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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

US Airline Pilots Association,

Defendant.

Case No.: CV-13-00471-PHX-ROS

US Airline Pilots Association's Response to Plaintiffs' Summary of Evidence

Preliminary Statement

For all of its mischaracterizations, plaintiffs' summary of evidence is faithful to the record in one respect: it makes scant reference to and fails to marshal the evidence on the "straightforward" issue framed by the Court, namely, did USAPA breach its DFR when it entered into the MOU which does not require USAPA to use the Nicolau Award in the McCaskill-Bond process. Doc. 122, at p. 4. The reason for this failure is equally straightforward: the record contains no such evidence and, as result, plaintiffs appear to have all but abandoned this claim. In its place, plaintiffs offer their previously rejected claim that USAPA breached its duty of fair representation by failing to implement the unmodified Nicolau Award, which plaintiffs contend is required by the 2005 Transition Agreement ("TA"). However, this re-framing of the issue fails to salvage plaintiffs' DFR claim because the Ninth Circuit has already ruled they have no vested rights to any particular seniority regime and have suffered no injuries. Likewise, this Court has ruled the TA can be modified by US Airways and USAPA, which the evidence shows is precisely what the parties provided for in ¶ 4 of the MOU, a provision that was proposed by the Companies. Further, plaintiffs' summary of the evidence (Doc. 259) makes no reference to any evidence showing that USAPA acted arbitrarily, discriminatorily or in bad faith in agreeing to the MOU or that plaintiffs have suffered any injury. Finally, plaintiffs have failed entirely to point to any evidence that could even begin to satisfy a single element necessary for the extraordinary injunctive relief sought under Count IV.

I. USAPA is Not Required to Use the Nicolau Award

As reflected in Point II of their summary (Doc. 259, p. 4), plaintiffs continue to base their case on the false premise that the TA required USAPA to implement the Nicolau Award. There is no merit to this claim.

This Court's October 11, 2102 Order in the previous case denied the West Pilots' motion for summary judgment on Count I (alleging that USAPA violates the DFR by refusing to negotiate for the Nicolau Award) and granted, in part, USAPA's motion on Count II (alleging that USAPA does not violate the DFR by departing from the Nicolau

Award). The Court held, in part, that USAPA "is free to pursue any seniority position it wishes during the collective bargaining negotiations." CV-10-01570-PHX-ROS, Doc. 193, p. 1. The Court explained that any such departure could be subject to a future DFR claim when a "particular seniority regime is ratified" but the decision held, unmistakably, that the TA did not require USAPA to implement or follow the Nicolau Award. Indeed, the Court explicitly noted, "It is undisputed that the TA can be modified at any time 'by written agreement of [USAPA] and the [US Airways].'" Doc. 193, p. 7. That is exactly what was done in ¶4 of the MOU, which provides that the TA is superseded by the MOU (and the MTA) as of the Effective Date.[1] US Airways agrees the TA was modified by the MOU. Stipulated Facts ("SF"), ¶176; Ex. 251.

In addition, as indicated in USAPA's Summary of Evidence (Doc. 260, ¶¶22, 24), the Nicolau Award was the result of an internal ALPA process and even ALPA and the West MEC considered it nothing more than a *bargaining proposal*. America West Merger counsel explicitly described the Nicolau Award as "the proposal regarding seniority integration" that would be "present[ed] at the bargaining table with US Airways." Ex. 208, p. 20. And, upon presenting the Nicolau Award to US Airways, ALPA President John Prater reminded the Company that under the TA and ALPA Merger Policy "no airline may use the award until the negotiation and implementation of a single collective bargaining agreement." Ex. 223. Further, as a matter of law, USAPA, the new bargaining agent, was not "in any way limited" by proposals or agreements of the previous representative "in [its] pursuit of new terms of employment." *AFA v. US Air, Inc.*, 24 F.3d 1432, 1440 (D.C. Cir. 1994). And finally, there is no evidence

[1] Plaintiffs selectively paraphrase ¶4 of the MOU and omit the part of the provision that explicitly provides that the terms of the MTA (the newly adopted APA agreement as modified by the MOU) shall become effective on the Effective Date (the effective date of merger) and that, "in accordance with the process specified herein" and "at the earliest practicable time for each such term" the new terms "shall govern and displace any conflicting or wholly or partially inconsistent provision of the former US Airways pilots agreements or the status quo arising thereunder." The procedures set forth in MOU ¶10 take effect immediately. Accordingly, immediately upon the effective date of the MOU, the procedures governing seniority integration set forth in ¶10 of the MOU completely displace the procedures for seniority integration set forth in the TA.

supporting plaintiffs' argument that it was ¶10.h that extinguished any claim they might have had under the 2005 TA. In fact, as Dean Colello, the NAC Chairman, testified at trial, ¶10.h has nothing to do with terminating the TA. Rather, it is ¶4 of the MOU, which was proposed by the Companies, that provides that all prior agreements, including the TA, are replaced by the Merger Transition Agreement ("MTA") as of the Effective Date. Trial Tr., 275-76.[2] For all these reasons, there is simply no support for plaintiffs' assertion that USAPA was under any obligation to implement or adhere to the unmodified Nicolau Award.

II. USAPA did not mislead the West Pilots about the MOU or ¶10.h

The notion that plaintiffs were misled by USAPA or were in the dark as to the meaning or consequences of the MOU or ¶10.h is utterly without merit. Initially, as stated in USAPA's Summary of the Evidence, the record is replete with statements and materials published by USAPA, principally the NAC, that made crystal clear the MOU did not include the Nicolau Award, was neutral with respect to seniority and had the effect of terminating the 2005 TA. *See, e.g.*, Exs. 234- 236; Colello Tr.; Holmes Tr. Not only were the communications clear, they were made with the agreement of Mr. Holmes and Mr. Calveri, the two West pilots on the four person committee.

Moreover, the evidence shows that plaintiffs and members of Leonidas were fully aware of these facts and were in constant contact with their lawyers about these issues, their legal strategy, and what actions to take. This evidence shows that plaintiffs and Leonidas members, advised by their counsel, made a deliberate decision to urge West Pilots to approve the MOU even though they were fully aware that it did not include the Nicolau Award and that it terminated the TA. This evidence is principally contained in Exhibits 308 and 310, which are email chains dated January 22-23, 2013, among

[2] Contrary to plaintiffs' misrepresentation, Mr. Colello, never testified that the TA seniority integration procedures continue in effect until sometime after the effective date of the American Airlines merger. He said just the opposite, namely that the TA continues in effect until the date of the POR. Tr., 295. He provided one example (the scheduling system), that would take time to change but never stated or even suggested that the process set forth in ¶10 would not be implemented immediately or that the displaced process of the TA would somehow continue. Tr., 287-88.

plaintiffs and members of Leonidas. Exhibit 308 reflects discussion of whether Messrs. Holmes and Calveri would have permitted the MOU to contain language to "evade the Nic" and whether ¶10.g and ¶10.h allow the company to "amend (abandon)" the TA. Exhibit 310 demonstrates that these issues have been discussed with counsel. One participant notes the only question is whether to file a lawsuit before or after the voting on the MOU ratification ends. These emails are consistent with the Leonidas updates (Exs. 258 and 259) which note, among other things, that the MOU is seniority neutral, contains no poison pill, and that no one should be afraid that voting for the MOU is harmful to their ultimate goal of suing to enforce the Nicolau Award. From these documents alone, it cannot be doubted that plaintiffs knew, *inter alia*, that USAPA took the position seniority integration with American would start with the current two seniority list status quo, and that USAPA believed the MOU modified the TA.

Plaintiffs' contention (Doc. 259, p. 10) that Mr. Holmes did not have sufficient information to make an informed decision as to whether to support the MOU misstates the record. In his deposition, Mr. Holmes admitted that he knew, as of January 2-4, 2013, when the BPR voted to approve the MOU, that the MOU was neutral with respect to seniority, that it did not require use of either date of hire or the Nicolau list in the seniority integration process, and that he participated in the creation of materials about the MOU to be provided to pilots, which included a provision stating that seniority would be governed by a process consistent with McCaskill Bond and, equally significantly, that it did not state that the Nicolau Award would be used in that process. As to ¶10.h of the MOU, at trial Mr. Holmes admitted that as of December 2012, he had certain concerns as to whether that provision had an effect on the TA and that he was aware there were some people who believed ¶10.h would terminate the TA. Mr. Holmes testified that notwithstanding his awareness of that controversy and that it was a question mark, the benefits of the MOU overrode those concerns and, as a member of the NAC he recommended to the BPR that they approve the MOU, participated as a member of the NAC in creating materials and attending road shows to educate pilots about the MOU,

and as a pilot voted in favor of the MOU. On these facts, and on the record as a whole, the statement that Mr. Holmes lacked sufficient information to make an informed decision about the MOU or ¶10.h simply cannot be credited.

III. Plaintiffs' Arguments about ¶10.h are Meritless

Plaintiffs grasp at straws when they argue that ¶10.h of the MOU does something other than ensure that the MOU was completely neutral with respect to seniority. The fact is that ¶10.h simply clarified that the MOU was in fact neutral with respect to seniority and eliminated any notion that the MOU would change the existing two list system at US Airways other than through the process outlined in the other provisions of ¶10. This is in fact the same position taken by US Airways and USAPA in the incomplete tentative agreement referred to as "MOU I." The evidence that the parties always intended to address seniority only through the process set forth in the MOU is overwhelming and un-rebutted. SF, ¶77; Hummel Dep.; Colello Tr.; Colello Dep.; Owens Dep. What plaintiffs appear to be complaining about is that the final MOU makes this position even clearer, and hence undercuts their "Nicolau by sneak attack" strategy, that is, their plan to urge approval of a "neutral" MOU and then to claim that the MOU requires implementation of the Nicolau Award. Ex. 308, 310, 258 and 259.

Plaintiffs appear to believe that they would have succeeded on their claim that the MOU was the "single agreement" referred to in the TA "but for" ¶10.h. Nothing could be further from the truth, for, as shown above, that was never the parties' agreement or intent nor could the MOU qualify as the "Single Agreement" referred to in the TA. But, having had their argument that the Nicolau Award is somehow a part of the MOU negated, plaintiffs now attack USAPA for including the clarification and foiling their schemes. However, Plaintiffs' "Nicolau by default" claim is as meritless with respect to the earlier draft "MOU I" as it is now under the final MOU. In both cases it was the clear and unvarying intention of the parties to modify the provisions of the TA regarding seniority integration and continue the two list status quo pending the new integration process. There was never any agreement or intention on the part of any party to the final

four-party MOU or to the prior three-party draft MOU I that either agreement would implement the Nicolau Award. Likewise, there was clearly no ratification of Nicolau by the East Pilots who voted to ratify the final MOU on the explicit understanding that it would not implement the Nicolau Award.

The agreement and intention of the parties did not change between the so-called MOU I and the final MOU. Both replaced the TA seniority provisions with a seniority integration process based on McCaskill-Bond. Both terminated the TA. Neither provided for the implementation of any integrated seniority lists outside that process. What did change is that plaintiffs can no longer argue that the Nicolau Award somehow became part of the MOU by default. Clarification of this consistent intention of the parties (while unfortunately not deterring plaintiffs from yet another meritless lawsuit), simply provides no basis for any claim against USAPA.

Nor is there any merit to plaintiffs' implicit suggestion that ¶10.h needed some type of separate consideration. Paragraph 10.h is merely a clarification based on the demand made by US Airways and the other parties that seniority be addressed only through a process based on McCaskill-Bond. It was prudent for USAPA to include the language of ¶10.h to confirm the parties' intent (along with the other clarifications and details fleshed out in the other nine subparagraphs of the final MOU) that there would be no interim change in the existing two-list system.

Plaintiffs completely misrepresent the record in citing the trial testimony of John Scherff for the proposition that "US Airways never expressed that it wanted to delay East/West pilot integration during the pendency of the merger." What Mr. Scherff stated was that he had not heard any US Airways representatives express that desire. Tr., 176. This is not surprising since there is no reason he would have – he was not on the NAC, he did not attend any negotiations, and he never testified he had any discussions with representatives of US Airways on any subject concerning negotiation of the MOU. The record is replete with evidence, including in the facts stipulated to by plaintiffs (SF, ¶77), that US Airways insisted that the two list status quo continue pending the merger. US

Airways made it a condition of agreeing to negotiate with USAPA. *See* Hummel Dep. 52-53; (Scott Kirby, [President of US Airways] "made it perfectly clear that we weren't going to deal with seniority in any way, shape or form, that the McCaskill-Bond process would allow us to deal with that at a later date, that we would be able to work towards an MOU provided that there was no discussion on seniority and that the seniority issue would be dealt with after the merger."); Colello Tr.; Colello Dep.; Owens Dep.; Hummel Dec. Plaintiffs never called or even deposed Mr. Kirby or any other US Airways, AMR or APA representatives. Plaintiffs in no way contradicted this evidence. As they bear the burden of proof on this matter, the facts as set forth in the record defeat their claim.

IV. The Evidence Shows USAPA Will Represent All US Airways Pilots Fairly in Seniority Integration Proceedings with APA

There is no merit to plaintiffs' assertions that USAPA does not and cannot represent former America West Pilots fairly. Nor, in particular, does the evidence show any fixed intention to present a strict date-of-hire list in seniority integration with the APA. This statement is a distortion of the evidence. Further plaintiffs have presented absolutely no evidence to support any of the elements required for the extraordinary relief that would entitle them to interfere with USAPA's status as the exclusive bargaining representative in its dealings over seniority. (Plaintiffs' Summary, Point VI.A)

Mr. Pauley, Chairman of USAPA's Merger Committee, made absolutely clear in his trial and deposition testimony that the Merger Committee is responsible for developing and analyzing various methodologies for integrating the lists and that he and the Committee believe there are various ways to arrive at a fair and equitable basis for integrating these lists, including elements of Nicolau and that the starting point for these various scenarios is the two list system (East and West) currently in effect at US Airways. Mr. Pauley stated categorically that no methodology had been fixed upon. Mr. Davison likewise confirmed that numerous methodologies are being studied. Tr. 414-15.

In their summary, and wholly without justification, plaintiffs resort to "table pounding" (as they can pound neither the law nor the facts) by purporting to question the

credibility of Mr. Pauley's testimony on these points. However, their failure to rebut this testimony at trial despite the opportunity to do so[3] speaks louder than their unwarranted remarks. Similarly unrebutted is Mr. Pauley's testimony that all of the pilots on the Merger Committee, including those based in Phoenix, unanimously oppose providing a separate seat at the table for West Pilots and all members of that committee believe they are able to present a much better and stronger position as a unified group and will arrive at a much better outcome than if there were separate representation.

V. USAPA Operates Democratically and in Accord with its DFR

Plaintiffs completely mischaracterize the evidence in their attempt to show that USAPA somehow runs roughshod over the interests of various minority groups within the Union and cannot represent the divergent interests of its members. Prior to rebutting this claim in detail, it is important to bear in mind the testimony of both East and West pilots that USAPA, like every union, must balance the interests of various components of its membership in various contexts both with respect to seniority and with respect to the myriad other issues the organization must address. As Mr. Holmes stated, younger pilots may want higher compensation while older pilots may be more focused on retirement benefit enhancements. As Mr. Owens testified, East Pilots questioned, often stridently, whether the MOU should contain a waiver of the change of control provisions when that waiver benefitted West Pilots but not East Pilots. Mr. Crimi noted that he and his fellow Charlotte representatives on the BPR (*i.e.*, East Pilots) sometimes found themselves in the minority faction on the BPR, attesting to the fact that issues do not always come down to East versus West. The reality is these and other tensions exist all the time, which is why unions are given wide latitude in representing their members. As a final resort, the law provides for change in representation, as happened here in 2008.

Plaintiffs' Point III.A, which purports to discuss the formation of USAPA, is completely irrelevant. *See* Tr., 39:16-19; Tr. of May 14, 2013 Hearing (Doc. 91) p. 7:20-24. Suffice it to say that there were many reasons why the US Airways pilots were

[3] *See* Tr., p. 430: plaintiffs declined the Court's offer to present rebuttal testimony.

dissatisfied with ALPA and voted for an independent representative. *See* Davison Tr. They had a perfect right to do so and their exercise of that right provides no support for plaintiffs' claims concerning an MOU negotiated and ratified more than five years later.

Plaintiffs' Point III.B contains similar misrepresentations regarding USAPA's Constitution and likewise has nothing to do with the claim in this case. First, the record does not support the contention that USAPA has ever insisted upon strict "date of hire." As set forth in the Stipulated Facts, USAPA has never proposed and does not insist upon an inflexible date-of-hire list. Rather, the proposal made by USAPA in 2008 is for date-of-hire with significant conditions and restrictions that protect former America West Pilots from being displaced by more senior former US Airways pilots. SF, ¶¶54, 55. [4]

Second, Mr. Pauley, among others, specifically rejected the proposition that the *objectives* provision of the USAPA Constitution that plaintiffs cite is a straightjacket that requires strict date-of- hire or prevents consideration of various seniority integration methodologies with the pilots of American Airlines, including aspects of the Nicolau Award. Pauley Tr., 375. In stark contrast with the repeated explanation that the Merger Committee is flexible and is considering various seniority integration methodologies without being doctrinaire, the West Pilots are wholly fixed on pure and unmodified Nicolau, that is, Nic or nothing, a position that could harm US Airways Pilots as a whole, including West Pilots, in the upcoming seniority integration process with the APA. Soha Dep. pp.43-44; Koontz Dep. p.46; Burman Dep. p. 63; Stockdell Dep. p. 104; Wargocki Dep. p. 47. Indeed, as the Court is aware, USAPA has made numerous attempts to engage the West Pilots in discussions to resolve the impasse over the Nicolau Award, but, although USAPA has been willing to compromise, the West Pilots have not, repeatedly and consistently demanding USAPA accede to the unmodified Nicolau list.

Point III.C, that the East Pilots constitute a majority of the membership is simply

[4] Equally irrelevant and unavailing is the claim that Mr. Scherff was somehow thwarted in attempts to amend the USAPA Constitution to eliminate Article I, Section 8.D. The fact is that an amendment is not necessary to allow consideration of a wide range of seniority integration methods and that, in any event, the West Pilots are sufficient in number to, by themselves, force a Union-wide vote on such an amendment.

beside the point. The fact is that USAPA, its BPR, and the Merger Committee are firmly committed to representing all the pilots employed by US Airways. To be sure, there is a disagreement over the Nicolau Award. But USAPA has acted responsibly to represent the interests of all pilots with respect to the MOU, in which the East Pilots gave up their Change of Control and other scope protections for the good of all pilots, with respect to grievances on behalf of West Pilots and a whole range of other matters. And, as to seniority integration with American's pilots, Mr. Pauley testified that USAPA will start with the two existing lists, and that this will benefit the majority of US Airways pilots (including East and West pilots) by affording the Merger Committee greater flexibility in integrating the US Airways Pilots with American's pilots.

Several witnesses also debunked the myth that USAPA is a tyranny of the majority. Mr. Hummel testified in his deposition as to his efforts – early and often – to reach out to and include representatives various domiciles and factions in USAPA affairs and committees. Both Mr. Holmes, a West Pilot, and Mr. Colello, an East Pilot, testified that the members of the NAC endeavored to act in the best interests of all pilots, regardless of whether they were East or West. Mr. Pauley testified – and this testimony was not rebutted despite plaintiffs' opportunity to do so – that the Merger Committee is unanimous in its belief it can work in the best interests of all US Airways' pilots and advocate for a fair and equitable merger of seniority lists with APA on their behalf and that no separate representation for West Pilots is necessary or appropriate.

USAPA has successfully represented all of it pilots in grievances, in obtaining an MOU that will give US Airways pilots unprecedented increases in pay and benefits and with respect to numerous other matters. USAPA is led by responsible people who understand their duties to the pilots they represent. The credible evidence compels the conclusion that USAPA will continue to fulfill its duties to all US Airways pilots.

Respectfully submitted this 6th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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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