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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don Addington; et al., Plaintiffs, vs. US Airline Pilots Ass'n, et al., Defendants.	No. CV-13-00471-PHX-ROS **PLAINTIFFS' RESPONSE TO MEMORANDUM BY USAPA (Doc. 95) AND US AIRWAYS (Doc. 98) ON REMEDY AND MCCASKILL-BOND**

MEMORANDUM OF POINTS AND AUTHORITIES[1]

I. Labor Protective Provisions, McCaskill-Bond and DFR

A. The LPPs provide protection where the DFR does not apply.

Union members may not exercise self-interested political power to make decisions that must be fair to the interests of all members of the craft (bargaining unit). *See Branch 6000, Nat'l Ass'n of Letter Carriers v. NLRB*, 595 F.2d 808, 809 (D.C. Cir. 1979) (by using a "vote based on the individual preferences of the union members, without any consideration of the interests of the non-union employees, the union breached its

[1] The West Pilots agree with and adopt US Airways' arguments on the LPPs. (Doc. 98.) Because the West Pilots already fully briefed their response to USAPA's arguments on ripeness (Doc. 52) they incorporate and rely on those arguments to respond to USAPA's further arguments on ripeness made in its most recent filing (Doc. 95).

obligation to represent fairly the interests of all employees in the bargaining unit"). In other words, a union cannot delegate its duty of fair representation ("DFR") to majority rule because the duty is intended to constrain majority rule. That fundamental principle underlies all that is at issue in this litigation.

Where two merging worker groups cannot agree on an integrated seniority list, a union that represents both groups satisfies its DFR by submitting the dispute to arbitration. *See Air Wisconsin Pilots Protection Committee v. Sanderson*, 909 F.2d 213, 216-17 (7th Cir. 1990) (noting that there is no unfairness in a "system whereby disputes over seniority are referred to arbitration"); *Gvozdenovic v. United Air Lines, Inc*., 933 F. 2d 1100, 1107 (2nd Cir. 1991) ("Submission of the impending dispute to arbitration was an equitable and reasonable method of resolving it."). In contrast, a union breaches its DFR in that context if it allows the larger, more politically powerful faction to dictate how to integrate seniority. *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 217 (9th Cir. 1989).

A union has no such duty, however, where it represents only one of two merging worker groups. *McNamara-Blad v. Assoc. of Prof. Flight Attendants*, 275 F.3d 1165, 1170 (9th Cir. 2002). In that context, the DFR does not provide a right to arbitrate a seniority integration dispute. The Civil Aeronautics Board (the "CAB") crafted its Labor Protective Provisions (the "LPPs") to address that situation.

Under the CAB, the LPPs provided merging workers with a right to arbitrate seniority integration where they were not represented by a single union. The LPPs expired in the 1980s. At the end of 2007, McCaskill-Bond brought some of the LPPs back into federal law. But, because the DFR provides analogous protection in single-union mergers, McCaskill-Bond neither is needed in, nor applies to, such mergers. 49 U.S.C. § 42112, note, § 117(a)(1) (providing that McCaskill-Bond does not apply where "the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers").

B. East-West integration is subject to the DFR, not the LPPs.

The 2005 US Airways-America West merger was a single-union merger where both merging pilot groups were represented by the Air Line Pilots Association ("ALPA"). When the East and West Pilot groups could not agree on an integrated seniority list, the DFR required that ALPA submit the dispute to neutral arbitration. That was the Nicolau arbitration.[2] As this Court stated in *Addington* II, that "impartial arbitrator's decision regarding an appropriate method of seniority integration is powerful evidence of a fair result." (Doc. 193 at 7:17 to 7:18.) USAPA would surely satisfy its duty to represent all pilots fairly if it implemented that seniority list. *See Air Wisconsin*, 909 F.2d at 216-17 (rejecting a claim to the contrary). But it has refused to do so.

II. Remedy

A. The Court must order implementation of the Nicolau Award and West Pilot participation in the integration with American Airlines pilots, and it should also award substantial damages.

It will likely be necessary to arbitrate the integration of the US Airways and American Airlines pilots' lists. There is no need, however, to re-address East-West seniority integration. That integration was arbitrated in 2007. All agreed that the resulting Nicolau Award would be final and binding. There is no reason to repeat that process. Indeed, to do so would be a DFR breach. *See Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 143 (3d Cir. 1998) (noting that "the Monitor [standing in the shoes of the union] had in fact breached his duty of fair representation by attempting to reopen [a seniority] arbitration in an arbitrary manner"). Consequently, even if USAPA did not impose a scheme of East-West seniority integration by fiat, it would breach its DFR by repeating an East-West arbitration.

[2] Mr. Nicolau is the "former president of both the National Academy of Arbitrators and the International Society of Professionals in Dispute Resolution." *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999).

In its most recent filing (Doc. 95), USAPA once again shows that it will not use the Nicolau Award list. Rather, it will do everything it can to use the strict date-of-hire list that was dictated by the East Pilot majority.[3] If left to its devices, USAPA would use a date-of-hire seniority order in the course of integration with the American Airlines pilots. And it now makes clear that it would also exclude the West Pilots from participating in that process. There is simply no question that USAPA is breaching its DFR. The only question is what remedy is needed to make the West Pilots whole.

USAPA failed to propose a remedy. (Doc. 95.) Rather, USAPA went to lengths to argue that the Court did not have authority to provide any remedy. USAPA could not be more wrong. The United States Supreme Court has long recognized that federal courts can provide whatever remedies are necessary to make whole those who are injured by a DFR breach. As explained below, to make the West Pilots whole, the Court must issue a mandatory injunction. It must also award substantial damages against USAPA.

B. The Court has broad power to remedy a DFR breach with equitable relief and damages.

The Supreme Court instructs that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach." *Vaca v. Sipes*, 386 U.S. 171, 195 (1967). "In approving resort to the usual judicial remedies of injunction and award of damages when appropriate, the Court emphasized that relief in each case should be fashioned to make the injured employee whole." *Electrical Workers v. Foust*, 442 US 42, 49 (1979) (internal citation and quotation marks omitted). "The District Court has jurisdiction to enforce by injunction

[3] USAPA argues that it "has never advocated for strict date of hire seniority" because it offers what are called "conditions and restrictions" that limit how East Pilots can exercise advantageous seniority rights. (Doc. 95 at 14:16 to 14:18.) Such conditions and restrictions would only temper the risk that West Pilots would be displaced by East Pilots from current positions. They would not provide any benefit to West Pilots who would be unable to hold positions that would be available to them if the Nicolau Award seniority list were used.

petitioners' rights to nondiscriminatory representation by their statutory representative." *Graham v. Bdh. of Firemen*, 338 US 232, 240 (1949). "[R]emedies constituting authorized 'affirmative action' include an award of seniority status, for the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole. . . .'" *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 769 (1976). The Supreme Court, therefore, has long recognized that federal courts have broad, flexible power to remedy a union's DFR breach.

USAPA's argument to the contrary is plainly wrong.[4] Nothing has materially changed since the Supreme Court announced the decisions quoted above. Indeed, based on such doctrine, the Ninth Circuit affirmed a broad remedy in *Bernard*, 873 F.2d at 218, that mandated the temporary use of a court created seniority order and mandated conducting a neutral arbitration to create a permanent seniority list.

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[4] USAPA argued in its brief as follows:

> Based on these governing principles, courts are barred from fashioning a remedy for a breach of the DFR that dictates the terms of the negotiations or revises the union's lawful procedures for selecting representatives to be present either in negotiations or at arbitration. In other words, the relief requested by plaintiffs in the form of a mandatory injunction to negotiate for the Nicolau Award or to allow plaintiffs to inject themselves into negotiations with the APA or to participate in a McCaskill-Bond arbitration, is completely beyond the scope of relief courts can provide.

(Doc. 95 at 13:13 to 13:19.)

USAPA also argued this in its brief:

> USAPA can state unequivocally that no remedy can include instructions to negotiate for a specific proposal or allow representatives of the plaintiffs to participate in negotiations or arbitration other than through USAPA's lawful procedures for the election and/or appointment of representatives.

(*Id.* 17:2 to 17:5.)

Based on such controlling authority, and without need to rely on the CAB's historic application of the LPPs, this Court has authority to do all of the following: (1) order use of the Nicolau Award; (2) order West Pilot participation in the pending seniority integration process with the American Airlines pilots; and (3) award the West Pilots substantial damages.

C. The Court should require use of the Nicolau Award unless USAPA submits to neutral arbitration to determine whether to use the Award.

USAPA is incapable of providing fair representation to the West Pilots on the issue of East-West seniority integration. Its Constitution imposes a date-of-hire seniority integration by fiat. (Doc. 94 at ¶¶ 39, 44.) Its officers repeatedly and unequivocally avow that they will do everything they can to impose date-of-hire. (*Id.* ¶¶ 108, 110, 117.) USAPA intends to "slip" East-West integration into the process of integration with the American Airlines pilots.[5] It steadfastly opposes any participation by the West Pilots in that process. Something must be done.

At the December 1, 2011, status conference in the declaratory judgment case, this Court recognized the need for judicial resolution of the DFR issues, stating "there will be a judgment on all those issues." (RT 5:12 to 5:13 (copy attached as Exhibit "A").) It also rejected a request by USAPA to delay a decision on the DFR issues in favor of mediation, explaining: "one side is going to stand stiffly against the other. It doesn't

[5] The Ninth Circuit held that the DFR claim would surely be ripe when there is a ratified joint contract that uses a date-of-hire seniority list. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1180, n.1 (9th Cir. 2010). In an effort to evade such ripeness, USAPA ratified the Memorandum of Understanding ("MOU"), a joint contract that has everything but a seniority list. It is surely no less ripe to insert the Nicolau Award list into the MOU than it would have been to pull a date-of-hire list out of a complete joint contract and insert the Nicolau Award list in its place.

make any sense. It's a needless consumption of time." (*Id.* 38:2 to 38:3.) The need for prompt judicial resolution is even greater now. [6]

Apart from damages (which is discussed below) the West Pilots proposed two remedies (no others have been proposed). The remedy favored by the West Pilots, which most directly addresses USAPA's breach, is an order mandating use of the Nicolau Award seniority list in the process of integrating US Airways pilots with American Airlines pilots. Yet even with that remedy, the Court should also require that West Pilot representatives participate in every step of that process to ensure that USAPA does not try in some way to subvert the intent of such an order. Because that process is negotiation between workers, not between workers and an employer, it is not collective bargaining. Consequently, the West Pilots would not (as USAPA argues) be functioning in that process as an uncertified union.[7]

"Arbitration law wisely relies upon the experience, perspective, understanding of industrial practice, and knowledge of logistics and economics, of the officer chosen as arbitrator." *Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment CSX Transp. N. Lines V. CSX Transp., Inc.*, 455 F.3d 313, 1316 (11th Cir. 2006). An alternative remedy here would be to defer to voluntary quick arbitration between East Pilots and West Pilots that applies such standards to determine whether to use the Nicolau

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[6] Moreover, USAPA's governance holds it hostage to the self-interested voting of the East Pilot majority. According to Article X of the USAPA Constitution, the "ad hoc committee" that the USAPA Board of Pilot Representatives ("BPR") created to purportedly negotiate with Plaintiffs is "[n]ot be authorized to negotiate and/or modify any provision(s) of the current Collective Bargaining Agreement and/or attachments thereto." Any agreement this committee might reach on seniority must be approved by the BPR and, if approved, then ratified by the USAPA membership. Furthermore, if such agreement were something other than a date-of-hire seniority list, 2/3 of USAPA's members would have to approve amending its Constitutional to eliminate the requirement to use date-of-hire integration.

[7] Indeed, the fact that USAPA gives lip service to negotiating with the West Pilot class belies that argument. If the West Pilots can negotiate seniority integration with USAPA, surely they can do so with the American Airlines pilots.

Award list.[8] The West Pilots would consent to such arbitration, provided that the arbitrator would make no finding other than to decide between the Nicolau Award list and a strict date-of-hire list. (*See* Doc. 96 at 4:20 to 4:23 (West Pilots proposing arbitrating the question: "shall the single integrated pilot seniority list . . . be the seniority list attached to the Nicolau Award . . ., or shall it be the Date-of-Hire seniority list?").)

Even with those terms, the West Pilots can agree to arbitrate only if the arbitration would provide genuine finality. For that, USAPA (and the East pilots) must also consent to arbitrate under such terms. Otherwise, if arbitration was ordered by the Court, USAPA could collaterally attack the result by appealing the order to arbitrate and thereby delay the pilot integration process under the MOU. That is unacceptable. The West Pilots cannot consent to arbitrate under such circumstances.

D. There must be a substantial damages award.

The fact that the Ninth Circuit did not find ripeness in 2010 did not excuse USAPA's conduct. It meant only that it was too early to "fashion a remedy that will alleviate Plaintiffs' harm." *Addington*, 606 F.3d at 1180. It is now time to fashion such a remedy. In so doing, the Court should give some consideration to the entire course of events starting in 2008. When the Court considers damages, in other words, it should consider events that occurred before the DFR claim was adjudged to be ripe. *See Wininger v. SI Management LP*, 301 F.3d 1115, 1121 (9th Cir. 2002) ("We are aware of no case restricting a district court's equitable powers to award attorneys' fees to the litigation directly before the court.").

The West Pilots necessarily incurred substantial litigation expenses and attorneys' fees responding to USAPA's ongoing efforts to breach its DFR, which began as early as April 18, 2008. With the specter of a six-month limitations hovering over their claim, the West Pilots filed their initial DFR action in September 2008, just under six months after

[8] To be clear, this arbitration would not be a de novo determination of fair and equitable seniority integration. That is plainly a DFR breach. *See Polonski*, 137 F.3d at 143.

USAPA made clear (through its Constitution and public pronouncements) that it would wrongfully disregard the Nicolau Award. They were again required to litigate in 2010 when US Airways named them as defendants in its declaratory judgment action. They were once again required to litigate the following year when USAPA harassed individual West Pilots in state court in Texas and Alabama. They were again required to litigate earlier this year when USAPA filed an adversary proceeding against Plaintiffs in the American Airlines bankruptcy case in New York. And they filed this action when USAPA crossed the bright-line of ripeness recognized by the Ninth Circuit. *See Addington*, 606 F.3d at 1180, n.1 (recognizing "an unquestionably ripe DFR suit, once a contract is ratified").

Each of these litigation steps was necessary to properly defend the Nicolau Award against USAPA's DFR breach. The resulting reasonable attorneys' fees and litigation expenses paid by the West Pilots have exceeded $3 million.[9] Whether characterized as damages or as attorneys' fees, the West Pilots should be made whole with an award equal to that amount. *See Harrison v. United Transportation Union*, 530 F. 2d 558, 564 (4th Cir. 1975) (awarding such fees under common benefit doctrine).[10] Plaintiffs would hold such funds in trust until the merger with American Airlines is completed and then, after paying outstanding obligations, refund what remains pro rata to donors.

E. Status of Stipulated Facts

As directed by the Court, the West Pilots filed a set of undisputed facts on May 17, 2013. (Doc. 94). To date, USAPA has not agreed to stipulate to any of those facts and has not proposed for West Pilot consideration alternative wording or any additional facts.

[9] The West Pilots' fees and litigation expenses have been funded through voluntary West Pilot donations. In contrast, USAPA has statutory authority to require all pilots, East and West, pay its fees and litigation expenses.

[10] The West Pilots incorporate the legal argument on common benefit doctrine that they made in their initial brief on remedy. (Doc. 96 at 6:3 to 6:19.)

III. Conclusion

This Court has authority to provide whatever remedy is needed to make the West Pilots whole. USAPA's steadfast refusal to abide by its DFR leaves the Court only one option: an order that mandates use of the Nicolau Award, requires West Pilot participation in the MOU process, and awards damages equal to the reasonable attorneys' fees and litigation expenses that the West Pilots incurred since the fall of 2008.

Dated this 24th day of May, 2013.

POLSINELLI PC

/s/ Andrew S. Jacob

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/ Andrew S. Jacob

By _____