In the

United States Court of Appeals for the Ninth Circuit

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA; *and a class of persons similarly situated*,

Plaintiffs-Appellants & Cross-Appellees

v.

US AIRLINE PILOTS ASSOCIATION,

Defendant-Appellee & Cross-Appellant

US AIRWAYS, INC.,

Intervenor-Cross-Appellant

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS ADDINGTON, *et al*.

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LIST OF ABBREVIATIONS

Dkt……Ninth Circuit document number

APA……..……..Allied Pilots Association

PAB…….Preliminary Arbitration Board

USAPA……...……..US Airline Pilots Association

SLI……...……Seniority List Integration

MOU……Memorandum of Understanding

AAPSIC…….American Airlines Pilots Seniority Integration Committee

I. MCCASKILL-BOND ISSUES

As set out in US Airways' 28(j) letter (Dkt. 41-1), Plaintiffs/Appellants (the "West Pilots") agree that the appeal and cross-appeal from the district court's decision regarding McCaskill-Bond issues became moot when the Allied Pilots Association ("APA") designated a separate committee of West Pilots to represent West Pilots in the Substantive SLI Process. *See* Section IV, *infra*.

As explained in the *Third Cross-Appeal Brief of Plaintiffs-Appellants Addington, et al*., the McCaskill-Bond claim before the district court was that the West Pilots had the right to separate representation in the seniority integration process. (Dkt. 28 at 17.)[1] In contrast, the question before the Preliminary Arbitration Board ("PAB") was whether APA had discretion to designate a separate West Pilot committee for that purpose. (Dkt. 41-3 at 3.) The PAB found that APA had such discretion and ordered APA to appoint such a committee. (*Id*. at 36). On January 12, 2015, APA in fact appointed the West Pilots' Merger Committee. At that point, the West Pilots obtained all the remedy they sought before the district court on the McCaskill-Bond issues, albeit on a basis different from that on which the claim was made. Those issues are, therefore, moot. *Cf*. *United States v*.

[1] All citations to this Court's docket use the docket pagination numbers.

Martinson, 809 F. 2d 1364, 1368 (9th Cir. 1987) ("So long as the court may order relief responsive to the wrong alleged, the appeal is not moot.").

The West Pilots are willing to acknowledge that the McCaskill-Bond issues are moot, notwithstanding that USAPA has yet to state unequivocally that it does not intend to appeal, or otherwise seek to set aside, the final and binding PAB award. (*See* USAPA Merger Committee Update, dated January 17, 2015, at Attachment A.) ("Litigation is always an option to protect the rights of our pilots [East Pilots], and the Committee will not hesitate to pursue appropriate claims if the Committee determines such action is necessary.")

USAPA has ninety (90) days, until April 9, 2015, to appeal the PAB award. USAPA, however, has suggested that it has twenty-four (24) months to challenge the PAB's award. As stated above, notwithstanding the uncertainty of USAPA's future intentions about the PAB award, the West Pilots are willing to agree the McCaskill-Bond issues are moot for the purposes of this appeal.

II. DUTY OF FAIR REPRESENTATION ISSUES

The answer to the second question posed by the Court is not straight-forward. The short answer to the Court's question is "perhaps." The precise answer depends upon which outcome to the Substantive SLI Process develops later this year.

The first possible outcome is that the Substantive SLI Board ("SLI Board") (*see* Section IV, *infra*) uses the Nicolau Award as a basis for integrating the East and

West pilots as a predicate for integrating all former US Airways pilots with the American Airlines pilots. If the SLI Board does that, then while the precise remedy the West Pilots sought in their DFR claim (an order directing USAPA to use the Nicolau Award as the basis for integrating the former US Airways pilots with the American Airlines pilots) would not have been achieved, the SLI Board's decision on its own to use the Nicolau Award would have produced the same end result and there would be no practical need for ruling here that the Transition Agreement ("TA") required use of the Nicolau Award. *Cf*. Section IV, *infra*. As noted in Section IV, *infra*, the parties will not know what list the SLI Board uses until it issues its award at the end of this year.

There is also a second possible outcome: If the East pilots assert that the SLI Board should use some other method for integrating the West and East pilots with the American pilots and the SLI Board agrees with that position, the remedy the West Pilots sought in its DFR claim will not have been achieved, either directly or indirectly.

If this Court abstains now and the SLI Board does not use the Nicolau Award, then for all intents and purposes it will be too late for the West Pilots to obtain relief from the Court to compel use of that list. The Court should therefore not abstain and should proceed to consider the merits of the DFR claim in order to avoid the risk of serious harm to the West Pilots. Accordingly, the West Pilots respectfully request

that the Court go forward with this appeal now and decide the DFR claim on an expedited basis.[1]

III. COMMON BENEFIT FEE AWARD

Even if the Court decides to abstain, it should still refer to the duty of fair representation issues now to the extent necessary to determine whether the West Pilots can proceed with their common benefit attorneys' fee claim.

The West Pilots made an ancillary attorneys' fees claim in the district court based on common benefit doctrine. (Dkt. 13-1 at 65 to 67.) The district court did not reach the merits of that claim because it found that the West Pilots did not prevail on the merits of their substantive claim. (Doc. 298 at 21:14 to 21:17 [ER 102].) This means the district court would reach the merits of the attorneys' fees claim if this Court determines on this appeal that the West Pilots should have prevailed on the DFR claim.

Federal courts address the merits of substantive claims, even if moot, if a fee claim is ancillary to those merits (as it is here). *See United States v. Ford*, 650 F.2d 1141, 1143-44 (9th Cir. 1981) (while "a claim for attorney's fees does not preserve a case which otherwise has become moot on appeal, . . . the question of attorney's fees is ancillary to the underlying action and survives independently under the

[1] The Court might consider issuing its decision in a preliminary order followed later by a formal opinion. 9th Cir. R. 36-1.

Court's equitable jurisdiction."). *See also Anderson v. US Dept. of Health & Human Services*, 3 F.3d 1383, 1385 (10th Cir. 1993) ("Not only may plaintiff pursue her request for attorney's fees even though the merits of the underlying controversy have become moot, but the court may (and must) refer to the merits of the underlying FOIA action in determining whether she is entitled to fees."). *Ford* and *Anderson* are, in turn, consistent with *Crowell v. Mader*, 444 U.S. 505, 506 (1980), an earlier United States Supreme Court decision which held that plaintiffs could apply for attorneys' fees in the district court, notwithstanding that by the time the matter was on appeal a state legislature's enactment of a new reapportionment plan mooted plaintiffs' attack on a previous plan. Following the sound reasoning in this line of cases, this Court should "refer" to the merits of the DFR claim now to determine whether it was error for the trial court to deem the West Pilots as a non-prevailing party on that claim.

Consequently, even if the Court abstains from addressing the substantive DFR claim on appeal, the West Pilots respectfully ask this Court to: (1) refer to the merits of the DFR claim by ruling that USAPA breached the duty of fair representation by making a contract (the Memorandum of Understanding or MOU) that did not require implementation of the Nicolau Award; and (2) remand this matter to the district court to address whether the West Pilots are entitled to a common benefit fee award.

IV. SUBSTANTIVE SLI PROCESS

Substantial progress has been made on the Substantive SLI arbitration. Pursuant to Paragraph 6 of the Protocol Agreement, the parties selected three arbitrators to serve as the Board of Arbitration: Dana Eishen, Ira Jaffe and M. David Vaughn. Since January, the three Merger Committees, namely the American Airlines Pilots Seniority Integration Committee ("AAPSIC"), the USAPA Merger Committee ("USAPA Committee") and the West Pilots' Merger Committee ("West Committee") have been working collaboratively to develop the Procedural Ground Rules for the Substantive SLI arbitration. The three Merger Committees, along with American Airlines and APA, sent the Substantive SLI Board proposed Ground Rules on March 17, 2015. On March 28, 2015, the SLI Board provided its input to the parties, and the parties are in the process of finalizing the Ground Rules.

Hearings have been set on the following dates: June 29, 30, July 1-3, 13-16, September 29, 30, October 1, 2, 12-16, 2015 in Washington, D.C. Pursuant to the Memorandum of Understanding ("MOU"), the SLI Board should issue its Award by December 9, 2015. In the event the SLI Board determines that it will be unable to meet the December 9, 2015 deadline, the parties will agree to a reasonable extension as requested by the Board. Therefore, if all goes according to schedule, the Substantive SLI arbitration will result in an SLI integrated pilot seniority list for all

New American Airlines pilots in December, 2015, or early 2016. That list, pursuant to the PAB, will be final and binding.

V. ADDITIONAL INFORMATION REGARDING THE SENIORITY INTEGRATION ISSUES SINCE THE RECORD IN THE CASE BELOW CLOSED IN OCTOBER, 2013

After the record in the case below closed in October, 2013, there has been a fair amount of litigation involving seniority integration issues. Under *United States ex rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992), the Court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." Thus, the Court can take judicial notice of the following cases which have a direct relation to the matters at issue here:

1. *US Airline Pilots Ass'n v. US Airways, Inc., et al.*, No. 1:14-CV-00328-BAH (D.D.C. Sept. 8, 2014).
2. *US Airline Pilots Ass'n v. Velez, et al.*, No. 14-CvS-17206 (N.C. Sup. Ct. Mecklenburg County filed Sept. 16, 2014).
3. *US Airline Pilots Ass'n v. Velez, et al.*, No. 3:14-CV-00577-RJC-DCK (W.D.N.C. Oct. 16, 2014).
4. *Bollmeier, et al. v. Hummel, et al.*, No. 3:15-CV-00111-RJC-DCK (W.D.N.C. filed Feb. 23, 2015).

Respectfully submitted this 3rd day of April, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit 32-1, I certify that Plaintiffs-Appellants & Cross-Appellees, Addington, et al.'s Supplemental Brief is proportionally spaced, has a typeface of 14 points and contains 1,667 words.

Dated this 3rd Day of April, 2015.

s/Marty Harper

CERTIFICATE OF SERVICE

On April 3, 2015, I caused the *Supplemental Brief of Plaintiffs-Appellants Addington, et al*. to be electronically filed with the Clerk of the Ninth Circuit Court of Appeals.

I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on April 3, 2015, in Phoenix, AZ.

s/Marty Harper