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.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Plaintiff US Airways, Inc. ("US Airways" or "the Company") opposes the Motion to Dismiss the Complaint filed by Defendants US Airline Pilots Association ("USAPA" or the "Union") and Michael J. Cleary ("Cleary") (collectively, "Defendants") as follows:

I. INTRODUCTION

In this case, US Airways seeks injunctive relief to halt an unlawful work slowdown by US Airways pilots directed by Defendants and causing incalculable irreparable harm felt most acutely at US Airways' largest hub in Charlotte, North Carolina. The most convenient and logical forum for this dispute is the Western District of North Carolina (WDNC), which is USAPA's home forum (its headquarters are here) and the locus of the unlawful pilot conduct.

In their Motion to Dismiss the Complaint, Defendants contend that the claim in this case should be dismissed or transferred because (1) the first-to-file rule gives priority to a lawsuit filed by USAPA against US Airways in federal district court in New York (the "N.Y. Action"); (2) the claim alleged in this case is a compulsory counterclaim in the N.Y. Action; and (3) the Norris LaGuardia Act ("NLGA"), 29 U.S.C. § 108, presents a jurisdictional bar to the injunction requested by US Airways in this case. These arguments are baseless and should be rejected.

First, because the unlawful activity giving rise to this lawsuit has been centered in Charlotte, the WDNC is the proper venue for this case. The first-to-file rule is not applicable to and does not require dismissal or transfer of this case because the balance of convenience weighs heavily in favor of a Charlotte venue and the claim in the present case does not overlap with the claims in the N.Y. Action.

Second, the claim in the present case does not constitute a compulsory counterclaim in the N.Y. Action because the claims in the two cases do not arise from the same transactions or occurrences. The claims in the N.Y. Action involve collective bargaining negotiations underway

between the parties, the grievance and arbitration procedure contained in the parties' collective bargaining agreement and allegations that US Airways has harassed USAPA supporters by imposing discipline. The present case, on the other hand, involves very different allegations regarding an unlawful pilot slowdown instigated by USAPA and causing substantial disruption to US Airways and the traveling public. Moreover, because US Airways is moving to dismiss the claims in the N.Y. Action it is not permitted to allege any counterclaims in that case.

Third, the courts have recognized that, where the injunctive relief is necessary to effectuate the purposes of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, and to protect the interests of the traveling public, the restrictions of the NLGA are not a bar to such relief. Additionally, Defendants have not offered any evidence of unclean hands and their argument fails for this reason as well.[1]

For the above reasons, the Motion should be denied. Any other result will create an unacceptable delay in the issuance of a judicial remedy for a blatantly unlawful slowdown which, with each passing day, is causing significant irreparable injury to US Airways' operations and the traveling public.

II. STATEMENT OF FACTS

A. US Airways' Operations in the Eastern District of New York Compared to the Western District of North Carolina.

US Airways is a common carrier by air that operates an extensive system of routes both within the United States and internationally. Domestically, US Airways operates hubs in

[1] US Airways' Motion for Preliminary Injunction is on file with the Court (Dkt. Nos. 10-11). The Declarations of E. Allen Hemenway, Paul Morell, Kerry F. Hester, Lyle Hogg, and Sloane Giddon in support of that Motion are relied upon herein and are incorporated by reference (Dkt. Nos. 12-16). A separate Declaration of E. Allen Hemenway dated August 15, 2011 ("Hemenway MTD. Decl."), is filed concurrently herewith. USAPA's Amended Complaint in the N.Y. Action (hereinafter "N.Y. Action Am. Compl."), as well as other exhibits referenced

Charlotte, Philadelphia, and Phoenix, as well as a large operation at Washington National Airport. (Hemenway MTD. Decl. ¶ 2.) These serve not only as the center of operations for the US Airways route system but they are also the only domiciles for US Airways pilots. (*Id.* ¶ 2.) Although US Airways is headquartered in Tempe, Arizona, its largest hub is in Charlotte (Hemenway MTD. Decl. ¶ 3; Hester Decl. ¶ 5), where fully 29 percent of US Airways pilots are based (Morell Decl. ¶ 8.). US Airways has a much smaller volume of traffic at airports within the EDNY and no US Airways pilots are based at airports in the EDNY. (Hemenway MTD. Decl. ¶¶ 2-3.)

B. The Defendants Can Be Found in this District.

USAPA maintains its headquarters and its only business office in Charlotte, North Carolina, in this District. (Morell Decl. ¶ 8.) As its president, Cleary conducts substantial business at USAPA's headquarters. He is on leave from his pilot duties while he serves as USAPA's president and maintains his business office in Charlotte. (Hemenway MTD. Decl. ¶ 4.)

C. The Unlawful Conduct Giving Rise to This Litigation Occurred Primarily in the Western District of North Carolina.

The illegal slowdown activity instigated by USAPA has been centered in Charlotte. USAPA is based in Charlotte and much of the direction to pilots to engage in unlawful activity has emanated from USAPA's Charlotte headquarters. (Hemenway Decl. ¶¶ 4, 18-19; Morell Decl. ¶¶ 14-17.) There is no evidence that USAPA managed its unlawful slowdown activities from a location in New York. Indeed, except for the N.Y. Action, USAPA has no significant presence in New York.

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herein are attached to the concurrently filed Declaration of Michael G. McGuinness ("McGuinness Decl.")).

As detailed in the expert report of Dr. Darin Lee, Defendants have directly instigated the unlawful slowdown by encouraging pilots to increase the frequency of maintenance reports on aircraft (and refuse to defer minor maintenance issues that would be deferred under normal circumstances), slow the speed of aircraft when taxiing either to or from the terminal gate, delay the completion of training requirements so that pilots are unavailable to fly, decline to fly on the basis of fatigue and generally slowdown in the performance of their duties. (Expert Rep. of Darin N. Lee, PH.D. ("Lee Rep.") ¶¶ 6, 9, 14, 19-20, 22, 32 (Dkt. No. 19, incorporated herein by reference).) The pilot slowdown activity has been centered in US Airways' East operations where USAPA has the allegiance of many pilots. (*Id*. ¶¶ 14, 16, 20, 32.) Evidence of a slowdown has not emerged in the Western United States (on flights operated by former America West pilots *not* loyal to USAPA) or at US Airways' Express operations where the pilots are represented by a different union. (*Id.* ¶¶ 6 at pp. 4-7, 15, 17; Hemenway MTD. Decl. ¶ 5; Declaration of Darin N. Lee, Ph.D. dated August 15, 2011 ¶ 4.)

Much of the slowdown activity has occurred in Charlotte or on flights bound for Charlotte. (Lee Rep. ¶¶ 6 at p. 6, 35, 51-53; Hemenway Decl. ¶ 17 (noting that USAPA is conducting a "purported 'safety campaign' . . . disrupting US Airways' operations, with much of the disruption in Charlotte"); *id.* ¶ 17, 18-19, 29 (USAPA's "Charlotte Domicile" promulgated thinly veiled directives to pilots to engage in work slowdowns for bargaining leverage); Hogg Decl. ¶ 27.) This conclusion is confirmed by the impact that the slowdown has had on the Charlotte operation. Starting in May 1, 2011, US Airways noticed a significant change in pilot behavior that has reduced, by 12 percentage points, the number of flights arriving "on-time" in Charlotte. (Lee Rep. ¶ 6 at p.6.) During this same period of time, pilot actions in Charlotte have caused a 70% increase in the average arrival delay for flights into Charlotte. (Lee Decl ¶ 2.)

Similarly, pilot actions since May 1 have caused an average of 3.8 daily cancellations in Charlotte or more than 400 overall. (*Id.* ¶ 3.) Finally, pilot slowdown activity also has resulted in an increase of more than five misconnected bags per thousand connecting passengers at Charlotte (the Company's largest connecting airport) since May 1 — which represents an increase of approximately 45 percent when compared to the historical average of 11.59 bags per thousand connecting passengers. (*Id.* ¶ 51 and n.58.)

D. Efforts by US Airways to Stop the Unlawful Activity.

In an effort to stop the unlawful slowdown short of litigation, US Airways sent four letters between December 23, 2010 and April 28, 2011, to Cleary at his Charlotte office advising him that USAPA was violating the RLA and demanding that USAPA take immediate steps to ensure there were no disruptions to US Airways' operation. (Hemenway Decl., Exhs. 8, 10-12.) These letters were a clear prelude to litigation as US Airways was required under the RLA to exert every reasonable effort to settle its differences with USAPA in connection with the slowdown before it took legal action. In one such letter, dated February 11, 2011, US Airways specifically stated that "the Company reserves all of its legal rights with regard to future status quo violations." (*Id.* Exh.10.)[2]

E. Defendants' Lawsuit in the Eastern District of New York.

In response to the four letters described above, USAPA denied the allegations of unlawful activity. (*Id.* Exhs. 9, 14.) Instead of making reasonable efforts to stop this conduct, USAPA increased the intensity of its unlawful activities, and, on May 27, 2011, filed a federal

[2] Notwithstanding these four letters from Hemenway, Cleary filed a declaration immediately after the hearing conducted by this Court on August 12, 2011, claiming that he had never received a letter from US Airways "that advised or threatened to bring any legal action against USAPA." (Second Decl. of Michael Cleary filed with the Court on August 12, 2011 ¶ 2.) Cleary's declaration directly contradicts an official USAPA publication dated June 1, 2011,

court action in the EDNY accusing US Airways of illegal conduct. *See U.S. Airline Pilots Ass'n v. US Airways, Inc.*, No. 1:11-cv-02579 (ARR) (SMG). (McGuinness Decl. Exh. 2.) In the N.Y. Action, USAPA pled four Counts under the RLA alleging that US Airways had bargained in bad faith over a new collective bargaining agreement, violated its status quo obligations under the RLA by changing the manner in which it processes grievances under the collective bargaining agreement applicable to pilots at US Airways and failed to exert every reasonable effort to settle grievances between the Company and the Union. On June 27, 2011, US Airways filed a letter with the court in the EDNY, as required by local court rules, seeking permission to file a motion to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). (McGuinness Decl. Exh. 3.) US Airways argued that three of USAPA's Counts were minor disputes and thereby subject to mandatory arbitration before the US Airways Pilots' System Board of Adjustment and that the remaining Count failed to state a viable cause of action.

USAPA filed a responsive letter on July 7, 2011, stating, among other things, that it intended to file an Amended Complaint. (McGuinness Decl. Exh. 4.) USAPA filed its Amended Complaint on July 18, 2011, alleging the four Counts contained in its original Complaint and adding a Count under Section 2, Third and Fourth of the RLA. (N.Y. Action Am. Compl. ¶¶ 140-49.) In its new Count, USAPA alleged that US Airways imposed discipline on pilots who expressed support for USAPA. US Airways filed a second letter seeking permission to file a motion to dismiss the Amended Complaint on July 27, 2011, arguing the same grounds for dismissal as contained in its previous letter and also establishing that the new count was a minor dispute subject to mandatory arbitration. (McGuinness Decl. Exh. 5.) USAPA responded on August 4, 2011. (*Id*. at Exh. 6.) The case currently is pending before the EDNY court for a

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explaining to members that Hemenway's letters were the groundwork for a company lawsuit.

determination as to whether Rule 12 motions to dismiss are to be filed, and, if so, what the briefing schedule for those motions will be.

III. ARGUMENT

A. THE FIRST-FILED RULE IS INAPPLICABLE.

Defendants argue in their Motion that the N.Y. Action involves claims substantially similar to the claim in this case and that dismissal or transfer is warranted under the so-called "first-to-file rule." (Def.'s Mot. at15.) The first-filed rule, however, is not applicable to the present case because the balance of convenience and the strong relationship the WDNC has to the alleged unlawful activity heavily favors venue in Charlotte. Moreover, even if the first-filed rule did apply, it would not compel transfer because the present case is not related to the N.Y. Action and judicial economy would not be advanced, and US Airways' entitlement to expedited relief would be compromised, by transferring this case to New York.

1. The balance of convenience strongly favors venue in Charlotte.

In certain circumstances, courts give priority to cases filed first in time and have stayed or transferred related cases filed at a later point. In the Fourth Circuit, however, it is clear that the first-to-file rule does not apply when a "balance of convenience" favors the second forum. *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 594-95 (4th Cir. 2004). The application of the rule is not mandatory but instead is discretionary with the court. *Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 361 (W.D.N.C. 2003). As the Fourth Circuit has held, "this Circuit has no unyielding 'first-to-file' rule." *CACI Int'l, Inc. v. Pentagen Techs., Int'l*, Nos. 94-2058, 94-2220, 1995 WL 679952, at*6 (4th Cir. Nov. 16, 1995).

In the Fourth Circuit, district courts often retain second filed lawsuits that have a strong connection to the chosen forum. Affirming one such decision, the Fourth Circuit held that the

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(McGuinness Decl. Exh. 12.)

district court "reasonably concluded from the mass of significant contacts with South Carolina that the balance of convenience tipped in favor of the second action having priority." *Nall v. Piper*, No. 90-2479, 1991 WL 192141, at *2 (4th Cir. Sept. 26, 1991). *See also CACI Int'l, Inc.*, 1995 WL 679952, at *6; *Quesenberry v. Volvo Group of N. Am., Inc.*, No. 1:09cv00022, 2009 WL 648658, at *3 (W.D. Va. Mar. 10, 2009). The court in *Quesenberry* relied upon the plaintiff's choice of forum, convenience of the witnesses, the fact that the lawsuits were filed close in time, the connection of the lawsuit to the plaintiff's chosen forum, and the fact that the first filed action was subject to a pending motion to dismiss in rejecting the first-to-file rule. In the present case, as shown more fully below, each of the *Quesenberry* factors favors venue in this District.

USAPA, as the moving party, bears a heavy burden in establishing a basis for transfer. *DMP Corp. v. Fruehauf Corp*., 617 F. Supp. 76, 77 (W.D.N.C. 1985). As courts in this District have recognized, "[a] defendant carries a particularly heavy burden when it moves pursuant to § 1404(a) to transfer an action from a district where venue is proper."[3] *Phillips v. S. Gumpert Co*., *Inc.,* 627 F. Supp. 725, 726-27 (W.D.N.C. 1986). USAPA must, therefore, convince the Court that the relevant considerations weigh "strongly in favor[]" of a transfer of venue. *Collins v. Straight, Inc*., 748 F.2d 916, 921 (4th Cir. 1984) (quotation marks omitted). USAPA cannot carry its burden in this case where transfer is discretionary, the parties and the locus of the unlawful activity are all in this District, and the inevitable delay associated with transfer is inimical to the public interest in uninterrupted and reliable transportation services. Accordingly, under the circumstances of this case, the first filed rule does not provide a basis for transfer.

[3] Because much of the conduct giving rise to the claims in this lawsuit occurred here (Lee Rep. ¶¶6, 35 and n.39, 37, 51 and n.58, 52), and USAPA and US Airways both have a significant

2. The relevant factors weigh strongly against a transfer of venue.

When deciding a motion to transfer in the context of the first-to-file rule, "[t]he factors the Court is to consider . . . are essentially the same as those considered in connection with motions to transfer venue pursuant to 28 U.S.C. § 1404(a)." *St. Paul Fire & Marine Ins. Co. v. Renne Acquisitions Corp.*, Nos. 3:09cv476-RJC-DSC, 3:09cv511-RJC- DCK, 2010 WL 2465543, at *3 (W.D.N.C. June 14, 2010) (Conrad, J.) (quotation marks omitted). These public and private interests include:

1. The plaintiff's initial choice of forum;
2. The residence of the parties;
3. The relative ease of access to proof;
4. The availability of compulsory process for attendance of witnesses and the costs of obtaining attendance of willing witnesses;
5. The possibility of a view;
6. The enforceability of a judgment, if obtained;
7. The relative advantages and obstacles to a fair trial;
8. Other practical problems that make a trial easy, expeditious, and inexpensive;
9. The administrative difficulties of court congestion;
10. The interest in having localized controversies settled at home; and . . .
11. The avoidance of unnecessary problems with conflict of laws.

Uniprop Manufactured Housing Communities Income Fund II v. Home Owners Funding Corp. of Am., 753 F. Supp. 1315, 1322 (W.D.N.C. 1990). Courts apply these factors flexibly to the particular facts of each case. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988). The analysis of the factors "is qualitative, not merely quantitative." *Commercial Equip Co., Inc. v. Barclay Furniture Co.*, 738 F. Supp. 974, 976 (W.D.N.C. 1990). Defendants cannot show that these factors weigh heavily in favor of transfer to New York. In fact, just the opposite is true.

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presence in WDNC, venue is proper here. 28 U.S.C. § 1391(b)(3); *see Denver & R. G. W. R. Co. v. Bhd. of R. R. Trainmen*, 387 U.S. 556 (1967).

a. The plaintiff's choice of forum.

As this District has recognized repeatedly, "it is black letter law, that a plaintiff's choice of a proper forum is a *paramount consideration* in any determination of a transfer request, and that choice . . . should *not* be lightly disturbed." *W. Steer-Mom 'N' Pop's, Inc. v. FMT Invest., Inc.*, 578 F. Supp. 260, 265 (W.D.N.C. 1984). The Fourth Circuit has ruled that a plaintiff's choice of forum is "entitled to respect and deference," *In re Carefirst of Md., Inc.*, 305 F.3d 253, 260 (4th Cir. 2002), and "should rarely be disturbed." *Collins v. Straight, Inc.*, 748 F.2d 916, 921 (4th Cir. 1984). Here, US Airways has selected Charlotte as the forum for its lawsuit and its decision should be respected.

USAPA appears to contend that its choice of New York as the proper forum is entitled to deference rather than the Charlotte forum selected by US Airways. (Def. Mot. at 19.) This argument is misplaced. Even in first-to-file cases, where second filed plaintiff's choice of forum has a substantial connection to the controversy at issue in the second filed case, the court gives deference to the choice of the second filed plaintiff. *Quesenberry*, 2009 WL 648658, at *6; *United Energy Distribs., Inc. v. Rankin-Patterson Oil Co.*, No. 7:07-3234-HMH, 2007 WL 4568997, at *2 (D.S.C. Dec. 20, 2007); *Samsung Elec. Co. v. Rambus, Inc.*, 386 F. Supp. 708, 716-17 (E.D. Va. 2005). In each of these cases, the court declined to apply the first-to-file rule in part because of the deference accorded to plaintiff's choice of forum. In this case, it is clear that USAPA filed its lawsuit in New York with an intent to preempt a lawsuit by US Airways that it knew soon would be filed. (McGuinness Decl. Ex. 12.) Under these circumstances, USAPA's decision to file its preemptive lawsuit in New York is not entitled to any weight. This factor favors venue in North Carolina.[4]

[4] This Court, in *St. Paul Fire & Marine,* 2010 WL 2465543, at *4, gave preference to the forum selected by the first filed plaintiff. In that case, however, the main parties were not residents of

b. The residence of the parties.

"The logical starting point for analyzing the convenience of the parties is a consideration of their residences in relation to the district chosen by the plaintiff and the proposed transferee district." *Facilitec Corp. v. Omni Containment Sys., LLC*, No. Civ. 03-3187(RHK/AJB), 2003 WL 21781914, at *1 (D. Minn. July 31, 2003). It is significant that USAPA, as the moving party seeking transfer to New York, has its headquarters in Charlotte and that Cleary frequently conducts union business from his Charlotte office. USAPA cannot argue that defending a lawsuit in its home forum is somehow inconvenient or a hardship.

While US Airways maintains its headquarters in Tempe, Arizona, it has substantial operations in the WDNC. (Hemenway MTD. Decl. ¶¶ 2-3; Hester Decl. ¶ 5.) Charlotte is its largest hub and US Airways' largest Eastern pilot domicile is located here. (Hemenway MTD. Decl. ¶¶ 2-3.) US Airways does not operate a hub in New York nor does it base any pilots there. (*Id.*) Thus, the residence of the parties favors venue in the WDNC.

c. The relative ease of access of proof.

Access to proof favors retaining this case in North Carolina. USAPA is headquartered in the WDNC and documentation to be produced by USAPA concerning its unlawful slowdown is likely to be located at its offices in Charlotte. (Morell Decl. ¶¶ 5-7; Hogg Decl. ¶¶ 8-15, 25-32, 34-37, 39-40.) To the extent US Airways calls any witnesses other than those who already have filed declarations in this matter, they are likely to work and/or reside in Charlotte. (Hemenway MTD. Decl. ¶ 6.) Given that US Airways maintains a large pilot domicile in Charlotte, and the significant number of US Airways flights that move through Charlotte each day, it is a convenient forum for pilots and other witnesses. New York, on the other hand, does not offer

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North Carolina and the case had no significant connection to the WDNC. In this case, on the other hand, US Airways filed its lawsuit in the forum with, by far, the greatest connection to the

any advantages in terms of access to proof. This factor weighs strongly in favor of venue in North Carolina.

d. The availability of compulsory process.

Defendants would not have better access to witnesses if this case were transferred to New York. They do not identify a single Company witness subject to process in New York who would be unavailable for a trial in North Carolina. On the other hand, if this case is transferred to New York, US Airways would be unable to invoke compulsory process to require the attendance of witnesses who reside in the Charlotte area including Charlotte-domiciled pilots who have been engaging in unlawful conduct. (Hemenway MTD. Decl. ¶ 6.)

e. The possibility of a view.

This factor favors venue in Charlotte. If a view is necessary, the airport in Charlotte, where the unlawful activity is focused, is far more relevant than any location in New York.

f. Practical problems that make trial easy, expeditious, and inexpensive.

This factor favors venue in Charlotte. Defendants appear to contend that sending the present case to New York is more expedient because the N.Y. Action has been pending for two and one-half months. (Def. Mot. at 19.) This argument is unavailing. The only activity that has occurred in the N.Y. Action is the filing of letters by US Airways seeking permission to file a motion to dismiss and responsive letters from USAPA. The parties have not appeared in court for even an initial status conference and the court has not issued any substantive rulings. The process of briefing and deciding UD Airways' motions to dismiss could take several months. In contrast, the parties have now filed detailed briefs in the present case, as well as substantial testimony and documentary evidence addressing the merits of the US Airways' claim. Expedience and judicial economy favor retaining the case in this Court where meaningful

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claim alleged.

proceedings already have taken place and are scheduled to continue swiftly.

g. The administrative difficulties of court congestion.

This factor strongly favors venue in the WDNC. This District has frequently used case-processing statistics per judgeship in analyzing this factor. *E.g., Uniprop*, 753 F. Supp. at 1324. The factor is particularly important in this case because US Airways is seeking expedited relief and the interests of the traveling public are at issue. The comparisons the Court has considered relevant reveal:

(2010 statistics)	WDNC	EDNY
Civil filings/judge	228	416
Pending cases/judge	293	648
Completed trials/judge	25	20
Median time (months) from filing to disposition (civil)	7.3	8.9
Median time (months) from filing to trial (civil) (2009)[5]	18.3	28.4

See Admin. Office of the U.S. Courts, *Fed. Court Mgmt. Statistics*, *U.S. District Court — Judicial Caseload Profile Report,* http://www.uscourts.gov/ cgi-bin/cmsd2010Dec.pl (last visited July 27, 2011) (McGuinness Decl. Exh. 7)). On average, it takes at least *ten months longer* to get to trial in the EDNY than in the WDNC. *Id.* Moreover, the other statistics also show that judges in the EDNY have 2.2 times as many pending cases as judges of the WDNC. *Id.* Each Judge in the EDNY has on average 188 more filings than his counterparts in the WDNC. *Id.* Judges in the WDNC complete five more trials per year than do their colleagues in the EDNY. *Id.* This District provides a more expedient and appropriate venue. *See Uniprop*, 753 F. Supp. at

1324; *Rubbermaid Inc. v. Satellite Cooling, LLC*, Civ. No. 3:08CV284-C, 2008 WL 4610028, at *3 (W.D.N.C. Oct. 15, 2008).

h. The interest in having localized controversies settled at home.

This factor also favors venue in Charlotte. The primary impact of USAPA's unlawful slowdown has been felt in Charlotte. As noted above, on-time arrivals in Charlotte have decreased substantially as a result of the slowdown and the incidence of mishandled bags also has increased measurably. (Morell Decl. ¶ 8; Hemenway Decl. ¶ 17.) Many of the offending publications encouraging the slowdown originated in Charlotte. (Hemenway Decl. ¶¶ 18-19, 27.) Both US Airways and USAPA have a strong local presence in this District.

i. The remaining factors are neutral.

The remaining factors, the enforceability of a judgment, the relevant advantages and obstacles to a fair trial and issues related to conflicts of laws are neutral. A federal court judgment is enforceable anywhere and a fair trial can be had in either federal court. Because this case involves only federal law there is no obvious conflict of law issue.

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In sum, eight of the eleven factors weigh in favor of retaining this case in North Carolina. Also, the fact that this case was filed only two months after the N.Y. Action, and that the N.Y. Action could well be dismissed at the pleading stage (*see* McGuinness Decl. Exhs. 3, 5), also favor venue in this District. *Quesenberry*, 2009 WL 648658, at *4, 6. Moreover, none of the relevant factors point to the EDNY as a more appropriate forum to litigate this case. Because USAPA has not carried its heavy burden to establish the propriety of a change of venue to New York its Motion should be denied.

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[5] 2010 statistics for the WDNC for this category are not contained in this report.

3. Even if it did apply, the first filed rule does not require transfer to an unrelated forum in New York.

The "first-filed" rule gives priority to the first suit filed between parties when the cases are sufficiently related. *EST, LLC v. Smith*, Civ. No. 5:08-CV-32-RLV-DCK, 2009 WL 903923, at *1 (W.D.N.C. Mar. 31, 2009). "[C]ourts have recognized three factors to be considered in determining whether to apply the first-filed rule: 1) the chronology of the filings, 2) the similarity of the parties involved, and 3) the similarity of the issues at stake." *Nutrition & Fitness, Inc.,* 264 F. Supp. 2d at 360. Analysis of these three factors in the context of the present case shows that the first-filed rule, even if it were applicable, does not require transfer to a foreign forum with no connection to the litigation.

The claim in the present case is not substantially similar to the claims in the N.Y. Action and the two cases are thus not parallel. *See generally McLaughlin v. United Va. Bank*, 955 F.2d 930, 935 (4th Cir. 1992); *New Beckley Mining Corp. v. Int'l Union, UMWA*, 946 F.2d 1072, 1074 (4th Cir. 1991). While the N.Y. Action focuses on the conduct of US Airways during collective bargaining negotiations, and the manner in which US Airways administers the grievance and arbitration provisions contained in their collective bargaining agreement, the present case involves the conduct of USAPA and its members in implementing an illegal slowdown. They involve very different factual and legal issues that present virtually no overlap.

In the N.Y. Action, USAPA alleges a claim for bad faith bargaining. The Supreme Court has cautioned that with respect to bad faith bargaining claims "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement.'" *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). USAPA's contentions in the N.Y. Action fall far short of alleging a desire not to reach agreements and should be dismissed on a Rule 12(b)(6) motion. In fact, USAPA concedes that US Airways has attended bargaining

sessions regularly, exchanged proposals and is currently engaged in mediation before the National Mediation Board ("NMB"). (N.Y. Action Am. Compl. ¶¶ 28-42.) Courts have dismissed bad faith bargaining claims with far more egregious allegations. *Air Line Pilots Ass'n, Int'l v. Spirit Airlines, Inc.*, No. 08-CV-13785, 2009 WL 1803236, at *13-15, 18 (E.D. Mich. June 18, 2009).

Even if the court in New York were to deny a motion to dismiss, USAPA's bad faith bargaining claim is not related to any claim in the present case. USAPA alleges that US Airways has expressed hostility toward the bargaining process, understaffed its bargaining team, made unreasonable proposals out of step with industry standards, refused to discuss bargaining proposals offered by USAPA concerning issues such as pay and vacation and refused to schedule additional bargaining sessions. (N.Y. Action Am. Compl. ¶¶ 44-57.) Thus, the court in New York would hear evidence about the many detailed bargaining proposals that have been passed between the parties over several years and will review those proposals for evidence of bad faith. It would take evidence regarding the conduct of the parties while attending negotiations, such as their willingness to discuss proposals productively and whether they approached the bargaining process with hostility and a closed mind. The court would evaluate other evidence of bad faith such as the number of days the parties have engaged in bargaining and the adequacy of the staffing US Airways has dedicated to the bargaining process.

The court in New York would have to assess other issues related to the bargaining process to rule on the bad faith claim. For example, in the midst of negotiations, a group of former America West pilots sued USAPA for breach of its duty of fair representation claiming that the seniority list proposed by USAPA during negotiations was illegal. See *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010). Litigation between the pilot groups over the

seniority issue already has lasted for years and still continues, with no end in sight. Thus, the court in New York would need to consider whether any delay in reaching a new agreement has been caused at least in part by this intra-union dispute. [6]

Finally, the negotiations between US Airways and USAPA are currently under the supervision of the NMB, which has unfettered authority to establish the timing, location and format of the negotiating sessions and to release the parties from bargaining when it determines that an agreement cannot be reached. (N.Y. Action Am. Compl. ¶¶ 35, 41-42.) To date, the NMB has not received a request for release from either party and negotiations continue. *Air Line Pilots Ass'n, Int'l v. Spirit Airlines, Inc.*, Case No. 08-CV-13785, 2009 U.S. Dist. LEXIS 52326, 186 L.R.R.M. 2934, 2946 (E.D. Mich. 2009). Thus, the court in the N.Y. Action will consider legal and factual issues surrounding these NMB supervised negotiations that are completely unrelated to the claim of an illegal slowdown alleged by US Airways in the present case. USAPA does not argue otherwise in its Motion.

USAPA also alleges in the N.Y. Action that US Airways has violated its status quo obligations under the RLA and abrogated the grievance and arbitration process contained in the collective bargaining agreement applicable to pilots in the following ways: (1) refusing to accelerate arbitrations; (2) refusing to execute global settlement agreements for minor grievances; (3) refusing to offer last chance agreements to pilots charged with disciplinary offenses; (4) failing to abide by previous arbitration decisions and (5) taking more time than warranted in presenting cases to arbitrators. (N.Y. Action Am. Compl. ¶¶ 62-104.) As set forth

[6] After the Ninth Circuit issued its decision, but before USAPA filed the N.Y. Action, US Airways filed a declaratory relief action against USAPA and the former America West pilots in federal district court in Arizona seeking a declaration from the court regarding its bargaining obligation in light of this intra-union dispute over seniority. (*See US Airways, Inc. v. Addington et al.*, Case No. CV-10-1570-PHX-ROS). This action is pending.

in the letters filed with the court in New York, the issues raised by USAPA in the N.Y. Action are minor disputes subject to the exclusive jurisdiction of the US Airways Pilots' System Board of Adjustment ("System Board"). Accordingly, they should be dismissed under Federal Rule of Civil Procedure 12(b)(1).[7] *Bhd. of Maint. of Way Employees v. Union Pac. R. Co.*, 358 F.3d 453, 457 (7th Cir. 2004); *Thacker v. St. Louis Sw. Ry. Co.*, 257 F.3d 922, 923 (8th Cir. 2001).

Even if USAPA's status quo claims were to survive a 12(b)(1) motion, the legal and factual issues are much different than those presented in this case. The primary focus of the claims in the N.Y. Action will be the past practices of the parties with respect to the grievance-related items identified by USAPA and whether US Airways has altered its behavior in a manner that changes the status quo. Thus, for example, the parties would submit evidence regarding the number of global settlements and last chance agreements that have been executed in past years, the circumstances under which those agreements were reached, and whether the number of agreements and circumstances under which they are negotiated have changed over time. The court would hear evidence about the discussions the parties have had over global settlements and last chance agreements, whether the tenor of those discussions or the positions of the parties on these subjects have changed in recent years and, if so, the reasons for the changes. The court would hear similar evidence related to the willingness of the parties to engage in accelerated arbitrations and under what circumstances. The court also would need to review the prior arbitration decisions that US Airways allegedly has failed to follow and hear conflicting evidence from the parties about whether US Airways has complied with those decisions in

[7] In fact, US Airways recently has filed its own management grievance with the System Board over issues that have arisen between the parties related to the scheduling of arbitration hearings. (McGuinness Decl. Exh. 8.)

particular circumstances. USAPA does not argue in its Motion that the issues and evidence related to these claims overlap with the Charlotte litigation.

Finally, the N.Y. Action also involves a claim by USAPA under Sections 2, Third and Fourth of the RLA that US Airways interfered with the representation rights of its pilots by imposing discipline on pilots who support USAPA. (N.Y. Action Am. Compl. ¶¶ 140-49.) These claims should be dismissed under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) because they require interpretation of the applicable collective bargaining agreement and are within the exclusive jurisdiction of the System Board. *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 440 (1989); *Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 906 (9th Cir. 2002).

If USAPA's claim under Sections 2, Third and Fourth was to somehow evade dismissal, the issues involved in that claim would not overlap with the issues involved in the present case. The court in New York would be required to evaluate the individual circumstances of each discipline decision which may include a review of documents as well as live testimony. Ultimately, the court would need to determine whether the discipline was imposed for legitimate reasons or whether it was tainted by anti-union animus on the part of US Airways towards USAPA. This determination would require the court in New York to make judgments concerning the motivations of the decision-makers involved in the many discipline decisions identified by USAPA in its Amended Complaint.[8] (N.Y. Action Am. Compl. ¶¶ 105, 114, 130-31, 137.)

[8] Whether or not the discipline was justified has no bearing on the legality of the slowdown, and, thus, on the claim alleged in this case by US Airways. *United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aero. Workers*, 243 F.3d 349 (7th Cir. 2001); *Long Island R. Co. v. Int' Ass'n of Machinists*, 874 F.2d 901 (2d Cir. 1989), *cert. denied,* 493 U.S. 1042 (1990).

The issues involved in the present case are very different from those involved in the N.Y. Action. Unlike the N.Y. Action, this case involves allegations of an unlawful slowdown implemented by US Airways pilots over the last three months. The Court will hear evidence that USAPA orchestrated the slowdown in order to disrupt US Airways' operation and thereby pressure the Company to capitulate in collective bargaining negotiations. The evidence will center on communications from the Union, both written and oral, encouraging pilots to refuse overtime, report minor maintenance items that are normally deferred and insist that they be fixed before the flight departs, taxi aircraft slowly and make themselves unavailable for flight assignments due to fatigue. The evidence also will focus on USAPA's campaign to harass pilots who do not cooperate with the slowdown campaign.

Furthermore, this case will involve detailed evidence regarding the impact of USAPA's slowdown campaign. US Airways previously has submitted to the Court in support of its Motion for Preliminary Injunction a significant volume of evidence establishing that USAPA's campaign is working and that the slowdown is wreaking havoc on the carrier's operation. The evidence also establishes that the slowdown has been perpetuated by the East pilots (who are supportive of USAPA) but not by the West pilots based in Phoenix (who oppose and have sued USAPA) or US Airways Express carriers (represented by a union other than USAPA). The N.Y. Action does not involve these slowdown related Activities.

4. The Norris LaGuardia Act does not impact the venue analysis.

Defendants argue that the allegations of bad faith bargaining, abrogation of the grievance and arbitration procedure and unlawful discipline imposed on USAPA supporters contained in the N.Y. Action are germane to the present case because they impact the relief available to US Airways. According to Defendants, Section 8 of the NLGA prohibits the imposition of a slowdown injunction when a carrier comes to court with so-called "unclean hands." Therefore,

Defendants contend that this Court must assess the allegations of unlawful conduct in the N.Y. Action as a predicate to imposing injunctive relief in the present case. This argument fails for three reasons.

First, as explained in more detail in Section C below, the unclean hands allegation does not present a jurisdictional issue for this Court. While in some situations Section 8 of the NLGA may restrict the ability of a court to issue an injunction in labor disputes, courts have made clear that these limitations do not apply where an injunction is necessary to effectuate the purposes of the RLA and protect the public interest in reliable transportation services. *United Air Lines, Inc.* 243 F.3d at 365 n.11. Thus, the allegations in the N.Y. Action are irrelevant to the issues presented in this case.

Second, as set forth in the letters filed by US Airways in the N.Y. Action, the vast majority of the allegations in that case constitute minor disputes and will be presented to a System Board as opposed to the federal court in New York. *See Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S 299, 303-04 and n.4 (1980); *Trans World Airlines,* 480 U.S. at 440. The remaining allegations, related to bad faith bargaining, will be dismissed because Defendants have not adequately alleged, and will not be able to establish, a desire on the part of US Airways not to reach an agreement. *Chicago & N.W. Ry.,* 402 U.S. at 579 n.11

Third, if Defendants could somehow submit evidence of a status quo violation by U.S. Airways in this case (which they cannot), it does not present the danger of inconsistent results or a waste of judicial resources. This Court would be evaluating such evidence to determine the limited issue of whether the unclean hands provision of the NLGA precludes an RLA injunction. The court in New York, if it ever hears the case at all, will be assessing this evidence for a different purpose — to determine whether US Airways has violated Section 2 of the RLA.

5. Granting this Motion will deprive US Airways and the traveling public of any meaningful relief.

The Court has wide discretion in deciding motions to transfer venue and in its application of the first-to- file rule. *Nutrition & Fitness, Inc.,* 264 F. Supp. 2d at 361. The Court should exercise its discretion not to apply the rule to this case because granting Defendants' Motion will be tantamount to denying US Airways and the traveling public the preliminary relief available to them and which they deserve. During the time it will take to send this case to New York, have it assigned to a Judge and have a hearing date arranged for pending motions, USAPA will have free reign to continue its slowdown with no threat of court intervention.[9] Passengers will continue to be stranded, bags will continue to miss their connections and summer travelers will continue to suffer significant inconvenience. In order to effectuate the purposes of the RLA, and preserve the public welfare, the Court should retain this Charlotte-centered case and issue appropriate injunctive relief.

B. US AIRWAYS CLAIM IN THE PRESENT CASE IS NOT A COMPULSORY COUNTERCLAIM IN THE NEW YORK ACTION.

USAPA argues that this case should be dismissed because US Airways' claim in this case is a compulsory counterclaim in the N.Y. Action filed by USAPA. (Def. Mot. at 20-23). Under Federal Rule of Civil Procedure 13(a) a counterclaim is compulsory if "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Because the

[9] Indeed, almost immediately upon completion of the August 12 hearing, USAPA issued a bulletin to its membership inaccurately proclaiming "District Court Denies US Airways' Request for Temporary Restraining Order." Furthermore, in what can only be described as cues to encourage further slowdown activity, the bulletin further stated "we are confident that the court will allow us to continue to advocate for our safety initiative." Similarly, Captain James Ray, a USAPA representative, told the Wall Street Journal that "[t]he Union does . . . support a change in the company's safety culture" and Cleary told the Charlotte Observer that "[t]he pilot group has an obligation in the public interest to continue to operate aircraft as safely as possible." (McGuinness Decl. Exhs. 9-11.) Absent a court order this behavior will not cease.

claims in the two cases do not arise from the same transactions or events there is no compulsory counterclaim.

As discussed in detail above, the claims in the N.Y. Action involve primarily the conduct of the parties during collective bargaining negotiations, and whether the negotiations were conducted in good faith, and the administration of the grievance and arbitration process provided for in the labor contract. The conduct at issue in the present case is USAPA's unlawful communications campaign encouraging the slowdown and the impact of the slowdown activities on the airline operation. In a very similar case decided under the RLA, the court held that a union's claim against a carrier for allegedly abrogating the grievance and arbitration process contained in a collective bargaining agreement, and imposing discipline on employees who engaged in a walkout, were distinct from and not compulsory counterclaims to the carrier's claim against the union in a separate lawsuit challenging the legality of the walkout itself. *American Airlines, Inc. v. Transport Workers Union*, 44 F.R.D. 236 (N.D. Okla. 1968). Accordingly, Defendants' Motion is baseless and should be denied.

Even if US Airways' claim in the present case was a compulsory counterclaim in the N.Y. Action, and it is not, US Airways has no vehicle by which to allege a counterclaim in the N.Y. Action. US Airways has requested permission to file a motion to dismiss in the N.Y. Action. Since counterclaims can only be filed as part of a pleading, and since motions to dismiss are not pleadings under Rule 7 of the Federal Rules of Civil Procedure, US Airways is not permitted to allege any counterclaims in the EDNY. *RLJCS Enterprises, Inc. v. Professional Ben. Trust, Inc.*, 2004 WL 2033067, at *2 and n.4 (N.D. Ill., Sept 2, 2004). Accordingly, Defendants' argument that US Airways should have done so is without merit.

C. THE NORRIS LAGUARDIA ACT DOES NOT PREVENT THIS COURT FROM GRANTING INJUNCTIVE RELIEF.

Defendants contend that the Complaint fails to state a claim and that the Court is without jurisdiction to issue an injunction because US Airways has violated the unclean hands provision of the NLGA. (Def. Mot. at 20-27.) Defendants' argument is contrary to the law and should be rejected.

It is well settled that the NLGA does not bar federal courts from issuing injunctions to prevent violations of the RLA. *Bhd. of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41-42 (1957). The Supreme Court has held that the specific provisions of the RLA take precedence over the more general provisions of the NLGA. *Id.* It is similarly well established that RLA injunctions are permissible even when the two requirements set forth in Section 8 have not been met. Rather, courts employ a balancing test that considers, among other factors, the interests of the traveling public. As the Seventh Circuit stated:

> We have not read § 8 of the NLGA as forming an absolute bar to injunctive relief against status quo violations when the party seeking the injunction has violated either its own status quo obligations or some other legal obligation. . . . Rather, we have 'weigh[ed] the competing equities to determine whether applying section 8's bar to injunctive relief would serve to further underlying purposes of both the RLA and the [NGLA].' In so doing, we have expressly noted that the imperatives of the RLA may over-ride § 8, and that a party's lack of 'clean hands' under § 8 'may be overcome by a balancing of the interests, particularly where it is the public interest involved. . .' While we do not decide the matter, we note that United could make a strong argument here that both the balancing of hardships and public interest weigh in favor of the issuance of the injunction in this case, and that therefore the injunction could have been granted even it United had violated § 8 of the NLGA."

United Air Lines, 243 F.3d at 365 n.11 (citations omitted). Accordingly, Section 8 presents no impediment to an injunction in this case because the public interest is paramount to any rights asserted by USAPA under Section 8 and would best be served by restoring the vital transportation services provided by US Airways. *Illinois C. R.R. v. Bhd. of R.R. Trainmen*, 398

F.2d 973, 975 (7th Cir. 1968); *Alton v. Southern Ry. v. Bhd. of Maint. of Way Employees*, 883 F. Supp 755, 763 (D.D.C. 1995).

Even if Section 8 applied to the facts in this case, and it does not, Defendants have not provided any evidence of unclean hands. They rely solely on an unverified Amended Complaint in the N.Y. Action and statements in their brief that lack citation to evidence. USAPA's unsupported allegations are plainly insufficient to establish a violation of Section 8. *Air Line Pilots Ass'n., Int'l v. United Air Lines, 802 F.2d 886, 902 (7th Cir. 1986); Int'l Ass'n of Machinists & Aerospace Workers v. Northwest Airlines*, 674 F. Supp. 1387, 1391 n.7 (D. Minn. 1987).[10]

Moreover, the issues surrounding the NLGA do not impact the Court's determination of proper venue. As shown above, the NLGA is inapplicable to the present case. Even if US Airways violated the status quo as Defendants argue in the N.Y. Action, and failed to exert every reasonable effort to settle disputes (and both contentions are false), the underlying purposes of the RLA and rights of the traveling public over-ride Section 8 of the NLGA (assuming the NLGA applies at all which it does not). *See United Air Lines,* 243 F.3d at 365 n.11. Thus, the allegations from the N.Y. Action are simply irrelevant and do not overlap with the present case.

CONCLUSION

[10] Defendants contend in their Memorandum In Opposition To Plaintiff's Motion For Temporary Restraining Order that the NLGA prohibits an injunction in this case because US Airways has not offered "clear proof" of the Defendants' involvement in illegal slowdown activity. The clear proof standard, however, applies to actions under an entirely different law, the National Labor Relations Act, against a union for damages and not to requests for injunctive relief. *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 403 (1947). Furthermore, under the RLA, USAPA must both refrain from instigating a slowdown and exert every reasonable effort to stop slowdown activity even if it is not instigated by USAPA. *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300, 1309-10 (11th Cir. 2001). In any event, US Airways offered into evidence many communications from USAPA demonstrating that the Union has orchestrated the

For the reasons discussed above, USAPA's Motion should be denied.

unlawful work stoppage. (See Brief In Support of Plaintiff's Motion For Preliminary Injunction at 10-33.)

This the 15th of August, 2011.

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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 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:

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