IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:11-CV-371-RJC-DCK

US AIRWAYS, INC., Plaintiff, vs. US AIRLINE PILOTS ASSOCIATION and MICHAEL J. CLEARY, Defendants	**REPLY MEMORANDUM OF LAW TO PLAINTIFF'S OPPOSITION TO USAPA'S MOTION TO VACATE THE PERMANENT INJUNCTION** (Oral Argument Requested)

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of defendant US Airline Pilots Association ("USAPA") in reply to Plaintiff's Brief in Opposition to Defendant's Motion to Vacate the Permanent Injunction. Silent as to the application of a "flexible standard" in determining whether it is no longer equitable for an injunction that has prospective application to remain in place, but conceding a change in factual conditions, plaintiff nevertheless argues that the permanent injunction, now in place for over two years, should remain indefinitely because the parties will soon be negotiating another agreement. However, the pending negotiations were not the basis of either plaintiff's complaint seeking an injunction or the Court's findings underlying entry of the permanent injunction. The factors courts identify in determining whether to vacate an injunction, as well as the interests of justice, all militate in favor of granting this application to vacate the permanent injunction against USAPA and its members.

ARGUMENT

POINT I

USAPA HAS MET ITS BURDEN OF ESTABLISHING CHANGED CIRCUMSTANCES WARRANTING DISSOLUTION OF THE PERMANENT INJUNCTION

A. Dissolution of the permanent injunction on the eve of JCBA negotiations is not premature.

US Airways argues the permanent injunction should remain because negotiations for a JCBA are just beginning, and as a check against the potential for improper conduct by USAPA in connection with those negotiations. US Airways Brief, at 13. While claiming that the "MOU was intended to ensure stable labor relations by establishing the ***majority*** of the terms and conditions of employment for pilots" (*id.*, at 9, emphasis added), US Airways nevertheless argues that the timing of USAPA's motion, on the eve of JCBA negotiations, "creates a strong inference that USAPA is seeking the ability to engage in an illegal slowdown . . ." (*id.*, at 13). US Airways' snide comment is completely unsubstantiated, and its attempt to inflate the importance of the JCBA is contradicted by its own statements. Indeed, in other court filings, US Airways has attached little importance to the JCBA in relation to the MOU, stating:

> As part of the merger process, American and US Airways entered into a Memorandum of Understanding ("MOU") with the unions representing the pilots at the two carriers (Allied Pilots Association or "APA" at American and USAPA at US Airways) that constitutes a collective bargaining agreement among the four parties. *See* MOU, *In re AMR Corporation*, United States Bankruptcy Court, Southern District of New York, 13-01282-shl, Doc. 20-2, attached hereto as Exhibit A. That collective bargaining agreement was subsequently ratified by the US Airways pilots overwhelmingly. In that agreement, the parties agreed that once the merger closes, with limited exceptions, the pilots at US Airways would immediately transition, without any further ratification vote, to the terms established in the new six-year American Airlines/APA collective bargaining agreement, which was approved by the bankruptcy court on December 19, 2012, as modified by the MOU. The parties recognized that they would still need to harmonize practices currently applicable to the two pilot groups, and accordingly, they agreed to an expedited process for compiling a new, final "joint" collective bargaining agreement ("JCBA"), but also agreed that the economic and most critical aspects of the modified six year American/AP agreement would remain in

> effect throughout . . . Because **the JCBA will only implement, rather than alter, the economics of the MOU** and would only make other limited changes contemplated by the MOU, the JCBA reached through arbitration will not be subject to membership ratification.

Addington v. US Airways, Docket No. 2:13-cv-00471-ROS, Doc. 57, at 3-4 (emphasis added).

At the time US Airways commenced this action against USAPA, the parties were involved in bitter and long-standing RLA Section 6 contract negotiations. In issuing a preliminary injunction, the Court found that the objectionable elements of USAPA's safety campaign were expressly linked to grievances over working conditions and obtaining "an industry standard contract." Memorandum Opinion and Order, Doc. 72, at 6-7, 13, 33. US Airways claim that, "USAPA is seeking the ability to engage in an illegal slowdown" (US Airways Brief, at 13) as an attempt to gain leverage in contract negotiations, it ignores its own statement that the time to gain leverage in the contract negations has long passed with the signing of the MOU. However, no such illegal conduct occurred during the MOU negotiations. The MOU provides USAPA members a contract with significant pay increases and job protections that is within the industry standard, and USAPA's 2011 grievances with US Airways are no longer a source of contention between the parties as it was at the time the injunction went into effect. US Airways' admission in its court filings that the JCBA merely implements, rather than alters, the economics of the MOU, puts the lie to US Airways' current assertion that there is a current threat of an illegal slowdown by USAPA during these negotiations. Moreover, as US Airways is well aware, the MOU provides for final and binding interest arbitration to resolve the terms of the JCBA if negotiations are not complete within 30 days of the NMB's certification of the bargaining representative for the merged American Airlines pilots. *See* MOU, ¶27, Doc. 94-2, Ex. A to the Declaration of Patrick Szymanski. There is no basis for or incentive for USAPA to engage in a job action as leverage in negotiations given that the terms of the JCBA will be

achieved either through agreement or arbitration. US Airways' claim that dissolution of the permanent injunction is premature because of the impending JCBA negotiations is without merit.

B. USAPA has fully complied with the terms of the injunction.

US Airways claims that "because USAPA did not stop its illegal slowdown until the Court issued the injunction, USAPA's compliance with the injunction is a reason for maintaining the injunction – not vacating it." US Airways Brief, at 13-14. This argument is meaningless and would be grounds to maintain every injunction in place in perpetuity. However, injunctions are not meant to be in place indefinitely. On the contrary, they must be "carefully limited in time and scope to avoid unwarranted, nonremedial effects." *Railway Labor Execs. Ass'n v. Wheeling & Lake Erie Ry. Co.*, 756 F.Supp. 249, 255 (E.D. Va. 1991) (internal citations omitted), *aff'd* 943 F.2d 49 (4th Cir. 1991). Thus, the relevant inquiry is whether USAPA has complied with the injunction, as to which there is no dispute that USAPA is in full compliance.

USAPA's continued compliance is in contrast to the continued misconduct of the Local in *Holiday Inns, Inc. v. Holiday Inn*, 645 F.2d 239 (4th Cir. 1981), cited by US Airways in support of its argument that USAPA must remain subject to contempt sanctions for violation of the injunction. US Airways Brief, at 13.

In denying the defendant Local's motion for relaxation of the injunction, the court in *Holiday Inns* found that "the Local's misconduct evinces no hint of cessation or dilution. On the contrary it has never lessened in its constancy." *Id.*, at 242. While "compliance is what the law expects" (US Airways Brief, at 13[1]), the Supreme Court has held that Rule 60(b), in applying a less stringent, more flexible standard, provides that "a party may be relieved from a final

[1] US Airways cites to *MicroStrategy, Inc. v. Business Objects, S.A.*, 369 F.Supp.2d 725 (E.D. Va. 2005) for the proposition that "compliance is what the law expects." The injunction in *MicroStrategy* had been in place for nine months, and the court noted that defendant's compliance for only nine months was "too brief to warrant dissolution when balanced against the time that Business Objects possessed the documents." *Id.*, at 735. Here, the injunction has been in place for two years and three months.

judgment or decree where it is no longer equitable that the judgment have prospective application." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992). In light of USAPA's continued compliance, there is no basis to assume, speculate, or imply that the prohibited conduct will occur in the future, including during JCBA negotiations. US Airways' claim of a "realistic risk" that USAPA will resort to illegal self-help measures "throughout the JCBA negotiations process and beyond" (US Airways Brief, at 17) is unsupported, and contradicted by its previous court filings. The permanent injunction should be vacated.

C. US Airways' claim that US Airways and American are now operating as a single transportation system makes compliance substantially more onerous.

In discussing the changed factual circumstances since issuance of the injunction, US Airways states that "[t]he MOU provides that the negotiations for a JCBA will be completed no later than 30 days after the NMB [National Mediation Board] determines that the combined US Airways/American operation constitutes a single transportation system and certifies the collective bargaining representative for the single carrier's pilots." US Airways Brief, at 9-10. It is US Airways' position that "American and US Airways now operate as a single transportation system", and thus, the APA's petition for single carrier status should be processed. *Id.*, at 10. As noted by US Airways, USAPA opposes the APA's petition, and submits that the two airlines are not operating as a single transportation system.

Assuming, without conceding, that US Airways' argument is valid, the conclusion is that the permanent injunction is now moot.[2] If the airlines are operating as a single transportation

[2] While it is USAPA's position that the two airlines are not operating as a single transportation system, and in responding to US Airways' argument, USAPA is not seeking a ruling from this Court on that issue. The issue is currently before the NMB, which has exclusive jurisdiction to decide whether the two airlines are operating as a single carrier. 45 U.S.C. § 152, Ninth; *IBT v. Texas Int'l Airlines*, 717 F.2d 157 (5th Cir. 1983). Regardless of how the NMB rules, the factors courts have identified as relevant to the determination of whether to vacate an injunction support the dissolution of the permanent injunction.

system flying under the name "American Airlines"[3], questions are raised as to who the injunction protects, and which pilots are bound by it. The injunction is meant to protect US Airways, not the merged airline. By its terms, the injunction applies to USAPA and the US Airways pilots, not the pre-merger American pilots. If all the pilots are employed by a single carrier, then the terms of the injunction make no sense and are incapable of being enforced. For example, there would be confusion as to what would happen if a pre-merger American pilot commits an act that is prohibited by a pre-merger US Airways pilot. This sets up the wholly untenable possibility that pilots working for the same company, flying the same aircraft on the same routes, would be subjected to different rules of conduct and discipline. One pilot would be subject to the grievance procedure while the other may be facing the contempt of this Court, resulting in disparate treatment of the pilots of the merged American Airlines.

The injunction prohibits US Airways pilots from refusing to perform "normal pilot operations", including but not limited to, "slow taxiing, writing up all maintenance items, 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 overtime flying . . . " Doc. 72, at 43-44. The above conduct is not in and of itself illegal. For instance, [u]nder US Airways policies as well as FAA standards, a fatigued pilot should not fly an airplane." Doc. 72, at 16. Pursuant to US Airways policy and FAA standards, it is "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." *Id.* US Airways claimed, and the Court agreed, that USAPA was encouraging "a concerted effort by pilots to decline to fly under the pretense of 'fatigue' in order to disrupt operations." *Id.* If, as US Airways claims, the merged airlines are operating as a

[3] On the effective date of the merger, the combined company started to operate under the "American Airlines" name. http://www.amrcaseinfo.com/pdflib/6800_15463.pdf.

single transportation system, what happens if a pre-merger American pilot calls in fatigued? Is that a violation of the injunction? Enforcement of the injunction becomes impracticable when different rules of conduct apply to various pilot groups. What is illegal conduct for a pre-merger US Airways pilot may be legal conduct for a pre-merger American pilot. That different rules of conduct may apply to the merged pilot force was unforeseen when this Court entered its injunction. Such a significant and unforeseen change in the facts makes compliance substantially more onerous and enforcement impracticable, and militates in favor of vacating the injunction.

D. Inconsistent application of the injunction on the merged pilot workforce will likely require the Court to expend judicial resources and could have a detrimental effect on the public interest.

As shown above, continuing the injunction in effect creates a substantial likelihood of inconsistent application of the injunction as between pre-merger US Airways and American pilots. Inconsistent application of the injunction on the merged pilot workforce has the potential of opening the floodgates to motions for contempt, and opposition by pre-merger US Airways pilots. Antagonism amongst the merged pilot workforce resulting from inconsistent application and enforcement of the injunction poses the risk of "enormous disruption" and harm to the "traveling public". *See* US Airways Brief, at 16.

There has been no violation of the injunction since its issuance, and there is no substantiated reason to assume there will be in the future. The objectives of the injunction were served long ago, and there is no reason to invite the possibility of future judicial involvement. The injunction should be vacated.

E. The Norris-LaGuardia Act applies to the permanent injunction.

US Airways' argument that the Norris-LaGuardia Act ("NLGA") has no bearing on

whether the permanent injunction should be vacated is incorrect. US Airways Brief, at 17. The Court found "that US Airways had offered enough "clear proof" of USAPA's involvement in the work slowdown to satisfy the RLA standards."[4] Doc. 72, at 37. The Court did not find that the NLGA did not apply. The law is clear that injunctive relief arising out of a labor dispute is subject to the requirements of the NLGA. *Bhd. of R.R. Trainmen, Enters. Lodge, No. 27 v. Toledo, Peoria & Western R.R.*, 321 U.S. 50 (1944); *United Airlines v. Int'l Ass'n of Machinists & Aerospace Workers*, 243 F.3d 349, 362 (7th Cir. 2001) ("[W]hen a carrier seeks an injunction against a union, a court must look not only to the RLA but also to the NLGA"); *District 17, United Mine Workers of Am. v. Apogee Coal Co.*, 13 F.3d 134 (4th Cir. 1993) (reversing district court's approval of application for injunction in connection with labor dispute where the requirements for a labor injunction under the NLGA, which imposes requirements in addition to the normal preliminary injunction standard, had not been considered by the court).

The law is equally clear that labor injunctions are to be narrowly construed and should not apply prospectively except for limited circumstances. *See Westmoreland Coal Co., Inc. v. Int'l Union, United Mine Workers of Am.*, 910 F.2d 130, 138 (4th Cir. 1990).

The circumstances giving rise to US Airways' specific injury that warranted an exception to the NLGA's general prohibition on labor injunctions have passed, and the permanent injunction should be vacated.

CONCLUSION

For the foregoing reasons, defendant USAPA's motion for vacatur of this Court's permanent injunction should be granted.

Dated: April 14, 2014

[4] Section 6 of the NLGA provides, *inter alia*, that a labor organization shall not be held responsible or liable for the unlawful acts of its members "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been duly served on plaintiff US Airways, Inc. 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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This, the 14th day of April, 2014.

s/ John Gresham
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