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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Don Addington, *et. al.*,
Plaintiffs,
v.
US Airline Pilots Association, *et. al.*,
Defendants.

Case No.: CV-13-00471-PHX-ROS
**US Airline Pilots Association's
Opposition to Plaintiffs' First
Motion *in Limine* Seeking to
Preclude USAPA from Presenting
Evidence or Argument as to Why
Paragraph 10(h) Came to Be in the
MOU**

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1 Defendant US Airline Pilots Association (“USAPA”) hereby opposes Plaintiffs’
2 First Motion *in Limine* seeking to preclude USAPA from “presenting evidence or
3 argument as to why Paragraph 10(h) came to be in the Memorandum of Understanding
4 (“MOU”).” Doc. 207, at p. 1.

5 **Plaintiffs Make No Showing Justifying Their Motion *in Limine***

6 Plaintiffs’ motion should be summarily denied. As an initial matter, the motion is
7 improper as it fails to comply with this Court’s order that “**only** those motions in limine
8 that might result in a substantial saving of time or effort during trial should be filed.”
9 First Amended Scheduling Order, Doc. 195 (emphasis in original); *see also Crane-*
10 *Mcnab v. Cnty. of Merced*, CIV. 1:08-1218, 2011 WL 94424 (E.D. Cal. Jan. 11, 2011)
11 (“The first purpose of a motion *in limine*, protecting the jury, is inapplicable in the
12 context of a bench trial.”) (*citing United States v. Heller*, 551 F.3d 1108, 1112 (9th Cir.
13 2009) (in a bench trial, the need for an advanced ruling on a motion *in limine* to exclude
14 evidence is “generally superfluous”)). Plaintiffs make no such showing, and indeed
15 cannot.
16

17 Second, plaintiffs intentionally attempt to mislead the Court by stating that
18 “USAPA officers and committee members testified that Mr. Szymanski was the only
19 source of evidence as to why Paragraph 10(h) came to be part of the MOU.” Doc. 207, at
20 p. 1. This allegation is simply false. That attorneys may have *drafted* paragraph 10(h) is
21 of no import as it is customary that attorneys draft agreements. However, as to the *intent*
22 behind paragraph 10(h), USAPA has repeatedly stated that it was to ensure that the MOU
23 was seniority neutral in that it did not contain or refer to any seniority list integration
24 regime. *See Hummel Dep. Tr.*, 132-137 (“That the issue was that this must remain
25 absolutely seniority neutral. And my recollection is that’s what came back, it was agreed
26 to by all four members of the NAC as being seniority neutral and we went forward.”);
27 Pauley Dep. Tr., 81-84 (“The intent of all the seniority-related issues was to be neutral on
28

1 seniority of going forward.”¹; Plaintiffs’ Trial Exhibit 1, USAPA’s Response to
2 Plaintiffs’ Interrogatories, Response to Interrogatory No. 1²; USAPA Exhibit 136,
3 USAPA Iron Compass, Vol. 4, Issue 4, January 23, 2013; USAPA Exhibit 159, Leonidas
4 Update February 1, 2013³. Understanding this, on January 4, 2013, the BPR voted
5 unanimously to put the MOU to a member ratification vote. In so voting, the BPR, which
6 included three West Pilots, was fully aware of the language of paragraph 10(h). BPR
7 Meeting 88 Minutes, bates stamped USAPA001123-1124⁴.

8
9 In its answers to plaintiffs’ interrogatories, verified by Gary Hummel, USAPA
10 stated:

11 the reasons that Section 10(h) was “agree[d] to” include, first and
12 foremost, the MOU conferred unprecedented and previously
13 unattainable economic benefits on all US Airways pilots with an
14 estimated value of pay and benefit enhancements of \$1.6 billion over
15 six years, including by way of illustration: pay rates and other
16 economic benefits for US Airways pilots equal to those provided to
17 American Airlines pilots; average pilot pay increases of \$30,000 per
18 year upon the effective date of the POR (retroactive to February 8,
19 2013) and an approximate average additional increase in 2016 of
20 another \$40,000 per year; an industry average pay parity adjustment
21 effective on January 1, 2016, which would bring pay for all the
22 pilots of the proposed merged airline into line with the two other
23 major domestic carriers – Delta Airlines and United Airlines;
24 increase in the pension contribution rate (made by the Company to a
401(k) account for each eligible pilot) to 14% from the current rate
of 10% for all US Airways pilots in addition to the above pay
increases; on January 1, 2014, the pay rates for all pilots will
increase an additional 8% and the pension rate will increase to 16%;
and a \$40 million lump sum payment to be distributed amongst all
US Airways pilots on the Effective Date of the POR. In addition,
the MOU conferred significant non-economic benefits on all US

25 ¹ Excerpts of deposition transcripts are annexed as Exhibit “A”.

26 ² Annexed as Exhibit “B”.

27 ³ Annexed as Exhibit “C”.

28 ⁴ Annexed as Exhibit “D”.

1 Airways pilots, including without limitation, no-furlough provision
2 and scope provision protections to protect the jobs of US Airways
3 pilots in the merged airline.

4 Additional reasons Section 10(h) was “agree[d] to” were that
5 US Airways proposed (and American and the UCC agreed) that the
6 MOU would not address seniority other than to provide for a
7 seniority integration process consistent with McCaskill-Bond that
8 would be separate from the process for reaching a Joint Collective
9 Bargaining Agreement; that the “status quo” in effect at the time the
10 MOU was negotiated was a two list system that was unchanged from
11 the systems in effect at America West and US Airways at the time of
12 their merger in 2005; that all the parties to the MOU agreed that the
13 MOU was not the “single agreement” referred to in the Transition
14 Agreement; that no “single agreement” as referred to in the
15 Transition Agreement had ever been negotiated or ratified; that
16 under the MOU, the Transition Agreement would be replaced by the
17 MOU on the Effective Date of the Plan of Reorganization; that given
18 the dispute concerning seniority at US Airways it made no sense to
19 risk the substantial economic gains in the MOU by tying it to any
20 particular resolution of seniority; and that, in any event, there was no
21 interest by any of the parties to the MOU in tying the MOU to any
22 particular resolution of the US Airways seniority issue particularly
23 given the nature of the dispute concerning the Nicolau Award and
24 the existence of the McCaskill-Bond process.

25 Plaintiffs’ Trial Exhibit 1, USAPA’s Response to Plaintiffs’ Interrogatories, Response to
26 Interrogatory No. 1 (annexed as Ex. B).

27 Third, plaintiffs disingenuously argue that “USAPA used privilege and work-
28 product (and perhaps feigned ignorance) to prevent timely discovery of the actual reasons
for Paragraph 10(h).” Doc. 207, at p. 3. As discussed above, USAPA’s “actual reasons”
for paragraph 10(h) have long been communicated to plaintiffs. That plaintiffs may
disagree with those reasons does not mean USAPA should be prevented from presenting
their reasons at trial.

Moreover, as plaintiffs are well aware, USAPA had agreed to produce Mr.
Szymanski for deposition, and counsel for plaintiffs and USAPA were in communication

1 to work out the details and scope of the deposition. *See* email correspondence between
2 counsel for USAPA and plaintiffs⁵. It was plaintiffs' counsel who chose not to proceed
3 with Mr. Szymanski's deposition under the guise that "discovery closed" notwithstanding
4 the fact that USAPA's counsel had previously agreed to Plaintiffs' request that Mr.
5 Szymanski's deposition could take place on October 10, 2013, 10 days after the
6 September 30, 2013 discovery cut off.⁶

7
8 Lastly, if plaintiffs truly thought Mr. Szymanski's deposition was necessary to
9 their affirmative case, then they should have availed themselves of the subpoena powers
10 allowed under Rule 45 of the Federal Rules of Civil Procedure. Plaintiffs chose not to
11 subpoena Mr. Szymanski, and in an attempt to resolve any dispute on the issue, USAPA
12 agreed to produce Mr. Szymanski for deposition. Having failed to employ discovery
13 procedures pursuant to the Federal Rules of Civil Procedure, including seeking court
14 intervention, plaintiffs cannot now cry "foul" and seek to limit USAPA's evidence at
15 trial.

16 **The Evidence is Relevant to Claim One and USAPA's Defenses**

17 Plaintiffs claim USAPA breached its duty of fair representation by not including
18 the Nicolau Award in the MOU. In response to specific questions at depositions and in
19 interrogatories, plaintiffs have focused on the intent behind paragraph 10(h) of the MOU.
20 USAPA will show that the record is replete with evidence supporting USAPA's claim
21 that: (1) the MOU was intended to be seniority neutral; and (2) that plaintiffs and class
22 members were well aware that the MOU was seniority neutral, that they knew the
23 benefits contained within the MOU, and that these benefits were for all US Airways
24 pilots. USAPA's Local Rule 56.1 Separate Statement of Facts in Support of USAPA's
25

26 ⁵ Annexed as Exhibit "E".

27 ⁶ Pursuant to the Court's Order, dated August 26, 2013, the parties could stipulate to
28 change the deadlines in the Scheduling Order, Doc. 174.

1 Motion for Summary Judgment, Doc. 213, ¶¶59-60, 74-90 and exhibits thereto. The
2 ratification of the MOU establishes that plaintiffs stood ready to reap the benefits of the
3 MOU and cannot prevail on their breach of the duty of fair representation claim. *Id.*, at
4 ¶¶83-84; 107.

5
6 **CONCLUSION**

7 For the foregoing reasons, USAPA respectfully requests that the Court deny
8 plaintiffs' first motion *in limine*.

9 Respectfully submitted this 16th day of October, 2013.

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CERTIFICATE OF SERVICE

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I hereby certify that on October 16, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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