

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

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US AIRWAYS, INC.,

Plaintiff,

v.

US AIRLINE PILOTS ASSOCIATION and
MICHAEL J. CLEARY,

Defendants.
-----X

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION
TO ALTER OR AMEND
SEPTEMBER 28, 2011
DECISION AND ORDER**

PRELIMINARY STATEMENT

The Preliminary Injunction issued on September 28, 2011, puts US Airways pilots and USAPA in an impossible position, for, although the Court noted that “it in no way intends to interfere with the duty of pilots in command to ensure the safety of their passengers and equipment” (September 28, 2011 Decision and Order, p. 42) and although the intent of the Order is to restore the status quo that existed before May 1, 2011, the terms of the Order directly contradict various provisions of the Federal Aviation Regulations (FARs) and the company’s Flight Operations Manual (FOM) and require other actions inconsistent with applicable rules, regulations and the applicable collective bargaining agreements that go beyond restoring the status quo.

First, the Order requires USAPA to include in its notice to the pilots “a directive” to “cease and desist” from “writing up all maintenance items” (September 28, 2011 Decision and Order, p. 43, ¶2(c)). This directive is directly contrary to various provisions of the FARs, including Section 121.563 which provides that the “pilot in command shall ensure that all mechanical irregularities occurring during flight time are entered in the maintenance log of the airplane at the end of flight time,” and provisions of the FOM, including Section 4.18.9 (“Difficulties or Deficiencies Noted During Flight”), which directs that pilots are to “Record any discrepancies in the logbook.” (Accurate copies of the FARs and FOMs cited in this Memorandum are attached to the supporting declaration of Captain Michael J. Cleary).

Second, the Order requires USAPA to include in its notice to the pilots “a directive” to “cease and desist” from “calling in fatigued” (September 28, 2011 Decision and Order, p. 43, ¶2(c)). This provision is directly contrary to Section 2.1.1 of the FOM

which states “Flight crewmembers will not report for duty when ... fatigued” and Section 13.7.5 which states “It is ultimately the individual pilot’s responsibility to determine their level of fatigue and ability to safely remain on duty. Any pilot who is too fatigued to fly must . . . [c]ontact Crew Scheduling immediately.”

Third, the Order requires pilots to “cease and desist” from “delaying flights,” “refusing to answer a call from crew scheduling” and “refusing to accept voluntary or overtime flying” (September 28, 2011 Decision and Order, p. 44). By their terms, these provisions are directly contrary to a pilot’s obligation to delay a flight in order to ensure the safety of passengers or equipment, require pilots to answer all calls from crew scheduling (which pilots clearly are not required to do) and require pilots to accept “voluntary” flying (which pilots also are not required to do).

Defendants respectfully submit the Court did not intend these results. Nevertheless this is what the Order, by its terms, directs. Defendants request that the Order be amended as set forth in the proposed amended Order annexed hereto Exhibit A (attached) to make clear that what the Court intends is to restore the status quo that existed prior to May 1, 2011, and not to interfere with a pilot’s safety obligations or re-write the collective bargaining agreement.¹

Defendants emphasize that this motion and the requested amendments are not an attempt to subvert the intention of the Court’s Order or to allow pilots to continue any

¹ Defendant USAPA has issued a set of QandA’s addressing the many questions submitted by pilots about the conflict between various portions of the preliminary injunction and the applicable FARs, the FOM and the collective bargaining agreement. A copy of the QandA’s was filed with the Court as Exhibit 2 to the Second Supplemental Declaration of Michael J. Cleary regarding Compliance. The QandA’s address some of the issues raised in this motion and represent USAPA’s best understanding of the Court’s Order as a whole. The specific conflicts identified in this motion nevertheless remain and should be resolved by the Court for the reasons set forth herein.

alleged job action. Defendants have complied with the Court's Order and will continue to do so. The amendment is necessary to ensure that pilots are not subject to conflicting directions that could seriously affect safety of their passengers and equipment or abrogate their rights under the collective bargaining agreement.

ARGUMENT

Point I.

THE COURT HAS THE POWER TO ALTER AMEND THE PRELIMINARY INJUNCTION ORDER

District Courts have plenary power to modify preliminary injunctions. Fed. R. Civ. Pro. 59(e); see also Transportation, Inc. v. Mayflower Services, Inc., 769 F.2d 952 (4th Cir. 1985); Rankin v. Coleman, 401 F.Supp. 664 (E.D.N.C. 1975) (“[u]nder certain circumstances, it may even be an abuse of discretion where a trial court fails to mold a preliminary injunction to fit the particular case.”); System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright, 364 U.S. 642 (1961) (stating that district courts may modify injunctive relief even if it is in the form of a consent decree).

A party may move the court to alter or amend a judgment pursuant to Rule 59(e) to (1) incorporate an intervening change in the law, (2) to reflect new evidence not available at the time of trial, or (3) to correct a clear legal error or prevent a manifest injustice. Zinkand v. Brown, 478 F.3d 634 (4th Cir. 2007). In essence, Rule 59(e) “gives the district court a chance to correct its own mistake if it believes one has been made.”

Id.

Point II

THE ORDER SHOULD BE AMENDED TO ELIMINATE ANY INCONSISTENCY WITH APPLICABLE FARs AND FOMs REGARDING MAINTENANCE WRITE-UPS AND CALLING IN FATIGUED AND OTHER CONFLICTS WITH APPLICABLE RULES, REGULATIONS AND APPLICABLE COLLECTIVE BARGAINING AGREEMENTS

Defendants submit that the Order be amended as indicated in attached Exhibit A to (a) eliminate the conflict with the provisions of the FARs and the FOM that require pilots to write up all maintenance items, (b) to eliminate the conflict with the FOM requirement that pilots call in fatigued when they are fatigued and (c) to eliminate conflicts with other rules, regulations and the applicable collective bargaining agreements.

A. The Provision of the Order Relating to Write-Ups Conflicts with the FARs, the FOM and Other Company Communications

The Order provides, at ¶2(c), “Including in such notice a directive from USAPA to US Airways’ pilots who are engaging in a concerted refusal to perform normal pilot operations, [by] including, but not limited to . . . writing up all maintenance items, . . . to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same.”

This provision of the Order directly contradicts FAR Section 121.563, which provides the “pilot in command shall ensure that all mechanical irregularities occurring during flight time are entered in the Flightdeck Maintenance Log (FDML) of the airplane at the end of flight time.” This provision of the Order also contradicts the FOM, subjecting US Airways pilots to the untenable choices of contempt of the Court’s Order,

discipline and/or loss of their flight certificate for violating Company policy and the applicable FARs. In fact and directly contrary to the Order, pilots are required to write-up every mechanical discrepancy. The following are illustrative sections of the FOM that mandate write-ups in the FDML:

Section 4.18.9. Difficulties or Deficiencies Noted During Flight, **“Record any discrepancies in the logbook.”** (emphasis added)

Section 8.1.3 Operation. **No aircraft may be operated after maintenance, preventive maintenance, or alterations unless an appropriate entry is made in the applicable document (i.e., FDML, CML, ME-192) by an authorized person.** (emphasis added)

Section 8.3.5. FDML Discrepancy. **An FDML discrepancy entry is required for any failure, malfunction or defect that may affect the safe operation of the aircraft.** (emphasis added)

Section 8.5.1 Cabin Maintenance Logbook (CML)

* * *

Reporting Discrepancies. Once a discrepancy has been identified,

* * *

The captain will:

- Initial new CML write ups in Block #6.
- Make the appropriate write-up in the FDML for items with "FDML" listed after them.
- Make sure all discrepancies are reported to MOC using the Early Alert function in ACARS. See 2.4.2 "Mechanical Discrepancies In-Flight, Early Alert".

• Note •

The captain will always either ensure the discrepancy is in the FDML, or initial the CML write-up entered by the "A" flight attendant. (emphasis added)

Similarly, Section 8.10.6 requires flight crew and maintenance to discuss maintenance items contained in the logbook.

Section 8.10.6 Preflight.

Maintenance Briefing. A formal and thorough preflight briefing will be conducted between the flight crewmembers and maintenance personnel. Discuss the status of the aircraft including logbook entries regarding what was inoperative, repaired or replaced. The purpose and specific items, systems or components to be tested will be discussed in detail.

While it is clear from these examples from the FOM that there are compelling reasons for pilots to err on the side of more rather than less information in the FDML, a 2009 directive from US Airways strongly reinforces this policy. Exhibit “B” annexed to the Cleary declaration is a message to US Airways pilots from Tom Lulkovich, US Airways Director of Flight Safety and Regulatory Compliance dated February 11, 2009. The subject of the memo is “FDML Discrepancy write-ups” and provides as follows in full:

A routine FAA inspection covering aircraft maintenance logbooks revealed several areas of concern with US Airways MEL and FDML procedures. One aspect of the FAA concerns is pilot non-compliance with recording discrepancies in the FDML. **No matter how trivial it may appear in some circumstances, the appropriate entry must be made in the FDML any time maintenance is notified of a discrepancy.** (emphasis added)

Please review Chapter 8 [of the FOM] for guidance on proper FDML discrepancy procedures.

Thank you in advance for your diligence in this matter.

The provision of the Court’s Order relating to write-ups is inconsistent with the FOM provisions and the 2009 memorandum quoted above. This inconsistency has the potential to cause uncertainty and confusion as to what matters should be written up, which ultimately undermines the purposes of the FDML procedures and violates the Federal Aviation Regulations and US Airways policies.

While it is true that the provision of the Order at issue (¶2(c)) is by its terms

directed to “US Airways’ pilots who are engaging in a concerted refusal to perform normal pilot operations” by, inter alia, “writing up all maintenance items,” in fact, this proscription applies universally because all pilots are required to make such write-ups. In terms of the requirement to comply with FOM Section 8.3.5, among other FOM provisions, there is no distinction between a pilot who is engaged in a concerted refusal to perform and a pilot who is performing his or her duties. All US Airways pilots are required to document and record matters in accordance with the FOM. Thus, this provision of the Order affects all pilots and puts all pilots in the wholly untenable position of choosing either compliance with the Order or the FOM and risking contempt for making one choice and discipline for the other.

As set forth in Exhibit A, Defendants request that the Order be modified to eliminate this conflict by explicitly stating that that pilots are directed not to engage in a “list of actions,” which includes “writing up maintenance items,” “to the extent the action would differ from what the pilot would have done before May 1, 2011, or where the purpose or intent of the action is to interfere with normal pilot operations” (¶2(c)). Stated in these terms, the directive does not conflict with the applicable FAR and FOM provisions and remains faithful to the intent of the Court’s Order to re-establish the status quo.

B. The Provision of the Order Relating to Calling in Fatigued Conflicts with the Company Flight Operations Manual and Federal Aviation Regulations

The Order provides, at ¶2(c), “Including in such notice a directive from USAPA to US Airways’ pilots who are engaging in a concerted refusal to perform normal pilot operations, [by] including, but not limited to . . . calling fatigued . . . to cease and desist all such activity and to cease and desist all exhortations or communications encouraging

same.”

This provision of the Order directly contradicts the FOM, subjects US Airways pilots to the untenable choice of contempt of the Court’s Order or discipline and also poses substantial risk to passenger safety for violating Company policy. In fact and directly contrary to the Order, pilots are required **not** to report for duty and/or fly an aircraft when they are experiencing the symptoms of fatigue, and instead must immediately contact the Crew Scheduling department in order to be released from his or her flight. The following are illustrative sections of the FOM that mandate calling in fatigued:

Section 2.1.1. Policy. ... Flight crewmembers will not report for duty when ... fatigued (see paragraph 13.7.5, “Fatigue”)

Section 13.7.5. Fatigue. Upon commencing a duty period or reserve duty period, pilots are presumed to be sufficiently rested to remain on duty ... It is ultimately the individual pilot’s responsibility to determine their level of fatigue and ability to safely remain on duty. Any pilot who is too fatigued to fly must:

- CLT/DCA/PHL Based Crews. Contact Crew Scheduling immediately. If a pilot advises Crew Scheduling of being too fatigued to fly (i.e., other than physical illness), he will be released from the trip ...
- PHX Based Crews. Contact the appropriate Chief Pilot, through the dispatcher, OCC Manager, or Crew Scheduling. A pilot may be released from a trip after consultation with the Chief Pilot as follows:
 - o If a pilot advises the Chief Pilot of being too fatigued to fly (i.e., other than physical illness), he or she will be released from the trip.

The aforementioned provisions of the FOMs clearly and unmistakably provide that it is Company policy, and an FAA rule, that pilots are not fit for duty when fatigued and must immediately report such fatigue to the Company pursuant to the above procedures in order to allow the Company to release the pilot from his or her scheduled

flight/trip.

Testimony at the preliminary injunction hearing demonstrated that US Airways recognizes the validity and necessity of the rules against flying while fatigued. For instance, Captain Lyle Hogg, the Company's Vice President of Flight Operations, stated the following regarding pilot fatigue and the Company's position thereon:

17 Q. Okay. I'm going to refer you to what you had discussed
18 with counsel before, Captain Kubik's communications,
19 learnings with his pilots in regard to pilot fatigue.

20 Would you agree with me that pilot fatigue is an
21 important safety issue that pilots should not fly an aircraft
22 while fatigued?

23 A. Yes, I would agree.

24 Q. Would you also agree with me that Congress has mandated
25 FAA to come out with new standards in regard to pilot
1 fatigue; is that your understanding?

2 A. That's correct.

3 Q. Okay. Would you also agree that one of the reasons
4 they've done that is because of pilot fatigue, which was
5 designated as a reason for the Colgan air crash in Buffalo,
6 where many people lost their lives?

7 A. That was a contributing factor in that accident.

8 Q. Would you agree then that pilots who are fatigued, who
9 do not feel at the top of their form, should not fly an
10 aircraft?

11 A. Yes.

12 Q. Isn't that exactly what Captain Kubik said, pilots who
13 are fatigued should not fly an aircraft?

14 A. In so many words, that's what he said.

See, Evid. Hearing Tr. at 118-19 (emphasis added).

Captain Hogg's testimony concerning the Company's position on this issue mirrors the express policy found in the FOM. The language of ¶2(c) of the Order effectively directing pilots to cease and desist from calling in fatigued is tantamount to ordering pilots to disregard an express Company policy required by the FOM by not removing themselves from duty while fatigued, nor advising the proper Company

officials of such fatigue. This process is important to the safe and efficient operation of the airline and should not be circumvented by the provisions of the Court's preliminary injunction order.

As set forth in Exhibit A, Defendants request that the Order be modified to eliminate this conflict by explicitly stating that that pilots are directed not to engage in a "list of actions," which includes "calling in fatigued," "to the extent the action would differ from what the pilot would have done before May 1, 2011, or where the purpose or intent of the action is to interfere with normal pilot operations" (¶2(c)). Stated in these terms, the directive does not conflict with the applicable FOM provisions, does not direct pilots to ignore actual fatigue that may risk passenger safety and remains faithful to the intent of the Court's Order to re-establish the status quo.

C. The Order Should be Amended to Eliminate Provisions that Interfere with Safety and Requires Action Inconsistent with The Applicable Collective Bargaining Agreements.

Defendants submit that other provisions in ¶2(c) of the Order conflict with provisions of the FARs and FOM, go beyond restoring the status quo, conflict with the applicable collective bargaining agreements and are overbroad. For example, in ¶2(c) of the Order, USAPA is required to give notice to pilots that they are prohibited from "delaying flights." However, as the Court is aware, there are circumstances under which pilots would be derelict in their duties and in violation of FARs and FOM if they *fail to* delay flights. It is overbroad and conflicts with the duty of the pilot in command to ensure the safety of his or her passengers and equipment to direct pilots to cease and desist from "delaying flights" without recognition of the myriad situations in which doing the exact opposite of that directive is necessary, proper and in compliance with FARs.

Similarly overbroad are requirements stated in ¶2(c) of the Order that pilots must “cease and desist” from “refusing to answer a call from crew scheduling” and “refusing to accept voluntary or overtime flying” (September 28, 2011 Decision and Order, p. 44). Defendants understand that the purpose of the Order is to restore the status quo but these requirements go beyond restoring the status quo to amending the collective bargaining agreement and, by their literal terms, require pilots to answer every call from crew scheduling and to accept “voluntary” flying. In general, pilots are only required to answer calls from crew scheduling when they are on duty as a reserve pilot. Pilots are not required and never have been required to accept voluntary or overtime flying.

As set forth in the proposed Amended Order, Defendants request that the Order be modified to eliminate these conflicts by explicitly stating that that pilots are directed not to engage in a “list of actions,” which includes “delaying flights,” “refusing to answer calls from crew scheduling” and “refusing to accept voluntary or over time flying,” “to the extent the action would differ from what the pilot would have done before May 1, 2011, or where the purpose or intent of the action is to interfere with normal pilot operations” (¶2(c)). Stated in these terms, the directive does not conflict with the applicable FAR and FOM provisions, does not amend the applicable collective agreements and remains faithful to the intent of the Court’s Order to re-establish the status quo.

D. The Order Should be Amended to Affirmatively Express Non-Interference with Pilots’ Judgment as to Safety and Airworthiness and a return to the Status Quo

The Court concluded its Opinion with the following statement concerning the duty of pilots in the operation of their aircraft: “To the extent that USAPA is concerned

that an injunction would hamper its legitimate safety efforts, this Court declares that it in no way intends to interfere with the duty of pilots in command to ensure the safety of their passengers and equipment.” (September 28, 2011 Decision and Order, p. 42)

The Court’s recognition of the primacy of the pilot in command is fully consistent with the FOM, for example Section 1.3.4 thereof, titled “Captain’s Authority & Status”:

This manual does not and could not cover every contingency. US Airways expects its captains to use common sense and good judgment, especially in those situations not specifically covered. The captain is the pilot in command (PIC) of the aircraft and has authority over all assigned crewmembers from the time they report for duty until termination of the flight. This includes transportation to and from the layover facility. Crewmembers will promptly comply with a captain’s order. Conflicting procedures and instructions should be brought to the captain’s attention; however, if the order stands, it is to be obeyed. **The captain is solely responsible for his aircraft, crew and passengers. He is the final authority in Flight Operations matters ensuring all flight operation activities for his flight are completed in accordance with Company policy and procedures.** If the captain is dissatisfied with any aspect of the aircraft’s airworthiness and/or maintenance status, or if he is not sure the operation can be safely executed, then the operation will stop until he is completely satisfied. This includes, but is not limited to, matters associated with checklists, weight and balance, de/anti-icing, fueling, etc. (emphasis added)

Defendants respectfully submit it is critically important that the Court’s Order — as opposed to the Decision — affirmatively state and expressly support the FOM provision quoted above. Such a statement is necessary to eliminate doubt that pilots are required to fulfill their obligations under the applicable provisions of the FARs and FOM. This is exactly what the District Court did in United Airlines v. IAM, 243 F.2d 349 (7th Cir. 2001), one of the principal cases cited by Plaintiff and one which involved important safety considerations. There the District Court explicitly provided in its order, “This notice in no way is meant to have impact upon each mechanic’s exercise of their usual diligence in providing safety for all aircraft.” Id. at 358.

For the reasons stated in section C, the Order should equally state that it is not intended to abrogate or modify any rights under the established collective bargaining agreements. The Court's authority in this case is, as Plaintiff has argued, to restore the status quo. That authority does not extend to amending the applicable collective bargaining agreements or requiring pilots to act in ways inconsistent with the status quo.

Accordingly, as set forth in the Proposed Amended Order, Defendants request that the Order be amended to add the following paragraph:

4. Nothing in this Order shall be construed to interfere with the duty of pilots in command to ensure the safety of their passengers and equipment, to require pilots to violate any obligation imposed by Federal Aviation Regulations or the US Airways Flight Operations Manual or to modify or abrogate any provision of any applicable collective bargaining agreement.

CONCLUSION

For the foregoing reasons, the Preliminary Injunction should be amended as set forth in the Proposed Amended Order.

Dated: October 19, 2011
Charlotte, North Carolina

Respectfully submitted,

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