

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 BRIEF IN OPPOSITION  
TO DEFENDANTS’ MOTION  
TO ALTER OR AMEND  
SEPTEMBER 28, 2011  
DECISION AND ORDER**

Plaintiff US Airways, Inc. (“US Airways”) opposes the Motion to Alter or Amend September 28, 2011 Decision and Order filed by Defendants US Airline Pilots Association (“USAPA”) and Michael J. Cleary (collectively, “Defendants”) as follows:

**PRELIMINARY STATEMENT**

On September 28, 2011, this Court issued its Memorandum Opinion and Order (the “Court’s Order”) granting US Airways’ request for a preliminary injunction. On October 19, 2011, without first meeting and conferring with US Airways as required by Local Rule 7.1(B), Defendants filed their Motion to Alter or Amend the Court’s Order. Defendants claim that the Court’s Order “could seriously affect [the] safety of [US Airways’] passengers and equipment” and puts pilots in an “impossible position” by requiring them to violate various provisions of the Federal Aviation Regulations (“FARs”) and US Airways’ Flight Operations Manual (“FOM”). But the Court’s Order in no way interferes with legitimate safety efforts or requires pilots to violate these rules — and Defendants know that. Indeed, even before filing this motion, Defendants provided all US Airways’ pilots with a “Q and A,” specifying precisely what the Court’s Order prohibits and what it allows.

Defendants' motion is primarily focused on paragraph 2(c) on page 43 of the Court's Order — the plain language of which Defendants grossly distort. Paragraph 2(c) simply requires that USAPA issue a directive to those US Airways pilots who are engaging in a concerted refusal to perform normal pilot operations to cease and desist all such activity and to cease and desist all communications encouraging such activity. While paragraph 2(c) provides some specific examples of the ways in which pilots have been engaged in a concerted refusal to perform normal pilot operations, contrary to Defendants' contention, it in no way requires or suggests that pilots should not write up *legitimate* maintenance items or should fly an aircraft when they are *actually* fatigued. And, the Court's Order itself makes that abundantly clear.

Moreover, contrary to Defendants' representations to this Court, Defendants are fully aware of what is and what is not required by the Court's Order, and they know that the Court's Order does not permit or require pilots to violate the FARs or the FOM. In an October 17, 2011 publication that was issued to all US Airways' pilots, USAPA President Cleary states: "USAPA does not understand that the Injunction permits or requires pilots to violate the Federal Aviation Regulations, the Flight Operations Manual or the applicable Pilot Handbook. Pilots cannot, however, use these rules as a pretext to unnecessarily delay or cancel a flight, slowdown operations or otherwise interfere with normal flight operations." That same document explains in detail what is required of pilots by the Court's Order.

Defendants' instant motion and its publications to US Airways' pilots are eerily reminiscent of Defendants' actions in their illegal slowdown campaign. Under the guise of safety, Defendants have even mischaracterized the Court's Order to the Federal Aviation Administration ("FAA") in an apparent attempt to bolster their motion — despite the fact that there is nothing at all ambiguous about the Court's Order.

For these reasons, Defendants' motion should be denied.

### **STATEMENT OF FACTS**

On October 17, 2011 (two days before Defendants filed their motion), USAPA sent a message entitled "President's Update — Injunction Q and A" to all US Airways' pilots announcing that it intended to file such a motion. (*See* Declaration of Lyle Hogg in Support of Plaintiff's Opposition ("Hogg Decl.") ¶ 2, Ex. 1.) In that message, USAPA President Cleary states to all US Airways' pilots:

[W]e will be asking the District Court to clarify/modify its order to make it clear that pilots are still required to obey the Federal Aviation Regulations, Flight Operations Manual and Pilot Handbook; [*sic*] and in particular, must write up maintenance issues as those rules and regulations require, and must take appropriate action to ensure the safety of their passengers and equipment, including calling in fatigued when they are fatigued. USAPA has the right to appeal the District Court's decision to the United States Court of Appeals for the Fourth Circuit, and will decide whether to appeal only after the request for clarification/modification is decided . . . The request for clarification/modification will be filed within the next few days and we expect the Court will act promptly on the motion.

(*See id.*)

Incredibly, in the same October 17, 2011 "Q and A" publication announcing USAPA's intention to file a motion to alter or amend the Court's Order due to alleged conflicts with the FARs and FOM, USAPA makes clear that it fully understands that the Court's Order does not permit or require pilots to violate the FARs or the FOM: "USAPA does not understand that the Injunction permits or requires pilots to violate the Federal Aviation Regulations, the Flight Operations Manual or the applicable Pilot Handbook." (*See id.*)

And in an earlier publication entitled "President's Update to the Board," dated October 14, 2011, which was posted on a public website ([http://airlineforums.com/topic/49837-us-pilots-labor-discussion/page\\_\\_st\\_\\_24416](http://airlineforums.com/topic/49837-us-pilots-labor-discussion/page__st__24416)), USAPA President Cleary references the "Q and A," and

expressly recognizes its potential for diluting the Court's Order: "We have been working on a Q and A document to publish to the pilots shortly that will address the concerns. We have been deliberate in the pace of that communication so as to provide separation from our PI requirements that we [*sic*] due on October 4 and any follow on explanations to the pilots. Specifically, we wanted to [*sic*] the Court to see our compliance with the directives as a standalone action undiluted by commentary or explanation." (*See id.* ¶ 3, Ex. 2.)

On October 18, 2011, the day after USAPA's release of the "Q and A" to all pilots announcing that Defendants intended to file a motion to modify the Court's Order, US Airways' pilots received an anonymous text message stating: "No judge can order you to compromise safety. Tempe [a reference to the location of US Airways' headquarters] will find out that this is the new norm. Do not be intimidated. Be strong." (*See id.* ¶ 4, Ex. 3.) While this anonymous text message did not expressly reference Defendants' motion to alter or amend the Court's Order, the timing and substance of the message strongly suggest that it is in reference to Defendants' motion.<sup>1</sup>

In addition to sending a message to all US Airways' pilots prior to filing this motion, USAPA President Cleary also attempted to enlist the assistance of the FAA in challenging this Court's Order. On or about October 12, 2011, the FAA contacted Paul Morell, US Airways'

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<sup>1</sup> This is not the only post-injunction anonymous message encouraging the illegal slowdown. On October 10, 2011, an anonymous note was placed in a pilot's mailbox in the Charlotte crew room, chastising the pilot for making up time in the air by arriving only seven minutes late after taking off 43 minutes late. (Hogg Decl. ¶ 5, Ex. 4.) The note states: "There is no excuse for this[.] We need everyone on board[.] [T]o learn more go to [angrypilot.org](http://angrypilot.org)[.] GET ON BOARD[.] Your [*sic*] not fair to your brothers who are working for a [standard] contract[.]" (*Id.*) As a result, US Airways sent USAPA a letter asking that USAPA communicate a clear and complete condemnation of these messages and make all efforts to identify who is involved. (*See* Declaration of Sloane Giddon in Support of Plaintiff's Opposition ("Giddon Decl.") ¶ 2, Ex. 1.) In response to that request, USAPA posted notices on the public and password-protected portions of its website concerning these messages. (*See id.* ¶ 3, Ex. 2.)

Vice President, Safety and Regulatory Compliance, and informed him that USAPA President Cleary had contacted the FAA multiple times making the same claims that Defendants now make to this Court — that the Court’s Order somehow requires pilots to violate the FARs and the FOM with respect to maintenance write-ups and fatigue calls. (*See* Declaration of Paul Morell in Support of Plaintiff’s Opposition (“Morell Decl.”) ¶ 2.) The FAA informed Mr. Morell that it had advised USAPA President Cleary to put any concerns he had in writing. (*See id.*) To date, US Airways has heard nothing further from the FAA.

USAPA President Cleary has confirmed his communications with the FAA regarding the Court’s Order in his October 14, 2011 Update to the Board. (*See* Hogg Decl. ¶ 3, Ex. 2.) In that message, USAPA President Cleary states: “I had a conversation with the FAA about our PI on Tuesday afternoon as well. I wanted to alert the FAA to the sense of confusion that our pilots are experiencing over the PI. We know that FAA understands the pilots’ requirements to adhere to FAR and FOM standards and want to be sure we are on the necessary common footing with them on these critical pieces. My conversations with them will continue.” (*See id.*)

Immediately after filing the motion, on October 19, 2011, USAPA publicized its motion in a “Legal Update” to all pilots entitled “USAPA Files Notice of Motion to Clarify Preliminary Injunction:”

Today USAPA asked the United States District for the Western District of North Carolina to clarify the Preliminary Injunction issued on September 28, 2011, to make clear that the injunction does not permit or require pilots to violate any provision of the Federal Aviation Regulations or the Flight Operations Manual, and does not supersede the applicable collective bargaining agreements. The *Notice of Motion*, along with the *Brief in Support of the Motion*, *Declaration and Support of the Motion*, supporting exhibits, and the *Proposed Amended Order* are posted in the Legal Library on the USAPA website.

Pilots are reminded that the original Order of the Court remains in effect and pilots, therefore, continue to be subject to the Court’s Order enjoining them from participating in any slowdown, strike, work stoppage, sick-out, work to rule

campaign, or any concerted refusal to perform normal pilot operations in violation of the RLA.

(*See id.* ¶ 6, Ex. 5.)

On October 24, 2011, in a Philadelphia Domicile Update, USAPA again publicized the motion, stating: “As you know, the injunction in some cases appears to conflict with FAR and FOM requirements. A Motion to Clarify has been filed and we expect a reasonably rapid response to our concerns.” (*See id.* ¶ 7, Ex. 6.) And in the October 26, 2011 edition of “The Iron Compass,” Defendants again publicized the motion, telling pilots that the Court’s Order “puts US Airways pilots and USAPA in an impossible position” because “the terms of the Order directly contradict various provisions of the Federal Aviation Regulations (FARs) and the company’s Flight Operations Manual (FOM).” (*See id.* ¶ 8, Ex. 7.)

Given that the Court’s Order does not contradict the FARs or the FOM, and further given that Defendants know that based on their own publications, these repeated messages to all US Airways’ pilots publicizing the motion serve only to create the alleged confusion that Defendants claim they are attempting to correct. That Defendants are attempting to create, rather than correct, confusion is further demonstrated by the fact that at no time prior to filing the motion did counsel for Defendants contact US Airways’ counsel in an attempt to resolve the issues raised in the motion — as they are required to do by Local Rule 7.1(B).

### **ARGUMENT**

“[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.” *Fakih v. United States*, No. 11-CV-87-3-V, 2011 U.S. Dist. LEXIS 107478, at \*5-6 (W.D.N.C. Sept. 21, 2011) (denying motion). As noted by Defendants, the grounds for altering or amending a judgment under Rule 59(e) of the Federal Rules of Civil Procedure are to: (1) incorporate an intervening change in law; (2) reflect new evidence not available at trial; or (3)

correct a clear legal error or prevent a manifest injustice. While Defendants cite these alternative grounds, they do not identify the ground on which they are relying. In any event, for the reasons set forth below, Defendants' motion in no way satisfies any of the possible grounds.

**I. The Court's Order Is Clear And Defendants' Motion Grossly Distorts The Plain Language In An Attempt to Manufacture Confusion When USAPA's Own Publications Confirm That It Fully Understands The Court's Order.**

Defendants' assertion that paragraph 2(c) of the Court's Order directs pilots not to write up legitimate maintenance items and not to call in fatigued when they are actually fatigued is a gross distortion of the Court's Order that is directly contradicted by: (1) the plain language of the Court's Order; (2) the Court's express statement in the Order that the Order is not intended to interfere with legitimate safety efforts; and (3) USAPA's own published interpretation of the Court's Order communicated to all US Airways' pilots.

Paragraph 2(c) of the Court's Order states:

2. USAPA shall take all reasonable steps within its power to prevent the aforesaid actions and to refrain from continuing the aforesaid actions if commenced, including, but not limited to, the following: . . .

*c. Including in such a notice a directive from USAPA to US Airways' pilots who are engaging in a concerted refusal to perform normal pilot operations, including but not limited to, slow taxiing, writing up all maintenance times, calling in fatigued, delaying flights, refusing to answer a call from the scheduling, refusing to fly an aircraft that meets the requirements for flight, or refusing to accept voluntary or overtime flying, to cease and desist all such activity and to cease and desist all exhortations or communications encouraging same.*

(Docket No. 72 at 43 (emphasis added).)

The plain language of paragraph 2(c) simply requires that USAPA issue a directive to those US Airways pilots who are engaging in a concerted refusal to perform normal pilot operations to stop. That is all. Slow taxiing, writing up maintenance items, calling in fatigued, and delaying flights are only examples of ways in which pilots have been interfering with normal operations and that are to be ceased. But paragraph 2(c) in no way directs, requires, or even

remotely suggests that pilots should not write up *legitimate* maintenance items or not call in fatigued when they are *actually* fatigued. Indeed, the directive required by paragraph 2(c) only applies to those US Airways pilots who are engaging in a concerted refusal to perform normal pilot operations. Thus, by its own terms, paragraph 2(c) does not even apply to pilots who are performing normal pilot operations or who are engaging in any of the listed actions for legitimate safety reasons.

Moreover, the Court's Order at page 42 (the page before paragraph 2(c) at page 43) expressly states: "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. The court's injunction therefore should not dissuade good faith efforts to ensure the safe operation of the airline." (*See id.* at 42.)<sup>2</sup> While Defendants' motion suggests that this language somehow is not actually part of the Court's Order, the Court's Memorandum Opinion and Order is a single document.

Further, contrary to the representations made to this Court in their motion, Defendants know full well that the Court's Order is in no way intended to interfere with legitimate safety efforts and does not require that pilots refuse to comply with applicable FARs or the FOM. (*See Hogg Decl.* ¶ 2, Ex. 1.) The same is also true for the specific pilot actions regarding maintenance write-ups and fatigue calls raised by Defendants in their motion. The Court has expressly addressed these issues in the Order, and Defendants have expressly acknowledged that they are aware of that fact and understand the Court's Order on these issues.

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<sup>2</sup> Defendants' understanding of the significance of this language is evident from an "Urgent DCA Domicile Update," dated October 2, 2011, which USAPA issued as part of its efforts to comply with the Court's Order. In that publication, the portion of the Court's Order quoted above confirming that it is not intended to interfere with good faith safety efforts is the *only* language highlighted in bright yellow. (*See Hogg Decl.* ¶ 9, Ex. 8.)

With respect to maintenance write-ups, the Court's Order states that "[w]hile there is no prohibition against writing up any and all maintenance items . . . pilots ordinarily exercise their authority and discretion to not write up deferrable minor items when it could produce a delay or cancellation of a flight . . . In a slowdown, discretion can be exercised as a pretext for creating flight delays and cancellations when pilots reject aircraft even though they have no genuine safety concerns." (Docket No. 72 at 14.) Defendants have admitted that they understand the plain meaning of the Court's Order, telling pilots that Defendants do "not understand that the Injunction permits or requires pilots to violate [the FARs and FOMs regarding maintenance write-ups]" and that if "there is something wrong with [an] aircraft [the pilot] is required to enter it in the log book." (*See* Hogg Decl. ¶ 2, Ex. 1.)

Similarly, with respect to fatigue calls, Defendants assert that the Court's Order does not permit legitimate fatigue calls as required by applicable rules and regulations. But the Court's Order expressly addresses the issue regarding fatigue calls raised by the Motion, stating that "[u]nder US Airways' policies as well as FAA standards, a fatigued pilot should not fly an airplane" and that it is "ultimately the individual pilot's responsibility to determine his or her level of fatigue, and pilots who report that they are fatigued are released from their trip." (*See* Docket No. 72 at 16.) And Defendants have expressly acknowledged that they understand the plain meaning of the Order regarding fatigue calls, telling pilots that "if [a pilot is] fatigued so that accepting a flight would endanger passengers or equipment, [the pilot] should so inform flight operations," but that "if [a pilot is] not fatigued, [the pilot] may not call in fatigued." (*See* Hogg Decl. ¶ 2, Ex. 1.)

## **II. Defendants' Proposed Re-Write Of The Court's Order Would Improperly Limit The Court's Order.**

Paragraph 2(c) of the Court's Order expressly requires that USAPA issue a directive to all US Airways' pilots who are engaging in a concerted refusal to perform normal pilot operations to cease and desist all such activity. It also provides a representative list of examples of the ways that pilots might refuse to perform pilots operations, using the language "*including but not limited to.*" (See Docket No. 72 at 43 (emphasis added).) Accordingly, the Court's Order requires that USAPA issue a directive to US Airways' pilots who are engaging in a concerted refusal to perform normal pilot operations to cease and desist all such activity — regardless of whether they are doing so by engaging in one of the specific examples listed in paragraph 2(c) or some other behavior not listed (*i.e.*, the Order requires that USAPA issue a "blanket" cease and desist directive to pilots who are engaging in a concerted refusal to perform normal pilot operations).

Defendants, however, have proposed a re-write of paragraph 2(c) that would remove the blanket directive and replace it with a directive informing pilots to cease and desist only the specific "following listed actions" to the extent the action would differ from what the pilot would have done before May 1, 2011, or where the purpose or intent is to interfere with normal pilot actions. Defendants' proposed re-write is much more limited in scope and would not encompass other forms of concerted action that pilots have used to interfere with normal pilot operations. Given the complexity of US Airways' operations, it would be impossible to come up with a complete list of the ways in which a pilot could slow down US Airways' operations. Thus, Defendants' proposed amendment is inappropriate and should be rejected for this reason as well.

**III. The Applicable Legal Precedent Confirms That The Court's Order Is Appropriate And Not In Need Of Amendment.**

The appropriateness of the Court's Order is further confirmed by the fact that the language in the Court's Order is nearly identical to that of the injunctions issued in two other cases that are directly on point, *United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 185 L.R.R.M. (BNA) 2562 (N.D. Ill. Nov. 17, 2008), *aff'd*, *United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257 (7th Cir. 2009), and *United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers*, 243 F.3d 349 (7th Cir. 2001).<sup>3</sup> In those cases, the injunctions effectively ended unlawful slowdown campaigns, but were not the subject of motions to alter or amend. (See Giddon Decl. ¶¶ 4-5, Ex. 3-4.)

Before the injunction issued in *United v. ALPA*, in response to supposed "safety concerns" of the sort Defendants have raised here, the court held that it "trusts that all of the parties have the ability to distinguish between good faith efforts to address safety issues, including fatigue, and the use of safety as a pretext for an unlawful job action and, furthermore, that enjoining the job action will not dissuade any of the parties from good faith efforts to ensure the safe operation of the airline." See 185 L.R.R.M. (BNA) 2562, 2595. The parties here have that same ability to distinguish between good faith efforts to address safety issues and the use of safety as a pretext for an unlawful job action — and pilots know whether they are engaging in an action for legitimate safety reasons or in order to slow down operations.

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<sup>3</sup> Similar to the Court here, the district court in *United Airlines v. IAM* stated that: "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." See 243 F.3d at 358. Defendants suggest that this supports their position that similar language should be added here, but as noted above such language already exists in the Court's Order. (See Docket No. 72 at 42.) The Court's Memorandum Opinion and Order is a single document, and Defendants' suggestion that the Court must repeat on page 43 what it already states on page 42 makes no sense.

## CONCLUSION

The Court's Order is clear, and there is no basis for amending it — as confirmed by the nearly identical injunctions approved by other courts. The plain language of paragraph 2(c) simply requires USAPA to issue a directive to pilots who are engaging in a concerted refusal to perform normal pilot operations to stop all such activity. Defendants grossly distort this plain language in an attempt to manufacture confusion. If Defendants truly believed that the Court's Order required pilots to violate the FARs or the FOM, they would not have issued a publication to all pilots stating the exact opposite. They also would have reached out to US Airways' counsel to confer before filing their motion and then immediately sought relief from this Court if unable to reach a resolution. Instead, Defendants spent their time contacting the FAA regarding the Court's Order and crafting publications announcing their upcoming motion to all pilots. For these reasons, there is no basis for Defendants' motion, and it should be denied.

This the 1st of November, 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 to the following counsel of record by utilizing the Case Management/Electronic Case Filing System, which will send notice electronically to the following counsel of record:

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