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US AIRWAYS, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA, on behalf of themselves and all similarly situated former America West Pilots,

Plaintiffs,

vs.

US AIRLINE PILOTS ASS'N, an unincorporated association; and US AIRWAYS, INC., a Delaware corporation,

Defendants.

Case No. 2:13-cv-00471-PGR

DEFENDANT US AIRWAYS, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Defendant US Airways, Inc. ("US Airways" or the "Company"), by and through its undersigned counsel, hereby files this Motion to Dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. This Motion is supported by the following Memorandum of Points and Authorities, and Declaration of E. Allen Hemenway filed concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

Almost five years ago, nearly identical claims filed against US Airways in this Court by these same plaintiffs were dismissed for lack of subject-matter jurisdiction. Plaintiffs offer no valid explanation as to why jurisdiction that was lacking then could exist now, and, indeed, there is none. Their claims were properly dismissed then and should be dismissed again now.

Following the 2005 merger of US Airways and America West Airlines, Inc. that created defendant US Airways, a dispute arose between the pre-merger America West pilots (the "West Pilots") and the pre-merger US Airways pilots (the "East Pilots") regarding how the seniority lists of the two pilot groups would be integrated. That dispute led to the filing of a lawsuit in 2008 by the West Pilots (i.e., the plaintiffs here) for breach of the duty of fair representation ("DFR") against their union, defendant US Airline Pilots Association ("USAPA"), and for breach of a collectively-bargained Transition Agreement against the Company. Judge Wake dismissed the West Pilots' claims against the Company because those claims were "minor disputes" under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, and therefore subject to the exclusive jurisdiction of an arbitral Board of Adjustment. *See Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1063-1064 (D. Ariz. 2008). The West Pilots' DFR claims against USAPA were ultimately dismissed on ripeness grounds.

The West Pilots have now filed a new lawsuit, this time involving how the seniority of US Airways (East and West) pilots will be integrated with the seniority of American Airlines, Inc. ("American") pilots in connection with the recently-announced merger of US Airways and American. But even if these recent developments are relevant

to whether the West Pilots' DFR claims against USAPA are now ripe, they do not change the fact that, as decided in the prior *Addington* litigation, their claim against US Airways for breach of the Transition Agreement is a "minor dispute" that belongs before a Board of Adjustment and not a federal court.

Accordingly, Count Two of plaintiffs' Complaint should be dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit is the latest chapter in a long-running seniority dispute between two groups of pilots following the merger of US Airways and America West Airlines, Inc. in 2005 that created a single airline also known as US Airways. The pre-merger America West Pilots are commonly known as the "West Pilots" and the pre-merger US Airways pilots are commonly known as the "East Pilots." (Complaint For Declaratory Judgment On Duty Of Fair Representation And Order Enjoining Pilot Integration That Does Not Use The Nicolau Award Seniority List ("Compl.") (Doc. No. 1), ¶¶ 1-2.)[1]

A. Nicolau Award.

In 2005, the Air Line Pilots Association ("ALPA") represented the East Pilots and the West Pilots in two separate bargaining units, or "crafts or classes." (Compl. ¶¶ 39-40.) In connection with the merger, the East Pilots and the West Pilots (through their respective ALPA governing bodies) and the merging companies agreed, in a collectively-bargained Transition Agreement negotiated pursuant to the federal Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq*., that the pilot workforces of the two airlines would be combined. (*Id*. ¶ 41.) A dispute arose, however, as to the relative placement of the two groups of pilots on the integrated seniority list that was to be used on the combined, post-merger airline.

[1] For purposes of this motion only, US Airways accepts as true certain well-pleaded facts from plaintiffs' Complaint. Those facts pertain to the largely-undisputed historical background of the seniority dispute between the West Pilots and the East Pilots.

Pursuant to the Transition Agreement and its incorporation of ALPA's "Merger Policy," the East Pilots and West Pilots, represented by separate counsel, submitted their seniority-integration dispute to "final and binding" arbitration before a neutral arbitrator, George Nicolau. (*See* Compl. ¶¶ 42-46; Plaintiffs' Statement Of Facts In Support Of Motion For A Preliminary Injunction ("Statement of Facts") (Doc. No. 14) ¶¶ 21-24; Appendix Of Evidence In Support Of Motion For A Preliminary Injunction Enjoining Defendants (And Their Successors) From Integrating Pilot Seniority Without Using The Nicolau Award List To Define The Relative Seniority Of US Airways Pilots (Doc. No. 14-1), p. 121).[2] Arbitrator Nicolau issued his award on May 1, 2007. (Compl. ¶ 50.) The Transition Agreement required ALPA to present the integrated seniority list fashioned by Arbitrator Nicolau to US Airways and, if that seniority list satisfied certain conditions (which it did), US Airways was required by the Transition Agreement to accept the list; it did so on or about December 20, 2007. (*See id*. ¶¶ 49, 55.) Under the terms of the Transition Agreement, however, the integrated seniority list could not be implemented until a joint collective bargaining agreement applicable to the combined airline was negotiated. (*See* Statement of Facts ¶¶ 52-54.)

B. Formation Of USAPA.

The Nicolau Award did not integrate pilot seniority based strictly on each pilot's "date of hire" with his or her pre-merger airline, as the East Pilots had sought, but instead purported to fashion a "fair and equitable" seniority integration attributing importance to the "career expectations" of the pilots at each of the pre-merger airlines. (*See* Compl. ¶¶ 47-48, 51-54; Statement of Facts ¶ 32.) In response to the Nicolau Award, the East Pilots formed a new union, defendant US Airline Pilots Association ("USAPA"), whose constitution expressly mandates a "date-of-hire" integrated seniority list and prohibits implementation of the Nicolau Award. (*See* Statement of Facts ¶¶ 41-42, and 69.) The

[2] This Court may consider any relevant documents in determining whether it has subject-matter jurisdiction. *See Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003) (considering "affidavits furnished by both parties" in connection with Rule 12(b)(1) motion).

East Pilots outnumbered the West Pilots, and, following a representation election between USAPA and ALPA, the National Mediation Board certified USAPA on April 18, 2008 as the new collective bargaining representative for the combined, post-merger group of East Pilots and West Pilots. (*See* Compl. ¶¶ 5, 7-8, and 58-62; Statement of Facts ¶ 62). After it succeeded ALPA, USAPA proposed in the negotiations for a joint collective bargaining agreement that US Airways accept a "date-of-hire" integrated seniority list that was contrary to the Nicolau Award. (*See* Compl. ¶ 63.) The West Pilots perceived USAPA's "date of hire" seniority proposal to be less favorable to them as a group than the Nicolau Award. (*See id.*)

C. *Addington I*.

On September 4, 2008, six West Pilots filed a class-action lawsuit against USAPA and US Airways in this District, *Addington v. US Airline Pilots Association*, Case No. CV 08-1633-PHX-NVW ("*Addington I*"). (*See* Compl. ¶ 65.) The West Pilots alleged that USAPA had breached its duty of fair representation ("DFR") by abandoning the Nicolau Award without a legitimate union objective for doing so. (*See id.*) The West Pilots also alleged two claims against US Airways for breach of the Transition Agreement. Judge Wake dismissed both those claims for lack of subject-matter jurisdiction because the claims were "minor disputes" under the RLA, i.e., disputes that "involve the 'interpretation or application of collective bargaining agreements,'" and therefore subject to the exclusive jurisdiction of the Transition Agreement's arbitral Board of Adjustment. *Addington*, 588 F. Supp. 2d at 1063-1064 (citation omitted).

The West Pilots prevailed at trial on their DFR claim against USAPA. The Court found that USAPA had breached its duty of fair representation to the West Pilots through its "date-of-hire" seniority proposals, "because it cast aside the result of an internal seniority arbitration solely to benefit East Pilots at the expense of West Pilots" and "failed to prove that any legitimate union objective motivated its acts." *See Addington v. US Airline Pilots Ass'n*, 2009 WL 2169164, at *8 (D. Ariz. July 17, 2009). The Ninth

Circuit, however, vacated the district court's decision on ripeness grounds. *See Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010).

D. *Addington II*.

After the Ninth Circuit's decision in *Addington I*, USAPA continued to assert the position that it had the right to bargain for a non-Nicolau seniority list and the West Pilots continued to assert that USAPA did not. US Airways filed a declaratory judgment lawsuit in this District on July 26, 2010 against both USAPA and the West Pilots, *US Airways, Inc. v. Addington*, Case No. CV-10-01570-ROS (D. Ariz.) ("*Addington II*"), because "[a]ccording to US Airways, if it accepts USAPA's seniority proposal, the West Pilots have said they will sue US Airways for facilitating or assisting USAPA's breach of the duty of fair representation. And, if US Airways insists on adopting the new collective bargaining agreement incorporating the Nicolau Award, USAPA has promised a work stoppage." (*See* Order (Doc. No. 193) in *Addington II*, at 5:5-10.)

In this lawsuit, US Airways sought alternative determinations that USAPA's insistence on a non-Nicolau seniority list would or would not breach USAPA's duty of fair representation to the West Pilots and that US Airways could not be held liable to the West Pilots if it accepted USAPA's seniority proposal. Based primarily on her interpretation of the Ninth Circuit's ripeness decision in *Addington I*, Chief Judge Silver denied the requested declaratory relief.

Chief Judge Silver ruled that "[USAPA's] seniority proposal does not breach its duty of fair representation provided it is supported by a legitimate union purpose," but did not rule on whether USAPA had such a purpose. (*See* Order (Doc. No. 193) in *Addington II*, at 9:3-4.) Rather, that determination would have to wait until future events rendered the West Pilots' DFR claim ripe. (*See id.* at 7:21-22 and 8:3-5 (referring to when "a collective bargaining agreement is finalized"); at 7:23-8:3 (referring to when "a particular seniority regime is ratified"). Chief Judge Silver did, however, note that USAPA was "free" to abandon the Nicolau Award, but that "[b]y discarding the result of a valid arbitration and negotiating for a different seniority regime, USAPA is running the

risk that it will be sued by the disadvantaged pilots when the new collective bargaining agreement is finalized. An impartial arbitrator's decision regarding an appropriate method of seniority integration is powerful evidence of a fair result. Discarding the Nicolau Award places USAPA on dangerous ground." (*Id.* at 7:13-19.)

Finally, Chief Judge Silver also stated that "USAPA is bound by the Transition Agreement," as the successor union to ALPA, but that the "Transition Agreement can be modified at any time 'by written agreement of [USAPA] and the [US Airways].'" (*Id.* at 6:18-7:3 (quoting Transition Agreement § XII(B) (alterations in Court's Order).)[3]

E. <u>US Airways/American Airlines Merger And Memorandum Of Understanding</u>.

In February of this year, US Airways and American agreed to merge. In connection with this merger, the two airlines, USAPA, and the union representing American's pilots, the Allied Pilots Association, entered into a Memorandum Of Understanding Regarding Contingent Collective Bargaining Agreement ("MOU") that sets the terms, and/or prescribes procedures for setting terms, of the new collective bargaining agreement that will be applicable to the American pilots and the US Airways (East and West) pilots if the merger is consummated. (*See* Compl.¶ 78; Declaration Of Andrew S. Jacob In Support Of West Pilots' Motion To Transfer Action To Judge Wake Or Judge Silver ("Jacob Decl.") (Doc. No. 5); Ex. 1.) The merger is subject to regulatory approvals and the Bankruptcy Court for the Southern District of New York's confirmation of a Plan of Reorganization involving American's corporate parent (AMR Corporation); these conditions are currently anticipated to occur in the third quarter of this year. The MOU, in turn, only becomes effective if and when the merger closes. (Jacob Decl.; Ex. 1 ¶ 18(c).)

[3] US Airways has appealed the district court's ripeness decision in *Addington II*. Neither the West Pilots nor USAPA filed an appeal or cross-appeal. US Airways' opening brief is currently due on May 10, 2013.

The MOU provides generally that the seniority of the American pilots and the US Airways (East and West) pilots shall be integrated on a "final and binding" basis in a manner consistent with the McCaskill-Bond amendment, a federal statute enacted in 2008. (*See* Compl. ¶ 81.) The MOU does not specifically address the Nicolau Award or the integration of East and West pilots as part of the overall US Airways/American pilot seniority integration process. (*Id*. ¶ 82.)

F. The Instant Lawsuit (*Addington III*).

On March 6, 2013, plaintiffs, many of whom were representatives of the certified West Pilot Class in *Addington I*, filed the instant lawsuit. Plaintiffs assert a cause of action against USAPA, based on their contention that USAPA does not have a legitimate union purpose for using anything other than the Nicolau Award as the basis for integration of the East Pilots and West Pilots, and that USAPA therefore 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." (Compl. ¶ 96-100.) Plaintiffs also assert a cause of action against USAPA to recover their attorneys' fees under the common benefit doctrine. (*See id*. ¶¶ 113-119.) As against US Airways, plaintiffs contend that the Transition Agreement contains an implied covenant of good faith and fair dealing that US Airways allegedly breached by entering into the MOU because the MOU does not specifically require the use of the Nicolau Award to integrate the seniority of the East Pilots and West Pilots. (*See id.* ¶¶ 101-112.) As in *Addington I*, plaintiffs have not filed any grievances or otherwise attempted to invoke the arbitral jurisdiction of the Transition Agreement's Board of Adjustment with respect to their claim for breach of contract against US Airways. (Declaration of E. Allen Hemenway In Support Of Defendant US Airways, Inc.'s Motion To Dismiss For Lack Of Subject-Matter Jurisdiction ("Hemenway Decl.") ¶ 3 (filed concurrently herewith).)

ARGUMENT

A. Because Plaintiffs Have Asserted A "Minor Dispute" Under The Railway Labor Act Subject To The Exclusive Jurisdiction Of The Board of Adjustment, This Court Has No Subject-Matter Jurisdiction Over Plaintiffs' Claim For Breach Of The Transition Agreement.

In the face of a challenge to subject-matter jurisdiction raised by a Rule 12(b)(1) motion to dismiss, "the plaintiff has the burden of proving jurisdiction in order to survive the motion. A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case . . . ." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001) (internal quotation marks and citation omitted), *abrogated on other grounds* by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). As demonstrated below, plaintiffs have not, and cannot, meet their burden to establish subject-matter jurisdiction over their claim against US Airways for breach of the Transition Agreement.

1. Under The Railway Labor Act, Any Dispute Over Interpretation Or Application Of A Collective Bargaining Agreement, Like Plaintiffs' Claim Against US Airways Here, Is A "Minor Dispute" Within The Exclusive Jurisdiction Of The Appropriate Board Of Adjustment.

Under the RLA, a "minor dispute" is a dispute involving the interpretation or application of a collective bargaining agreement. *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 722-23 (1945). The RLA requires the parties to a minor dispute to submit their contract interpretation issues to the appropriate board of adjustment for final and binding arbitration. 45 U.S.C. § 184. The jurisdiction of the appropriate adjustment board is "mandatory, exclusive and comprehensive." *E.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322-24 (1972); *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 36-38 (1963); *Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904, 906 (9th Cir. 2002). Such an adjustment board has

been established pursuant to Section X of the Transition Agreement to hear disputes over the interpretation or application of that Agreement. (Hemenway Decl. ¶ 3.)

It is undisputed that the Transition Agreement is a Railway Labor Act collective bargaining agreement, and plaintiffs concede that their claim against US Airways is a minor dispute that generally would have to be resolved through arbitration before a board of adjustment. (*See* Comp. ¶ 111.) Indeed, Judge Wake reached the exact same result in *Addington I*, where he dismissed these plaintiffs' claims against US Airways for breach of the Transition Agreement. *See Addington*, 588 F. Supp. 2d at 1063-1064.

2. Plaintiffs Allege No Basis For An Exception To The Exclusive Jurisdiction Of The Board Of Adjustment Over Their Claim For Breach Of The Transition Agreement.

In seeking to justify their failure to initiate arbitration under the Transition Agreement, plaintiffs allege only that "[d]espite vigorous protests by the West Pilots, USAPA refuses to assert breach of the Transition Agreement implied covenant" against US Airways. (*See* Compl. ¶ 110.) But plaintiffs have made no attempt to initiate the Transition Agreement's dispute-resolution procedures themselves. (Hemenway Decl. ¶ 3.) And, as was the case in *Addington I* (which involved many of the same plaintiffs as here), US Airways is willing to process any grievance filed by plaintiffs or any other individual pilots, which raise the claim set forth against US Airways in Count Two of plaintiffs' Complaint, to final and binding arbitration before the Transition Agreement's Board of Adjustment. (*See* Hemenway Decl. ¶ 4.) Accordingly, plaintiffs' claim against US Airways for breach of the Transition Agreement should be dismissed.

CONCLUSION

For all the foregoing reasons, US Airways respectfully requests that Count Two of plaintiffs' Complaint be dismissed with prejudice for lack of subject-matter jurisdiction pursuant to Rule 12(B)(1) of the Federal Rules of Civil Procedure.

April 4, 2013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2013, I caused to be electronically transmitted the attached Defendant US Airways, Inc.'s Motion To Dismiss For Lack Of Subject-Matter Jurisdiction, and supporting Declaration Of E. Allen Hemenway, to the Clerk's office using the CM/ECF System for filing.

/s/ Robert A. Siegel

Robert A. Siegel

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