UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 11-CV-371 (RJC)(DCK)

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US AIRWAYS, INC.

Plaintiff,

v.

US AIRLINE PILOTS ASSOCIATION
and MICHAEL J. CLEARY,

Defendants.

--X

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR <u>TEMPORARY RESTRAINING ORDER</u>

Pursuant to Local Rule 7.1 (C), defendants US Airline Pilots Association ("USAPA") and Michael J. Cleary ("Cleary") (collectively, the "defendants") hereby submit this Brief in Opposition to Plaintiff's Motion for Temporary Restraining Order.

1. <u>Defendants attempted to accommodate demands for an expedited hearing on Plaintiff's original Motion for Preliminary Injunction</u>. Plaintiff's Brief in Support of the TRO motion describes the discussions between counsel that occurred between the filing of the Complaint and Motion for a Preliminary Injunction on July 29, 2011, and the filing of the Motion for Temporary Restraining Order on August 8, 2011, in an attempt to suggest that counsel for Defendants were dragging their feet. To the contrary, counsel reasonably attempted to accommodate Plaintiff's demands consistent with their obligations to defend this case. Counsel for the defendants not only proceeded expeditiously but also have communicated frequently and frankly with plaintiff's counsel. Some of that communication does not appear in the plaintiff's brief and is important for a full understanding of the matters before the Court.

The Complaint, Motion for Preliminary Injunction and other related papers were sent by email to Gary Silverman on Saturday, July 30. Principal counsel for defendants immediately began arranging for local counsel and an expert to address the 60-page expert report submitted by plaintiff's expert Darin Lee. John Gresham was engaged as local counsel on Wednesday, August 3. Also on August 3, potential expert Bob Mann indicated that he did not have time to work on the case because he was occupied with working other matters including a proceeding involving another party which happens to be represented by US Airways counsel Robert Siegel. Defendant's counsel then spoke with expert Don Garvett later on Wednesday, August 3. Mr. Garvett explained that he had some immediate prior commitments including a two week assignment for an airline in Brazil. On Thursday, August 4, Mr. Garvett briefly reviewed the report submitted by plaintiff's expert and checked to see if any of the assistants he would normally use on such a project had a conflict that would prevent them from working on this matter. One did, two others did not. In the meantime, as part of their discussions, Mr. Silverman asked plaintiff to make available the voluminous data on which plaintiff's expert had based his report. Counsel negotiated and executed a confidentiality agreement and the information was made available on Friday, August 5. Mr. Garvett began accessing the information that day and downloaded the available information before he was scheduled to leave for his previous engagement in Brazil on Sunday, August 7. Mr. Garvett and his assistants are reviewing the plaintiff's expert's report and the underlying information. Mr. Garvett is performing his review after finishing the daily work required by the engagement in Brazil. Mr. Garvett estimates that he and his assistants will be able to complete a preliminary partial review of Mr Lee's Report shortly after Labor Day in early September and that it would take approximately two more weeks to present his own independent assessment of the situation. A copy of Mr. Garvett's

qualifications and of an email message describing his retention, schedule and estimate of the time necessary to prepare his own report is attached as Exhibit 1.

It is obvious from even a cursory review of the report of plaintiff's expert and the list of what the report is based upon that it took several weeks to analyze and prepare the report. Mr. Garvett describes Mr. Lee's report as "extensive and detailed" and "highly technical." Counsel has not been advised of the length of time it took for Mr. Lee to complete his report or what assistance he had in gathering and digesting the data upon which he relies. It is clear, however, that it took a substantial amount of time for him to gather the information, perform the necessary analysis and calculations and draft the report. We also suppose that Mr. Lee had the significant assistance of staff from US Airways in collecting the data he needed for the report. It also appears that Mr. Garvett will need additional data to complete his report and, although he has experienced help, the resources Mr. Garvett can call upon cannot match the US Airways resources that were available to Mr. Lee. Plaintiff's complaint, motion for preliminary injunction and now its request for a temporary restraining order rely heavily on Mr. Lee's expert report. It is therefore clear that any schedule for a preliminary injunction hearing, or temporary restraining order, that does not allow a reasonable time for defendants' expert to review and analyze Mr. Lee's "highly technical" report, review and analyze the underlying data and calculations, collect additional information relevant to the matters addressed in that report, and to prepare his own report will deny defendants a fair hearing and will deny the Court access to the facts at issue in this action. Any demand for a schedule that denies defendants this opportunity is simply a tactic designed to make it impossible for them to defend against plaintiff's well prepared allegations.

During the week of August 1-5, Mr. Silverman had several conversations with Mr. Siegel concerning Mr. Siegel's demand that we reach agreement on an extremely abbreviated schedule for briefing and arguing the Carrier's motion for a preliminary injunction. Mr. Silverman advised during those discussions that even with prompt and full access to the data used in Mr. Lee's report, plaintiff's expert would not be able to complete even a preliminary review and analysis until early September and that plainly Mr. Lee had a much longer period to analyze the data and prepare his report. Mr. Silverman discussed with Mr. Siegel September 2 as a possible date for a response on the legal issues but would not commit to a date for a hearing because when Mr. Silverman spoke with Mr. Siegel, the data underlying the expert report written for US Airways had not yet been made available, had not been reviewed by Mr. Garvett, and there was no way even to estimate when Mr. Garvett would be able to analyze the data and complete his report. Mr. Silverman also advised Mr. Siegel that even if the parties were able to agree on a September 2 date, it would need to be subject to completion of our expert's report.

Once Mr. Gresham had been retained by defendants he immediately contacted over the next two days plaintiff's three local counsel, Mr. Marcus, Mr. King and Mr. Heyl, to advise them that he would be serving as local counsel for the defendants and to discuss scheduling issues and pending motions. Upon being advised on August 5, 2011 by Mr. Heyl that, by his reading of the local rules, the defendants response to the preliminary injunction was to be filed by August 15, 2011, and that counsel for plaintiff wished to have a scheduling conference during the week of August 8,2011, Mr. Gresham advised Mr. Heyl that defendants intended to file Rule 12b motion by August 12, reminded Mr. Heyl of the pending action in the Eastern District of New York, and indicated that with the filing of the 12b motion and the need for an expert report, defendants would file a motion asking for additional time to respond to the preliminary injunction motion.

Gresham suggested that it would make sense to request a scheduling conference for the week of August 15, since the court would have all of the motions in hand by August 15. Mr. Heyl stated that he would review this suggestion with plaintiff's lead counsel and respond on Monday. Defendant's local counsel received no response to his suggestion. Rather on Monday August 8, defendants served their TRO motion.

2. The Court should decide defendants' Motion to Dismiss before addressing plaintiff's requests for preliminary relief. As set forth in defendants' motion to dismiss which was filed yesterday, the matters at issue in this action are closely related to and constitute a compulsory counterclaim to claims at issue in the action filed in the Eastern District of New York on May 27, 2001. USAPA v. US Airways, Inc., No. 11-CIV-2579. As stated below in point 4, the allegations in defense of the claims made in the instant case are the affirmative allegations made in the New York action. The matters are inextricably intertwined and should be heard together, not separately. In the interests of judicial economy and for the reasons stated in support of defendants' motion, the Court should address that motion before setting a reasonable schedule for hearing on plaintiff's requests for preliminary relief.

3. The Temporary Restraining Order should be denied because there is not "clear proof" that defendants are responsible for the alleged misconduct as required by the Norris LaGuardia Act. Section 6 of the Norris LaGuardia Act, 29 U.S.C. § 106, provides:

> no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106.

To fulfill the above "clear proof" standard, a plaintiff must demonstrate a "definite and substantial connection" between the union and the alleged unlawful acts. Ritchie v. United Mine Workers of America, 410 F.2d 827, 835 (6th Cir. 1969).

Section 7 provides, in relevant part:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute … except after findings of fact by the court, to the effect -
> (a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, **but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof …**

29 U.S.C. § 107 (emphasis added).

This Circuit has recognized that the requirements of Section 7 apply to a request for a temporary restraining order or preliminary injunction in a labor dispute. See e.g. District 17, United Mine Workers of America, 13 F.3d at 136 (finding that the standards of the NLGA, including Section 7, and the customary Fourth Circuit preliminary injunction requirements apply to such a request). Moreover, it is also clear on its face that Sections 6 and 7 of the NLGA contain nearly identical requirements that the plaintiff demonstrate actual participation in, or authorization or ratification of, the alleged unlawful acts. Accordingly, the Court should consider the holdings of other courts regarding NLGA Section 6 in determining whether plaintiff has fulfilled the requirements of NLGA Section 7(a).

In the case at bar, the Court must disregard those alleged acts described in the complaint that are not clearly attributable to, and have not been ratified by, USAPA in determining whether plaintiff is entitled to an injunction. In its Complaint, plaintiff cites certain anonymous e-mails, message board postings and text messages that it alleges violate the RLA and encourage current

and future illegal job action in furtherance of the so-called "slowdown". (Ex. D, pp. 21-23, 28, ¶¶ 54, 57, 61-62, 75) For instance, plaintiffs include certain e-mails from the e-mail account entitled "b767pilotdriver@gmail.com" that are alleged to be vehicles for defendants to encourage participation in the slowdown campaign and threaten those wishing not to participate (E.g., Exhibit "3" to the Declaration of Lyle Hogg in Support of Plaintiff's Motion for TRO) While defendants do not concede that these anonymous messages are unlawful in any part, it is important to note, however, that strikingly absent from the Complaint are any facts or evidence connecting these alleged messages to USAPA in compliance with the NLGA.

In Ritchie v. United Mine Workers of America, the Sixth Circuit held that a union cannot be held liable for damages caused by the destruction of the employer's property during a labor dispute by anonymous men wearing masks, where the evidence presented did not establish a "definite and substantial connection" between the defendant union and alleged unlawful act. 410 F.2d at 835. Specifically, the court found that testimony from a witness that the anonymous men called him a "scab," as well as evidence demonstrating union officials made statements that such violence and destruction would cease if the employer signed the union's proposed collective bargaining agreement, did not satisfy the "clear proof" standard under the NLGA and, therefore, did not warrant the imputing of liability for the unlawful acts to the union. Id., at 834.

The Ritchie court's analysis of whether anonymous acts during a labor dispute should be attributed to a union under NLGA standards is instructive for the case at bar. As discussed above, many allegations of unlawful conduct in plaintiff's Complaint were admittedly performed by anonymous individuals. Moreover, the Complaint asserts no definitive connection between the anonymous conduct and USAPA, and does not sufficiently demonstrate that said conduct was ratified after the fact by USAPA. See e.g. United Mine Workers of America v. Gibbs, 383

U.S. 715, 739, 86 S.Ct. 1130, 1145-46 (1966)("[t]here can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred"); United Steelworkers of America v. Lorain, 616 F.2d 919 (6th Cir. 1980), cert. denied, 451 U.S. 983, 101 S.Ct. 2313 (1981)(holding that a union's failure to discipline its members who violated the no-strike clause in the collective bargaining agreement does not constitute ratification by the union of the strike).

Once the anonymous emails and other communications and actions that cannot be attributed to defendants are eliminated, as the Norris LaGuardia Act requires, there is insufficient proof to support plaintiff's motion for a temporary restraining order and the request should be denied. See Real Truth About Obama, Inc. v. Federal Election Commission, 575 F.3d 342, 346-47 (4th Cir. 2009)(any applicant for injunctive relief must provide a clear showing that they will likely succeed on the merits), vacated on other grounds, __, U.S. __, 130 S.Ct. 2371 (2010), re-issued in part, 607 F.3d 355 (4th Cir. 2010).

Stripped of the allegations not attributable to USAPA, plaintiff has not demonstrated that the defendants are responsible for the alleged misconduct and has not shown a "clear or substantial likelihood" that it will succeed on the merits in its claim against USAPA under Section 2, First of the RLA, and, moreover, has failed to properly state a claim under Section 2, First, that defendants have violated the duty to maintain the status quo and exert every reasonable effort to settle disputes. In the alternative, plaintiff's inability to fulfill the standards for injunctive relief under the NLGA and Fourth Circuit authority deprives the Court of jurisdiction to issue any such preliminary or permanent injunctive relief in favor of plaintiff.

4. The plaintiff has itself violated the Railway Labor Act and its status quo provisions and therefore is not entitled to relief. As shown in support of our motion to dismiss,

US Airways is not entitled to relief on its claims against USAPA for alleged violations of the status quo because US Airway has itself violate the Railway Labor Act and its status quo provisions as alleged in the action filed in the Eastern District of New York. As a result, plaintiff is not likely to succeed on the merits and its request for preliminary relief should be denied.

Section 8 of the Norris LaGuardia Act provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 108.

Section 8 thus mandates a "clean hands" requirement to any party seeking to enjoin another party to a labor dispute. See Brotherhood of R.R. Trainmen, Enterprise Lodge, No. 27, 321 U.S. at 56-57, 64 S.Ct. 413, 416-17 (Section 8 is a jurisdictional prerequisite limiting the conditions upon which a plaintiff may be entitled to injunctive relief in connection with a labor dispute.) Accordingly, the right to an injunction in connection with a labor dispute may be denied where the party seeking the injunction has committed, for example, a violation of its duty to maintain the status quo under the various applicable provisions of the RLA, or has failed to exert every reasonable effort to settle the dispute in violation of RLA Section 2, First. See, e.g., Int'l Ass'n of Machinists and Aerospace Workers v. National Railway Labor Conference, 310 F.Supp. 905, 913-14 (D.D.C. 1970)(stating that "[w]here the petitioner has violated any of the sections of the Railway Labor Act, the clean hands doctrine of Section 8 applies and the Court cannot issue an injunction").

As described in our motion to dismiss, the New York action alleges US Airways has violated the RLA by, *inter alia*, abrogating and unilaterally altering the grievance and arbitration

provisions in the existing collective bargaining agreement; failing to exert every reasonable to settle disputes arising out of the application of the existing collective bargaining agreement; failing to exert every reasonable effort to reach a single integrated collective bargaining agreement with USAPA; and intentionally interfering, influencing and/or coercing pilots in the exercise of their rights to organize, choose their representatives, and join or remain or not join or remain members of any union. Because plaintiff has violated the RLA in these respects, it is not entitled to relief against defendants here.

Furthermore, plaintiff should be barred from obtaining injunctive relief because it has failed to make every reason effort to resolve the dispute regarding safety culture through negotiations as required by Section 8 of the NLGA. It is established that Section 8 applies even where the party seeking an injunction has not violated any legal duty under the RLA or other statute. See Brotherhood of R.R. Trainmen, Enterprise Lodge, No. 27, 321 U.S. at 63-65, 64 S.Ct. 413, 420-422 (the employer's failure to agree to arbitration pursuant to the RLA's major dispute resolution procedure precluded the employer from enjoining an allegedly unlawful strike by the union).

In this respect the Supreme Court stated as follows:

> Respondent's failure of refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court.

Id. at 63, 420; see also Piedmont Aviation, Inc. v. Air Line Pilots Ass'n, Int'l, 416 F.2d 633 (4th Cir. 1969), cert. denied 397 U.S. 926, 90 S.Ct. 924 (1970), rehearing denied 398 U.S. 915, 90 S.Ct. 1687 (1970).

Here, plaintiff has continually and intentionally failed to engage and respond to USAPA regarding its concerns about the flawed safety culture presently found at US Airways. Plaintiff has refused to permit USAPA any input with respect to SOPs and other rules, despite the fact that the only individuals who are experts in the daily duties of a pilot and operation of US Airways' fleet of aircraft are USAPA members. For instance, plaintiff has maintained its position that USAPA should not have a seat on the plaintiff's Flight Safety Operations Board ("FSOB")[1], despite the obvious benefit of including line pilots in the process of creating and altering SOPs and other safety guidelines.

Second, plaintiff refused USAPA's invitation to participate in the Safety Culture survey performed by Dr. Von Thaden and the Illumia Corporation despite multiple requests for input and assistance. In light of the above facts, further illustrated in the aforementioned declarations, it is clear plaintiffs failed to make every reasonable effort to resolve this dispute in a collegial manner by refusing to negotiate with USAPA over safety issues and denying USAPA any input into the process by which plaintiff creates and alters SOPs and other safety guidelines.

Additionally, plaintiff has also violated the second prong of NLGA Section 8 by objecting to, and refusing to make every reasonable effort to participate in, NMB mediation over the negotiation of a single integrated collective bargaining agreement. As described in USAPA's

[1] The FSOB is a collection of US Airways officials and officers who meet to discuss safety issues.

Eastern District of New York action, plaintiff actively resisted USAPA's request for NMB intervention in the ongoing negotiations.[2]

Accordingly, while the above failures may not constitute independent violations of the RLA, they are still sufficient to bar plaintiffs from seeking injunctive relief under the second portion of NLGA Section 8.

Plaintiff's argument against the application of NLGA Section 8 in its brief in support of its application for a preliminary injunction must be disregarded. Therein, plaintiffs insist that the obligation to make every reasonable effort to settle a dispute only narrowly applies to the union's alleged unlawful acts, therefore, plaintiffs have no duty to make such reasonable efforts and reward allegedly illegal conduct. (Plaintiff's Brief in Support of Motion for Preliminary Injunction, pp. 57-58) In support of this position, plaintiff cites to United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers, 243 F.3d 349, 364, 366-67 (7th Cir. 2001). However, plaintiff ignores the following statement from the Seventh Circuit in United Air Lines, which provides:

> If IAM had demonstrated that United had **either violated its own status quo obligations (or some other duty under the labor laws) or had failed to pursue all of the available channels of negotiation, mediation, and arbitration provided under the RLA**, then it would have a stronger case for barring the injunction under § 8 of the NLGA. However, as IAM has not made any such contention, we must reject its argument under § 8.

Id., at 365 (emphasis added).

As such, the case cited by plaintiff in support of its position that it has no duty to make every reasonable to settle disputes in order to seek an injunction in a labor dispute actually

[2] Plaintiff refused NMB intervention despite previously forcing USAPA to engage in lengthy and unproductive private mediation. As alleged in detail in the NY Action, these actions by plaintiff are tactics to delay the process of reaching a new agreement and undermine and weaken USAPA as the representative of US Airways pilots.

supports USAPA's position that plaintiff's violations of the RLA and failure to make every reasonable effort bar the instant claim.

5. <u>The Court should not issue any injunction that would interfere with the duty of pilots in command to insure the safety of their passengers and equipment</u>. Both law and applicable regulations place responsibility for aircraft operations squarely and exclusively in the hands of captain of the flight. In particular, the applicable regulations provide that the pilot in command of an aircraft "is directly responsible for, and is the final authority as to, the operation of that aircraft" and "[i]n an in-flight emergency requiring immediate action, . . . may deviate from any rule of this part to the extent required to meet that emergency." U.S. FAA FAR 91.3. The court should, and we believe must not, enter an injunction that would in any way interfere with a pilots duty to make the difficult decisions necessary to insure the safety of her or his passengers and equipment. Thus, to enter the injunction or restraining order as requested by plaintiff would indeed, and contrary to plaintiff's assertion, significantly burden defendants and the pilots they represent and would be contrary to the public interest. An injunction that would interfere with pilot judgment is exactly what plaintiff is asking for. And that request should be denied.

For the reasons set forth above, the Court should deny plaintiff's motion for temporary restraining order and proceed to address defendants' motion to dismiss, transfer or stay.

Dated: August 12, 2011
Charlotte, North Carolina

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing **Defendants' Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order and accompanying declaration and exhibits** on all of the parties to this cause by:

_____ Hand delivering a copy hereof to the attorney for each said party addressed as follows:

_____ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

_____ Transmitting via facsimile transmission a copy hereof to the attorney for each said party as follows:

__X__ Electronic transmission (e-mail) to the attorney for each said party as follows:

_____ Depositing a copy hereof in a first-class, postage-prepaid, properly-addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed to the attorney for each said party as follows:

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This, the 12th day of August, 2011.

/s/ John W. Gresham
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