the briefing schedule given US Airways' urgent need for relief. Because no agreement on a date for a proposed initial status conference could be reached, no call to the Court was made.[3]

II. The Unlawful Slowdown Campaign Has Continued Unabated, Encouraged by Individual Pilots and USAPA

As established in US Airways' Opening Papers, Defendants are engaged in an unlawful slowdown campaign in direct violation of the RLA. Unfortunately for US Airways and the traveling public, Defendants' unlawful behavior has continued unabated since US Airways filed its Opening Papers on July 29, 2011, and communications from USAPA and individuals pilots encouraging the slowdown have continued, if not intensified.

By way of example, on August 4, 2011, a placard encouraging pilots to continue to increase their maintenance write-ups in support of the slowdown campaign was found on the Flight Deck Maintenance Log of an aircraft. The placard states: "ZERO TOLERANCE ENTER ALL DISCREPENCIES (*SIC*) IN THE LOG, WHEN AND WHERE THEY ARE FOUND NO EXCEPTIONS!!! THERE IS NO SUCH THING AS A MINOR DISCREPANCY." (*See* Declaration of Lyle Hogg in Support of Plaintiff's Motion for Temporary Restraining Order ("Hogg TRO Decl."), ¶ 3, Ex. 1.) As noted in US Airways' Opening Papers, maintenance write-ups by East pilots are at an all-time high (particularly at airports where US Airways does not have its own maintenance personnel), while maintenance write-ups by West pilots remain at normal levels. (*See* Brief at 36-37.)

Further, on August 5, 2011, a placard was found on the Flight Deck Maintenance Log of an aircraft linking the slowdown to obtaining leverage in contract negotiations: "ARE

[3] Mr. Gresham also stated that Defendants intended to file "some motions." During Mr. Silverman's prior conversations with Mr. Siegel regarding arranging a schedule for resolution of US Airways' Motion, however, Mr. Silverman never mentioned that motions might be interposed by Defendants. Of course, the issuance of a TRO will not preclude the filing of Defendants' possible motions.

YOU 'ON BOARD'[?] YOU ARE EITHER PART OF THE SOLUTION OR YOU ARE PART OF THE PROBLEM[.] THERE IS NO MIDDLE GROUND[.] IF YOU WANT A NEW CONTRACT … EARN IT!!" (Hogg TRO Decl. ¶ 4, Ex. 2.) As detailed in US Airways' Opening Papers, "on board" is the official slogan disseminated by USAPA in promoting its campaign, including on USAPA-issued lanyards.

The harassment and intimidation of pilots who refuse to participate in the slowdown also has continued. On August 4, 2011, a truly offensive and blatantly illegal e-mail was sent to US Airways' pilots from the e-mail address "b767pilotdriver@gmail.com" announcing the "Pink Panties Winners," which vilified and named dozens of pilots who are not participating in the slowdown. (*See id.* ¶ 5, Ex. 3.)

The e-mail first addressed the fact that US Airways' management has obtained copies of e-mails sent to pilots encouraging the slowdown and submitted those e-mails to this Court in support of its motion for an injunction: "First of all I would like to say we have a snitch among us. Lower than life. Someone who would turn in or forward an email to management. You are the biggest looser (*sic*)." (*Id.*) This portion of the e-mail then closed with an ominous threat: "You better hope we never find out who YOU are." (*Id.*)

The e-mail then thanked those pilots participating in the slowdown, using the "on board" slogan: "Thanks for everyone who is 'ON BOARD' and not just wearing the lanyard. It is OUR airline and we want it BACK." (*Id.*) The e-mail then identified, by name, position, and aircraft, those US Airways pilots who had engaged in voluntary flying or not otherwise "dropped" trips in order to cause flight cancellations — calling one pilot a "whore" and another a "back stabbing piece of monkey shit." (*Id.*) The e-mail closed by suggesting the pilots call out fatigued and making clear that pilots who did not participate in

the slowdown would continue to be identified in the future, stating: "That is all until August Pink Panties Awards." (*Id.*)

Further, despite the overwhelming statistical evidence submitted by US Airways that a slowdown is occurring among East pilots, as well as the overwhelming evidence of communications encouraging the slowdown, USAPA has not only refused to take any efforts to stop the slowdown, but has continued to encourage the slowdown campaign under the guise of safety. For example, in a USAPA publication entitled "The Iron Compass" issued to all pilots on August 3, 2011, under the heading "Legal Update," USAPA asserted that US Airways did not file the lawsuit "because of any actions of its pilots, but in a blatant attempt to muzzle your union from bringing its legitimate concerns regarding the safe operation of US Airways airplanes to the attention of the passenger public." (*Id.* ¶ 6, Ex. 4.) Given that the parties have been in protracted contract negotiations and viewed in context with all of the other communications that have been issued (as detailed in US Airways' Opening Papers), this is a clear signal to USAPA's members that they should continue engaging in the same unlawful delay tactics. *See, e.g., United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers*, 243 F.3d 349, 355-57 (7th Cir. 2001).

Then, on August 6, 2011, USAPA's President, Defendant Michael Cleary, issued a message entitled "The Spent Cartridges of the Battlefield." (*Id.* ¶ 7, Ex. 5.) In response to a Company policy allowing employees to wear only Company-issued lanyards, the message stated that pilots should put their yellow USAPA-issued "Safety First, I'm On Board" lanyards in their "trophy case" because the "lanyards are the spent cartridges along the battle field." (*Id.*) The message stated that the Company's policy was "an attempt to punish [pilots] for daring to challenge their flawed safety culture." The message then stated that: "You may

absolutely be assured that very soon you will be provided numerous alternative methods of showing support for your union. Thank you for your strong conviction and for staying engaged." (*Id.*)

USAPA's ongoing denial of the slowdown campaign, while signaling to pilots to continue engaging in delay tactics under the guise of safety — despite the overwhelming evidence submitted in support of US Airways' Opening Papers — makes clear that USAPA will not only take no action to stop this slowdown, but will continue to encourage it, absent court-ordered injunctive relief.

III. The Resulting Irreparable and Financial Harm Has Continued Unabated

As set forth in its Opening Papers, East pilots began to disrupt US Airways' operations on May 1 by delaying departures, engaging in slow taxi, increasing the frequency of their maintenance write-ups, and calling in fatigued. (*See* Brief at 34-40.) All of these changes are occurring only as to flights operated by East pilots, and all of these changes are statistically significant. (*See id.* at 37.) For example, the odds that the increase in maintenance write-ups by East pilots is random (as opposed to concerted activity) is approximately one in 800,000. (*See id.* at 36.) And all of these changes have continued at the same statistically significant rate since US Airways filed this action on July 29, 2011. (*See* Declaration of Darin Lee In Support of Plaintiff's Motion for Temporary Restraining Order ("Lee Decl."), ¶¶ 2-4.)

As also explained in US Airways' Opening Papers, these changes in pilot behavior have resulted in a dramatic increase in the number of flight delays and cancellations for flights flown by East pilots. The increase in the rate of East pilot delays relative to the historical average has resulted in more than 1,100 additional East flight delays since May 1. (*See* Expert Report of Darin N. Lee, Ph.D. ("Lee Report"), ¶ 6.) The illegal slowdown also continues to cause, on

average, nine to ten flight cancellations a day, impacting 1,173 passengers a day. (*See id.*; Lee Decl. ¶ 3.) This means that, since US Airways filed its Motion ten days ago, 11,730 members of the traveling public have had their travel plans and daily lives disrupted (which for many of these passengers undoubtedly means missing an important family event or business meeting). And this does not include the thousands of passenger whose travel planes are being disrupted every day by late arriving flights and subsequent missed connections. (*See* Brief at 38-39.)

Further, Dr. Lee estimates that, should the current level of pilot job action persist, US Airways' damages from the illegal slowdown would be approximately $377,000 per day (which equates to almost $4 million in the ten days that have passed while US Airways has attempted to reach agreement on an expedited schedule with Defendants). (*See* Lee Report ¶ 54, Lee Decl. ¶ 3.)

IV. This Court Should Issue a TRO Pending a Hearing on US Airways' Motion for Preliminary Injunction

Just as with a preliminary injunction, a plaintiff seeking a TRO must make the following showing: (1) it is "likely to succeed on the merits," (2) it is "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*,

555 U.S. 7 (2008)).[4] For the reasons set forth in US Airways' Opening Papers, as well as this brief and supporting documents, US Airways more than satisfies the standard for a TRO, and a hearing should be held as soon as feasible. Unlike typical TRO situations where the defendant has little or no notice, Defendants have had the Opening Papers relied on in support of this motion for ten days — and thus have no basis to claim that a hearing on the TRO should be delayed. Further, Defendants cannot claim that issuance of a TRO will cause them any harm, as it would simply prohibit them from engaging in activity that is prohibited by law, and would only be in effect pending a hearing on US Airways' Motion for Preliminary Injunction.

CONCLUSION

Under these facts, US Airways' only option to stop the disruptions to its operations and resulting irreparable harm to the Company and the traveling public is the issuance of a TRO against Defendants. Thus, US Airways respectfully requests that this Court schedule a TRO hearing as soon as feasible and issue a TRO barring Defendants from engaging in an illegal slowdown pending a hearing on its Motion for Preliminary Injunction.

[4] Unions frequently argue that Section 7 of the NLGA requires an evidentiary hearing before a court can issue an injunction. But Section 7 of the NLGA specifically provides that a "temporary restraining order" may issue without so much as notice or a hearing where — as here — the complainant alleges that substantial and irreparable injury will result should the TRO not be issued. *See* 29 U.S.C. § 107; *see also Delta Air Lines v. Air Line Pilots Ass'n, Int'l,* 238 F.3d 1300, 1305-06 (11th Cir. 2001) ("For an injunction, live testimony with opportunity for cross-examination is normally required after proper notice; for a TRO, though, sworn affidavits may suffice if the complainant would suffer 'substantial and irreparable injury' without the TRO."); *Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp.*, 668 F.2d 276, 291 n.17 (7th Cir. 1981) ("Since § 7 expressly authorizes the issuance of temporary restraining orders ex parte and without notice, it is wrong to suggest that the statute requires the court to afford the defendant an opportunity to present live testimony."); *Celotex Corp. v. Oil, Chem. & Atomic Workers Int'l Union*, 516 F.2d 242, 247 (3d Cir. 1975) (noting that Section 7 provides for issuance of temporary restraining orders without full hearings).

This the 8th of August, 2011.

/s/ Robert R. Marcus
Robert R. Marcus
N.C. State Bar No. 20041
Jonathan P. Heyl
N.C. State Bar No. 25559
C. Bailey King, Jr.
N.C. State Bar No. 34043
SMITH MOORE LEATHERWOOD LLP
525 N. Tryon Street, Suite 1400
Charlotte, North Carolina 28202
Telephone: (704) 384-2630
Facsimile: (704) 384-2800
E-mail: rob.marcus@smithmoorelaw.com
jon.heyl@smithmoorelaw.com
bailey.king@smithmoorelaw.com

O'MELVENY & MYERS LLP:

Robert A. Siegel
Michael G. McGuinness
400 South Hope Street
Los Angeles, California 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
E-mail: rsiegel@omm.com
mmcguinness@omm.com

Mark W. Robertson
Times Square Tower
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
E-mail: mrobertson@omm.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been duly served on Defendants US Airlines Pilots Association and Michael J. Cleary electronically (via facsimile and e-mail), by depositing a copy in the United States Mail, first class, postage prepaid, addressed to the following counsel of record, and by utilizing the Case Management/Electronic Case Filing System, which will send notice electronically to the following counsel of record:

John W. Gresham
Tin Fulton Walker & Owen, PLLC
301 East Park Avenue
Charlotte, NC 28203

Patrick J. Szymanski
Patrick J. Syzmanski, PLLC
1900 L Street, NW, Suite 900
Washington, D.C. 20036

In addition, a courtesy copy of the foregoing document has been served on Defendants electronically (via facsimile and e-mail) and by depositing a copy in the United States Mail to the following counsel for Defendants:

Gary Silverman
O'Dwyer & Bernstein, LLP
Paul O'Dwyer Way
52 Duane Street
New York, NY 10007

This the 8th day of August, 2011.

/s/ C. Bailey King, Jr.
C. Bailey King, Jr.
Attorney for Plaintiff