Marty Harper (#003416)
mharper@polsinelli.com
Andrew S. Jacob (#22516)
ajacob@polsinelli.com
Jennifer Axel (#023883)
jaxel@polsinelli.com
POLSINELLI P.C.
CityScape
One East Washington St., Suite 1200
Phoenix, AZ 85004
Fax: (602) 264-7033
Phone: (602) 650-2000
Attorneys for Plaintiffs

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 **OPPOSITION TO US AIRWAYS' MOTION TO DISMISS (Doc. 28)** **Oral Argument Requested**

Plaintiffs oppose US Airways' Motion to Dismiss. [Doc. 28.] US Airways must be a party in this action because it is a defendant to a valid contract claim that can only be decided by a federal court. Plaintiffs explain their opposition further in the *Memorandum of Points and Authorities* that follows.

TABLE OF CONTENTS

I. Overview ... 1

A. The 2005 Merger of America West and US Airways ... 1

B. Breach of Duty of Fair Representation ... 1

C. First Round of Litigation ... 2

D. Second Round of Litigation ... 2

E. Third (and present) Round of Litigation ... 2

II. Legal Argument ... 5

A. Overview ... 5

B. Federal courts have jurisdiction over claims that an airline and its union made an agreement that violates workers' rights ... 5

C. This Court has jurisdiction to order US Airways (and USAPA) to use the seniority order in the Nicolau Award list. ... 7

D. US Airways' willingness to arbitrate does not negate this Court's jurisdiction. ... 7

III. Conclusion ... 8

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

TABLE OF AUTHORITIES

Cases

Addington v. US Airline Pilots Ass'n,
606 F.3d 1174 (9th Cir. 2010) 2

Addington v. US Airline Pilots Ass'n.,
588 F. Supp. 2d 1051 (D. Ariz. 2008) 2

Beriault v. Loc. 40, Super Cargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union,
501 F.2d 258 (9th Cir. 1974) 9

Bernard v. Air Line Pilots Assn., Intl.,
873 F.2d 213 (9th Cir. 1989) 7, 8

Consol. Rail Corp. v. Ry. Labor Execs. Ass'n,
491 U.S. 299 (1989). 6

Croston v. Burlington N. R.R.,
999 F.2d 381 (9th Cir. 1993) 9

Glover v. St. Louis-S.F. Ry. Co.,
393 U.S. 324 (1969) 6, 7

Loc. 3-7, Int'l Woodworkers v. Daw Forest Prods. Co.,
833 F.2d 789 (9th Cir. 1987) 3

Raus v. Bhd. Ry. Carmen of the U.S. and Can.,
663 F.2d 791 (8th Cir. 1981) 6

Steele v. Louisville & N.R. Co.,
323 U.S. 192 (1944) 6, 7, 9

Rules

Fed. R. Civ. P. 19 7

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

A. The 2005 Merger of America West and US Airways

In 2005, US Airways (then a bankruptcy debtor) and America West Airlines merged to form a new airline also called US Airways, one of the defendants in this action. [Complaint, Doc. 1, at ¶ 1.] In furtherance of that merger, the pilots ("East Pilots" from US Airways and "West Pilots" from America West) and the airlines entered into an agreement called the "Transition Agreement." [*Id.*, at ¶¶ 2, 42.] The Transition Agreement provided that the pilots would combine their seniority lists and that they would negotiate a "Single Agreement" with the new airline that would use such combined seniority list to fully integrate pilot operations. [*Id.*, at ¶ 103.] The pilots subsequently created that combined seniority list in an arbitration proceeding. [*Id.*, at ¶ 3.] The list that came out of that proceeding is knows as the "Nicolau Award." [*Id.*]

The Transition Agreement provided (and both pilot groups so understood) that the Nicolau Award would be a "final and binding" combination of the two pilot seniority lists. [*Id.* at ¶ 45.] Yet, the East Pilots immediately repudiated that agreement. [*Id.*, at ¶ 4.] Details of their repudiation are set out in the pending motion for a preliminary injunction. [Doc. 13, at 4:15 to 6:6 (internal pagination).]

B. Breach of Duty of Fair Representation

At the core of their repudiation of the Nicolau Award, East Pilots created US Airline Pilots Association ("USAPA"), a single-airline union that is controlled by the East Pilot majority. [Doc. 1, at ¶¶ 5, 7.] In a representation election, USAPA ousted the Airline Pilots Association, the multi-airline union then representing these pilots and requiring implementation of the Nicolau Award. [*Id.*, at ¶¶ 6, 58-62.] Under East Pilot control, USAPA is firmly and unequivocally repudiating its duty to honor the Nicolau Award.[1] [*Id.*, ¶ 84.] Indeed, as this Court noted in the previous case before it between the

[1] The Court found that "USAPA is bound by the Transition Agreement." *See US Airways, Inc. v. Addington, et al.*, CV-10-01570-PHX-ROS, Doc. 193 at pg. 6:19-20.

parties "the main purpose of USAPA is to reject the Nicolau Award." *See US Airways, Inc. v. Addington, et al.*, CV-10-01570-PHX-ROS, Doc. 193 at pg. 3:23-24.

C. First Round of Litigation

In September 2008, Plaintiffs filed a duty of fair representation ("DFR") claim against USAPA along with contract claims against US Airways. *Addington v. US Airline Pilots Ass'n.*, 588 F. Supp. 2d 1051 (D. Ariz. 2008). Plaintiffs sought damages against US Airways for lost wages and benefits and sought to enjoin US Airways from furloughing West Pilots that had a higher position than East Pilots on the Nicolau Award list. *Id.* at 1058. Judge Wake held that these contract claims (but not the DFR claim) were subject to the exclusive jurisdiction of the System Board because they involved the "interpretation or application of collective bargaining agreements." *Id.* at 1063. The Court dismissed those claims (against the airline) because none of the exceptions to that exclusive jurisdiction applied (but as explained below do apply here now). *Id.* at 1063-64. Later, the Court entered judgment against USAPA on the DFR claim that was later vacated for lack of ripeness. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1184 (9th Cir. 2010).

D. Second Round of Litigation

On July 27, 2010, US Airways filed a second round of litigation, a declaratory action that sought a ruling as to whether the airline would be liable if it entered into a collective bargaining agreement ("CBA") with USAPA that did not implement the Nicolau Award. *US Airways, Inc. v. Addington*, No. 10-CV-01570-ROS (D. Ariz. Jul. 26, 2010). The Court held that USAPA would breach its DFR if it entered into such a CBA without "a legitimate union purpose." [Amend. Judgment, 1 (Dec. 4, 2012) (Doc. 206)]. It left open the question of whether USAPA, under some as yet unforeseen circumstances, could have such a purpose.

E. Third (and present) Round of Litigation

The Transition Agreement has an implied covenant that "requires that neither party will engage in any act that will have the effect of destroying or injuring the right of the

other party to receive the fruits of the contract." *Loc. 3-7, Int'l Woodworkers v. Daw Forest Prods. Co.*, 833 F.2d 789, 795 (9th Cir. 1987) (internal quotation marks omitted). The "fruits of the contract" at issue here is implementation of the Nicolau Award. The Transition Agreement provided that the implementation of the Nicolau Award would occur when the pilots and the new airline entered into a single agreement applicable to both East and West Pilots (referred to in the Transition Agreement as the "Single Agreement") that provided one set of wages and benefits for all pilots, East and West. [*Id.*, at ¶ 103.] The Transition Agreement also required that US Airways accept the integrated list that arose out of the procedures outlined in the Transition Agreement, which resulted in the Nicolau Award. [*Id.*, at ¶ 107.] On December 20, 2007, US Airways accepted the Nicolau Award pursuant to the terms of the Transition Agreement. [*Id.*, at ¶ 55.] The implied covenant in the Transition Agreement, therefore, constrained US Airways from entering into any agreement with its pilots that set their wages and benefits unless it also provided for the integration of US Airways pilot operations using the Nicolau Award list. [*Id.*, at ¶¶ 104-07].

In February 2013, US Airways and USAPA entered into a contract, the Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement ("MOU"). [*Id.*, ¶ 78.] A copy of the MOU has been filed in this action. [Doc. 5-2.][2] Alleviating any doubt that the MOU is the Single Agreement contemplated by the Transition Agreement, it is described as an "agreement" that "provided for, among other things, the terms and conditions of employment for the pilots of American and US Airways during the period of single operations following a merger." *See In re AMR Corp.*, United States Bankruptcy Court, Southern District of New York, AMR Disclosure

[2] Documents to which a complaint refers, even when not attached, are considered to be part of the pleadings and may be considered in ruling on a Rule 12(b)(6) motion to dismiss. *F.D.I.C. v. Frankel*, 2011 WL 5975262 (N.D. Cal. 2011) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002)). Because US Airways has attacked the Court's jurisdiction, it not restricted to the face of the pleadings but can review any evidence to resolve factual disputes concerning jurisdiction. *See, e.g. McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988).

Statement, Doc. 7632, § III(D)(4) at pg. 47. It, therefore, is the "Single Agreement" contemplated in the Transition Agreement. [*Id.*, at ¶ 105.]

But, in derogation of the implied covenant in the Transition Agreement, the MOU does not provide for the integration of pilot operations using the Nicolau Award list. [*Id.*, at ¶ 82.] To the contrary, it provides that the only way to modify the "seniority lists currently in effect at US Airways" is through the McCaskill-Bond process outlined in paragraph 10 of the MOU. [Doc. 5-2 at § 10(h)]. The current seniority lists in effect at US Airways is not the Nicolau Award, but rather the two separate lists of East and West Pilots from pre-merger US Airways and American West Airlines. [*Id.* at § 15]. USAPA and US Airways have repudiated the Nicolau Award as part of the MOU, in violation of the contractual obligations under the Transition Agreement and in violation of USAPA's duty of fair representation.

The MOU unequivocally denies the West Pilots the "fruits" of the Transition Agreement—a path to implementation of the Nicolau Award. The MOU, therefore, either breached or changed the Transition Agreement. If the MOU breached the Transition Agreement, Plaintiffs have a valid contract claim against US Airways that can only be adjudicated by this Court rather than the Systems Board. In the alternative, if the MOU changed the Transition Agreement, Plaintiffs have a valid claim that US Airways acted in concert with USAPA to breach the DFR.[3] Either theory supports a valid claim against US Airways and entitles the West Pilots, at long last, to be integrated with the East Pilots pursuant to the Nicolau Award.[4]

---

[3] "Acting in concert" in such manner provides an alternative basis for subject matter jurisdiction based on these facts. *See* § II.B., *infra.* If needed, Plaintiffs can amend their pleadings to state such cause of action directly.

[4] To the extent that USAPA, US Airways, or others, argue that Plaintiffs are attempting to interfere with US Airways pending merger with American Airlines, enjoin USAPA from going forward with the MOU or "force" USAPA to breach any terms of the MOU, these arguments are more legal contrivances created by USAPA to prevent integration with the West Pilots pursuant to the Nicolau. Plaintiffs' position has been clear since the beginning of this dispute in 2008: the only list that US Airways, USAPA and the East Pilots can use for purposes of any agreement that sets the terms and conditions of employment of the US Airways pilots is the Nicolau Award. It is Plaintiffs' contention

II. Legal Argument

A. Overview

US Airways equates the contract claim in this action with the claims that the West Pilots made in 2008. That is wrong. In 2008, the West Pilots claimed that US Airways was breaching an existing contract. They sought damages against US Airways and an order enjoining US Airways from furloughing West Pilots. Because such relief could be granted without jurisdiction over USAPA it was subject to administrative resolution.

Now, Plaintiffs claim that US Airways wrongfully entered into a contract (the MOU) along with USAPA. This was wrongful because it breached an existing obligation to implement the Nicolau Award seniority order. Plaintiffs seek an order directing US Airways and USAPA to use the Nicolau Award seniority order when merging pilot seniority with the American Airlines pilots pursuant to the MOU. Such relief can only be obtained from a federal court. This Court, therefore, now has jurisdiction that was lacking in 2008.

B. Federal courts have jurisdiction over claims that an airline and its union made an agreement that violates workers' rights.

In minor disputes, the Board of Adjustment provides an exclusive administrative remedy. *Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 310 (1989). An exception to that rule is made where a union wrongfully acts "in concert" with the carrier-employer to breach an existing CBA or to set up "schemes and contrivances" to stymie aggrieved employees. *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324, 331 (1969). Rather, in such matters, "[j]oinder of the employer is permissible" in the court

---

that the MOU did set the terms and conditions of employment for the US Airways Pilots. If the Court ultimately agrees that this dispute is now ripe and orders USAPA and US Airways to use the Nicolau Award for purposes of the MOU, compliance with such an order does not require interference with or delay of the MOU or merger process. Whether USAPA will choose, ***at some point in the future***, to attempt to interfere or halt the MOU process because of such an order is not something that should be a consideration of this Court (or any other) for purposes of Plaintiffs' action.

proceedings against the union. *Raus v. Bhd. Ry. Carmen of the U.S. and Can.*, 663 F.2d 791, 797-98 (8th Cir. 1981).

The sine qua non of a carrier-employer acting in concert with a union to deny workers' rights is where the carrier-employer and the union enter into an agreement that, on its face, violates the union's DFR. Indeed, the first decision to recognize the existence of the DFR established that courts have jurisdiction in such matters over the carrier-employer. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944).

More recently and directly on point, the Ninth Circuit affirmed a preliminary injunction directed at an airline (and its pilot union) to remedy a tainted CBA that abrogated a minority pilot group's right to fair seniority integration after an airline merger. *Bernard v. Air Line Pilots Assn., Intl.*, 873 F.2d 213, 218 (9th Cir. 1989) ("The district court acted within its discretion in issuing an order to set the tainted agreement aside, compel the parties [the union and the airline] to reach a new one . . . ."). The MOU here, because it fails to implement the Nicolau Award seniority order, is similarly tainted. This Court, therefore, has similar jurisdiction to provide a remedy directed at both US Airways and USAPA.

The Supreme Court directly addressed the issue of jurisdiction over a carrier-employer in *Glover*, 393 U.S. 324. The workers in that matter sought relief against both their union and the carrier-employer. *Id.* at 328. The Supreme Court found that there was jurisdiction, distinguishing a claim alleging that a CBA was wrongful on its face from a claim alleging that it was wrongfully applied. *Id.* at 328-29 (holding that "the jurisdiction of the Railroad Adjustment Board remains exclusive in a fair representation case, to the extent that relief is sought against the railroad for alleged discriminatory performance of an agreement validly entered into and lawful in its terms"). In other words, where the carrier-employer and the union enter into a wrongful agreement, "the employer is made a party to insure complete and meaningful relief." *Id.* at 329. "The federal courts [in such matters] may therefore properly exercise jurisdiction over both the union and the railroad." *Id.* (citing *Steele* as an example).

Glover applies where a carrier-employer and union reach an agreement that is wrongful on its face. An agreement that derogates existing seniority rights for no legitimate union purpose is wrongful on its face. To provide a meaningful remedy where a union and carrier-employer have made such an agreement, a court must have jurisdiction to order both parties (the employer and the union) to change the terms of the agreement. That is precisely what happened in *Bernard*. That is what should happen here.

As the Court cautioned in the second round of litigation, "US Airways must evaluate any proposal by USAPA with some care to ensure that it is reasonable and supported by a legitimate union purpose." *See* CV-10-01570-PHX-ROS, Doc. 193. Here, there was no legitimate union purpose for USAPA to abandon the Nicolau Award other than to attempt to negotiate a more favorable outcome for the East Pilots at the expense of the West Pilots. US Airways was without doubt aware that there was no legitimate union purpose to abandon the Nicolau Award, yet agreed to do so.

C. This Court has jurisdiction to order US Airways (and USAPA) to use the seniority order in the Nicolau Award list.

The claim against US Airways here is not (as it was in 2008) that the airline is misapplying the Transition Agreement. The claim is that US Airways entered into an agreement that sets "the terms and conditions of employment for the pilots of American and US Airways" (the MOU) that violates the implied covenant in the Transition Agreement (and violates USAPA's DFR). The injunction sought here would order US Airways and USAPA to use the Nicolau Award for seniority integration in the course of the American Airlines merger. [Doc. 1, ¶ 123.] To provide such a remedy, this Court must have jurisdiction over both US Airways <u>and</u> USAPA. This Court, therefore, must deny US Airways' motion.

D. US Airways' willingness to arbitrate does not negate this Court's jurisdiction.

US Airways submits a declaration by Allen Hemenway, establishing that US Airways is willing to submit to the dispute resolution procedures set out in the Transition

Agreement (the so-called "Board of Adjustment"). [Doc. 28-1, at ¶ 4.] That willingness, however, is immaterial because the Board of Adjustment is incapable of providing the requisite relief.

It is well-established that administrative procedures such as the Board of Adjustment need not be exhausted where the plaintiff seeks "a remedy not available through the grievance procedure." *Beriault v. Loc. 40, Super Cargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union*, 501 F.2d 258, 266 (9th Cir. 1974). As explained above, where the wrong at issue occurred at the level of contract formation, a forum such as the Board of Adjustment does not have the authority to right the wrong. *Croston v. Burlington N. R.R.*, 999 F.2d 381, 386 (9th Cir. 1993) (holding that "[a]n employee will be excused from exhausting administrative remedies . . . where the alleged breach of duty relates to the union's conduct in negotiating the collective bargaining agreement.").

The remedy for the DFR / contract breach / acting-in-concert claim here would be an order compelling US Airways and USAPA to use the Nicolau Award seniority order when implementing the MOU to create a combined seniority list with the American Airlines pilots. Such an order must apply to both the airline and the union.

The Board cannot provide such relief unless USAPA agrees to submit its DFR liability to the Board. USAPA expresses no willingness to do so. Moreover, even if USAPA did express such willingness, there is no basis to compel Plaintiffs to do so. *Steele*, 323 U.S. at 207 ("the right . . . to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance."). US Airways' willingness to arbitrate, therefore, is insufficient to deprive this Court of jurisdiction.

III. Conclusion

Plaintiffs respectfully ask the Court to deny US Airways' motion to dismiss for lack of subject matter jurisdiction.

Dated this 26th day of April, 2013.

POLSINELLI PC

By */s/ Andrew S. Jacob*
Marty Harper
Andrew S. Jacob
Jennifer Axel
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 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.

By */s/ Andrew S. Jacob*