IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington, et al., Plaintiffs, vs. US Airline Pilots Association, et al., Defendants.	No. CV-13-00471-PHX-ROS **ORDER**

This is the third time a group of pilots formerly employed by America West Airlines, Inc. have been in litigation with their union based on the union allegedly mishandling the integration of seniority lists. The prior two suits were dismissed as not ripe, and the pilots may fear a strikeout. Here, though, the pilots' claim puts them on first base.

Based on the unique circumstances that developed after the second suit was dismissed, the motion to dismiss filed by the US Airline Pilots Association ("USAPA") will be denied. In hopes of bringing a swift end to the parties' disputes, the Court will advance the trial on the merits and consolidate it with a preliminary injunction hearing on September 24, 2013.

BACKGROUND

The parties' current disputes began in 2005. That year, pursuant to a "Transition Agreement," US Airways merged with America West Airlines, Inc. ("America West") to form a single airline. The America West pilots at the time of the merger are generally referred to as the West Pilots and the US Airways pilots are generally referred to as the East

Pilots. After the merger, the West Pilots and East Pilots could not agree on how the two pilot seniority lists should be integrated and the issue proceeded to arbitration.

The arbitration decision, referred to as the Nicolau Award, was issued on May 1, 2007. The Nicolau Award created an integrated seniority list that placed approximately 500 of the most senior East Pilots at the top of the list but placed at the bottom all of the East Pilots who were on furlough at the time of the merger. It then blended the remaining pilots. Certain East Pilots did not like this result and decided to do something about it.

A group of East Pilots formed a new labor organization known as USAPA. USAPA was originally, and remains to this day, committed to the combined pilot list being based primarily on date-of-hire. In other words, USAPA was formed to ensure that the Nicolau Award not govern the seniority issue. After some maneuvering, USAPA won a representation election and became the certified bargaining representative for all pilots at the merged airline. USAPA then began negotiating a collective bargaining agreement with US Airways. During those negotiations, USAPA proposed a seniority list based on date-of-hire but no collective bargaining agreement was ever finalized.

In 2008, a group of West Pilots sued USAPA claiming USAPA had breached its duty of fair representation by refusing to insist on the Nicolau Award during negotiations with US Airways. The case was certified as a class action and proceeded to trial where the West Pilots prevailed. On appeal, however, the case was dismissed as not presenting a ripe controversy. Shortly after that dismissal, US Airways filed a declaratory judgment action against the West Pilots and USAPA. That case also proceeded to summary judgment where this Court held that during the collective bargaining negotiations, USAPA was "free to pursue any seniority position" it wished. (Doc. 193). But the Court also warned USAPA that "discarding the result of a valid arbitration and negotiating for a . . . seniority regime" other than the Nicolau Award placed "USAPA on dangerous ground." (*Id.*). A fundamental assumption in the Court's decision was that eventually there would be a finalized collective bargaining agreement between USAPA and US Airways. (*Id.* at 8). Subsequent events, however, now show there will not be a collective bargaining agreement of the type the Court

envisioned.

In 2011, AMR Corp. (the parent company for American Airlines) filed bankruptcy. In approximately November 2011, US Airways and AMR began merger discussions. The two companies decided to merge and they entered into a "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement" ("MOU"). The MOU dictates the working conditions for all pilots in the event the merger is consummated. The MOU was ratified by the pilots currently working for US Airways.

The West Pilots, US Airways, and AMR maintain that the MOU qualifies as a collective bargaining agreement. USAPA, however, argues the MOU "is not a final and binding collective bargaining agreement." (Doc. 44 at 14). USAPA admits the MOU will "govern the terms and conditions of employment of the US Airways and American Airlines pilots after" the Bankruptcy Court handling the AMR case approves AMR's Plan of Reorganization. (Doc. 44 at 8). USAPA maintains there is something about the MOU–but USAPA does not identify precisely what–that means it should not be considered a "collective bargaining agreement."

The text of the MOU supports the position adopted by the West Pilots, US Airways, and AMR: that it is a collective bargaining agreement. The MOU states that once the merger is complete, the pilots currently at US Airways will, without any further ratification vote, become subject to the terms of the AMR collective bargaining agreement. The MOU also recognizes that a single integrated pilot seniority list is crucial to the merged airline's operations. Therefore, the MOU states that all pilots will begin a seniority-integration process "consistent with McCaskill-Bond." (Doc. 14-3 at 62).

"McCaskill-Bond" refers to a federal statute governing the seniority integration process when two airlines merge. 49 U.S.C. § 42112. In brief, the statute will require direct negotiations between the pilots from US Airways and AMR. In the event the pilots are not able to reach an agreement, they will proceed to binding arbitration to arrive at a "fair and equitable" integration. *See* 49 U.S.C. § 42112 (incorporating *Allegheny-Mohawk* standard). As a practical matter, the McCaskill-Bond process assumes USAPA will enter the process

advocating for a specific seniority list.

In March 2013, a group of West Pilots, on behalf of themselves and others similarly situated, filed this suit recounting the above facts and alleging USAPA breached its duty of fair representation "by entering into the MOU with the firm intention of using a date-of-hire seniority list rather than the Nicolau Award list." (Doc. 1 at 13). This allegation is somewhat unclear, but subsequent statements by the West Pilots have clarified their claim. The *exact* claim brought by the West Pilots is:

> USAPA breached its [duty of fair representation] because it made a contract that abandons a duty to treat the Nicolau award as final and binding.

(Doc. 52 at 13) (emphasis in original). In other words, the West Pilots' claim is that USAPA breached the duty of fair representation when it entered into the MOU because the MOU does not require USAPA use the Nicolau Award in the McCaskill-Bond process. USAPA has moved to dismiss this claim, arguing it is not ripe because there has not yet been a final collective bargaining agreement adopting a particular seniority regime.

In addition to their claim against USAPA, the West Pilots have also sued US Airways for allegedly breaching the Transition Agreement. The complaint alleges US Airways breached the Transition Agreement's implied covenant of good faith and fair dealing when US Airways agreed to the MOU without insisting on the Nicolau Award. (Doc. 1 at 13-14). US Airways has moved to dismiss this claim, arguing the dispute about the Transition Agreement is a "minor dispute" that must be heard by a Board of Adjustment and not a federal court.

ANALYSIS

I. USAPA's Motion to Dismiss

A. This Suit is Ripe

The Court need not linger on USAPA's ripeness argument.[1] There is a "two-part test

[1] USAPA challenges only prudential ripeness. Thus, the Court need not address constitutional ripeness. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1140-

to determine if a case satisfies prudential requirements for ripeness: the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011). Under the first part of the test, "[a] question is fit for decision when it can be decided without considering contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Cardena v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002). And to meet the second part of the test, "a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009). Both parts are satisfied here.

For the claim the West Pilots are actually making, there are no contingent future events the Court must consider. That is, USAPA entered into the MOU and the MOU does not require USAPA go into the McCaskill-Bond process with the Nicolau Award. Deciding whether entering into that MOU breached the duty of fair representation does not depend on anything yet to happen. Therefore, the first part of the ripeness test is met. As for the possible hardship of withholding review, the West Pilots, US Airways, and AMR all stress that allowing the dispute between the West Pilots and USAPA to continue to fester would introduce substantial uncertainty into the merger process. That uncertainty would frustrate a primary purpose of the merger: the immediate orderly integration of the two airlines' operations. Acquiescing to USAPA's request to withhold review for possibly years would impose a needless hardship on pilots and the airlines. Accordingly, this case is prudentially ripe.

B. *Res Judicata* Does not Apply

USAPA argues this suit is barred by *res judicata*, *i.e.* "issue preclusion." *Res judicata* applies to bar litigation of subsequent claims that were contained in a previous lawsuit or could have been asserted in a previous lawsuit. *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318 (9th Cir. 1992). The West Pilots' current claim is that USAPA breached its duty of fair

---

42 (9th Cir. 2000) (explaining constitutional versus prudential ripeness).

representation when it entered into the MOU. That claim was not asserted in the previous litigation nor could it have been asserted. Accordingly, *res judicata* has no application here.

C. The West Pilots Have Stated a Claim

USAPA's final argument is that the complaint does not satisfy Federal Rule of Civil Procedure 8 because it does not allege sufficient facts to support a claim for breach of the duty of fair representation. Given the parties' history and extensive interactions, there is no real question that USAPA knows how the West Pilots believe USAPA breached the duty of fair representation. In other words, the complaint alleges sufficient facts such that USAPA knows "the nature of [the West Pilots'] claim" and USAPA has "a fair opportunity to defend against it." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). USAPA's request to dismiss for failure to comply with Rule 8 will be denied.

D. Miscellaneous Arguments

Finally, USAPA makes a number of other arguments such as: ratification of the MOU precludes this suit, the request for attorneys' fees must be preemptively denied, and certain portions of the complaint must be stricken. The Court has considered all of USAPA's arguments but concludes no relief is appropriate at this time. The motion to dismiss will be denied in its entirety.

II. US Airways' Motion to Dismiss

In addition to the claim against USAPA, the West Pilots also assert a claim against US Airways for allegedly breaching the Transition Agreement. US Airways moves to dismiss this claim, arguing it presents a "minor dispute" that must be heard by a Board of Adjustment and not a federal court. The complaint concedes that normally this claim would present a "minor dispute subject to system board arbitration." (Doc. 1 at 14). In opposing the motion to dismiss, the West Pilots argue the normal rule does not apply because US Airways acted "in concert" with USAPA to breach an existing collective bargaining agreement. (Doc. 47 at 8). This claim is interesting but it does not appear in the complaint. That is, the claim against US Airways actually set forth in the complaint is a basic claim about the interpretation or application of a collective bargaining agreement. Because the

claim in the complaint must be submitted to arbitration, US Airways' motion will be granted.

III. Motion to Certify Class

The West Pilots have moved to certify a class and US Airways has filed notice that it agrees certification is appropriate. (Doc. 11, 40). The Court stayed briefing on this issue pending resolution of the other motions. (Doc. 43). The class certification motion must now be briefed, but USAPA should consider whether it is wise to oppose the motion. In the previous litigation, USAPA vigorously opposed a class certification motion but that opposition was not well-reasoned. (CV-10-1570, Doc. 111). Thus, the order granting certification was straightforward. (CV-10-1570, Doc. 125). Absent substantially better arguments than what it presented last time, USAPA should consider consenting to certification.

IV. Joinder and Intervention

The West Pilots have moved to join the Allied Pilots Association ("APA") as a party to this litigation. APA is the union presently representing the American Airlines pilots. The West Pilots are concerned that during the merger process, the APA will replace USAPA and the APA "will represent . . . all pilots in the post-merger New American airline." (Doc. 58). The APA does not oppose the request for joinder, apparently because it wishes to protect its rights in the event it does become USAPA's successor-in-interest.

The problem with the request to join APA is that, as of now, the West Pilots do not appear to have any viable claim against APA. Given that the West Pilots will only become subject to APA governance after the merger is complete, it is unclear how the West Pilots envision the current joinder would operate. But assuming joinder is proper, *i.e.* the West Pilots have current claims against APA, an amended complaint must be filed. Therefore, if the West Pilots want to have APA as a current party, they should immediately amend their complaint to name APA.

A similar problem is present in the request by AMR to intervene. Pursuant to Federal Rule of Civil Procedure 24, a motion to intervene "must state the grounds for intervention *and be accompanied by a pleading that sets out the claim or defense for which intervention*

is sought." (Emphasis added). AMR's motion to intervene is not accompanied by a pleading. Therefore, while AMR may be entitled to intervene, the Court cannot conduct a reasoned analysis of the issue because the precise form of the proposed intervention is not identified. The motion to intervene will be denied but AMR may refile a motion to intervene accompanied by an appropriate pleading. Alternatively, AMR may elect to simply appear as amicus.

Accordingly,

IT IS ORDERED the Motion to Dismiss (Doc. 28) is **GRANTED**. Claim II against US Airways, Inc. is **DISMISSED**.

IT IS FURTHER ORDERED the Motion to Dismiss (Doc. 44) is **DENIED**.

IT IS FURTHER ORDERED USAPA shall file its answer to the complaint within five days of this Order.

IT IS FURTHER ORDERED the Motion to Intervene (Doc. 56) is **DENIED**. If AMR Corporation wishes to intervene, it must file a motion to intervene accompanied by a proposed pleading no later than August 9, 2013.

IT IS FURTHER ORDERED the Motion for Joinder (Doc. 58) is **DENIED**. If Plaintiff wishes to join the Allied Pilots Association, no later than July 26, 2013 Plaintiff shall file an amended complaint naming the Allied Pilots Association. If an amended complaint is filed, USAPA shall file its answer within five days of the amended complaint's filing date.

IT IS FURTHER ORDERED the Motion to Consolidate (Doc. 60) is **GRANTED**.

IT IS FURTHER ORDERED the Motion to Strike (Doc. 113) is **DENIED**.

IT IS FURTHER ORDERED no later than August 2, 2013 USAPA shall file its response to the motion to certify class. The West Pilots' reply shall be filed no later than August 9, 2013.

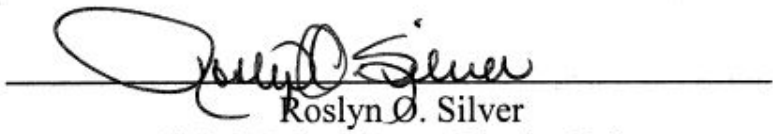
IT IS FURTHER ORDERED trial on the merits is accelerated and will be held at the same time as the preliminary injunction hearing. That hearing is set for September 24, 2013 at 9:00 a.m.

IT IS FURTHER ORDERED the parties shall meet and confer to determine the undisputed facts. No later than September 6, 2013 the parties shall file a joint statement of undisputed facts. That same date the parties shall also file independent statements of disputed fact.

IT IS FURTHER ORDERED no later than September 6, 2013 the parties shall file a Joint Proposed Pretrial Order in the form available on the Court's website.

IT IS FURTHER ORDERED no later than August 2, 2013 the parties shall file a joint proposed scheduling order in the form available on the Court's website. That order should contemplate the completion of all discovery in advance of the September 24 hearing.

DATED this 19th day of July, 2013.



Roslyn O. Silver
Chief United States District Judge