Docket Nos. 14-15757, 14-15874, 14-15892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Don Addington, et al.,

Plaintiffs-Appellants-Cross-Appellees

v.

US Airline Pilots Association,

Defendant-Appellee-Cross-Appellant

US Airways, Inc.,

Intervenor-Cross-Appellant

On appeal from The United States District Court
for the District Of Arizona, Case No. 10-1570-Phx-ROS
Judge Roslyn O. Silver

DEFENDANT - APPELLEE -CROSS-APPELLANT US AIRLINE PILOTS ASSOCIATION'S SUPPLEMENTAL BRIEF PURSUANT TO COURT'S ORDER DATED MARCH 20, 2015 (DKT #47)

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Defendant/Appellee US Airlines Pilots Association ("USAPA") submits the following response to this Court's Order of March 20, 2015 (Dkt. 47).

USAPA does not believe that any portion of the present appeal is currently moot. By contrast, the entire appeal will almost certainly become moot once the final decision in the McCaskill-Bond process is issued. The McCaskill-Bond statute provides that the final decision shall integrate the "seniority lists in a fair and equitable manner" and "shall be final and binding on the parties." McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. §42112, incorporating Sections 3 and 13 of the Allegheny-Mohawk Labor Protective Provisions, 59 C.A.B. 45, §§ 3 and 13. The final decision will be issued by December 9, 2015, or as may be extended by the arbitration panel.

Because the conclusion of the arbitration later this year will likely moot the present appeal, the Court may wish to consider withdrawing or deferring the submission of this matter until after the final decision is issued. Especially since the resolution of the present appeal and cross-appeal may well not result in the issuance of an opinion before December, proceeding in this matter would likely conserve judicial as well as private resources.

Factual Background

The current appeal concerns the seniority integration of pilots arising out of a merger that occurred a decade (and two airlines) ago. In 2005, US Airways

merged with American West Airlines. Appellants Don Addington, et al. (the "Addington Appellants") contend that this 2005 merger should have resulted in a seniority list integration that followed the "Nicolau award." But the award was never ratified, and the majority of the affected pilots properly certified a new union (USAPA) that proposed an alternative integration which, for various reasons, has never been implemented.

Litigation followed, including a prior appeal to this Court. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010). Subsequently, in 2013, US Airways merged again, this time with American Airlines. As a result, as required by the McCaskill-Bond Amendment, which was enacted after the 2005 merger, a new seniority list integration process commenced.

In January 2015, as part of that process, a preliminary arbitration panel issued an award finding that the Allied Pilots Association ("APA"), the new bargaining representative for the combined pilot craft or class, had the authority to designate a West Pilots' Merger Committee and to allow that committee to participate fully in the ongoing seniority list integration process. As a result, the Addington Appellants are participating in the McCaskill-Bond seniority integration process in a manner that will afford them the relief sought in the present matter, *i.e.,* the ability to independently propose and advocate a seniority regime at the new American Airlines. However, that process is not yet final, both because the

SLI panel has not ruled and because USAPA retains the legal right to challenge the preliminary award if it so elects. 45 U.S.C. 153(r) (two-year statute of limitations for challenges to arbitration awards under the RLA); *Thomas v. Republic Airways Holdings, Inc.,* No. 11-cv-01313-RPM, 2012 U.S. Dist. LEXIS 27537, *14 (D. Colo. March 2, 2012).

The panel of three arbitrators who will issue the McCaskill-Bond award are, of course, not bound by the proposals of the West Pilots Merger Committee or the proposals of the other two pilot committees. The panel's statutory mandate is to adopt a seniority integration regime that is "fair and equitable." 59 C.A.B. 45, § 3. The panel will hear the evidence and, unless the panel requests additional time, will issue a final decision by December 9, 2015. At that point, the present appeal almost certainly will be moot.

Argument

USAPA believes that the claims raised in the present appeal and in USAPA's cross-appeal are not yet moot, but will almost certainly become moot later this year.

USAPA answers the questions raised in this Court's Order of March 20, 2015 (Dkt. 47) as follows:

I. The Appeal and Cross-Appeals Regarding the McCaskill-Bond Issue

The Addington Appellants describe "Count Four" of this action as seeking "a declaratory ruling that [the West Pilots] had the right to separately participate in the process of integrating with the American pilots through representatives chosen by class members." *First Cross-Appeal Brief of Plaintiffs-Appellants Addington et al.*, Dkt. 13-1, at 52-53. The "remedy" they seek on appeal with respect to this McCaskill-Bond issue is "an order that the West pilots must have full party status in the MOU seniority integration process, with representatives of their choosing." *Id*. at 58.

The preliminary arbitration award of January 2015 grants the West Pilots precisely those rights. It orders that the "West Pilots Merger Committee [be] a full participant in the seniority integration process." Arbitration Decision, at 35. That committee was selected by the Appellants. Accordingly, given that no proposed integration regime advocated by any party is binding on the arbitrators, the ability to participate in the SLI process and advance their seniority proposal is all that the Addington Appellants could have obtained by a favorable decision in the district court. In this respect, if the SLI process is allowed to continue to completion, they will receive what they seek in the present appeal on the McCaskill-Bond issue.

However, USAPA does not believe this appeal is currently moot. USAPA retains the legal right to challenge the preliminary arbitration award, at least

through the date the final award is issued in December 2015. 45 U.S.C. 153(r) (two-year statute of limitations for challenges to arbitration awards under the RLA); *Thomas v. Republic Airways Holdings, Inc.,* 2012 U.S. Dist. LEXIS 27537, at 14 (D. Colo. 2012) (scope of judicial review of arbitration awards is the same under the McCaskill-Bond Amendment and the Railway Labor Act). USAPA does not believe that a preliminary award which is subject to challenge (and thus potentially vacated) renders Addington Appellants' request for judicial relief of the same type entirely moot.

Once the final award is issued (by December 9, 2015, or any extended date), this Court will know the final outcome of the McCaskill-Bond process. By contrast, at present, because the preliminary order is still open to challenge and the process has yet to run its course, the McCaskill-Bond issues presented in this case are not currently moot.

One additional point bears mention. Even if this Court were to find that the McCaskill-Bond issues in this case are currently moot, the proper remedy would be a dismissal of the Addington Appellants' appeal of these issues but would not include vacating the district court's decision under *United States v. Munsingwear*, 340 U.S. 36 (1950). This is true for two reasons.

First, *Munsingwear* applies when an appeal is entirely moot, not when merely a portion of that appeal (or request for relief therein) is moot. *Garcia v.*

Lawn, 805 F.2d 1400, 1402 (9th Cir. 1986) ("The test for mootness on appeal is whether the appellate court can give the appellant *any* effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot.") (emphasis added). Because the "fair representation" issues in the present appeal are clearly not currently moot, *see infra*, it would be inappropriate to vacate the decision of the district court, for, in general, appellate courts review (and vacate) judgments, not a lower court's reasoning or portions thereof. *See Black v. Cutter Labs*, 351 U.S. 292, 297 (1956).

Second, even when appeals become moot, vacatur is not appropriate when the mootness arises from the conduct of the appellant, in whole or in part. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-26 (1994). The Supreme Court's reasoning in *U.S. Bancorp Mortgage* is applicable here. Just as the settlement in that case resulted (in part) from the conduct of the appellant, thereby making the case moot – but the remedy of vacatur inappropriate – so too did the provisional arbitration order here arise from the action of the Appellants in asking for separate representation in the McCaskill-Bond process. Because this appeal did not "become moot due to circumstances unattributable to any of the parties," the remedy of vacatur would be inappropriate even if the appeal was presently entirely moot. *Id.* at 23.

II. The Duty of Fair Representation Issue

The Court asks in Question Two of its Order of March 20, 2015 "[w]hether an arbitration decision establishing a single pilots' seniority regime would cause Plaintiffs' duty of fair representation claim to become moot." The answer is "Yes."

The McCaskill-Bond Amendment requires "expedited hearings and decisions" in the seniority integration arbitration and "a decision within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties." 59 C.A.B. 45, § 13(a). The parties have mutually agreed to a schedule in which the arbitration will conclude, and a decision by the arbitrator will be rendered, by December 9, 2015, unless extended by the action of the panel of arbitrators.

The McCaskill Bond Amendment provides that a decision issued in accord with the statute is "final and binding." 59 C.A.B. 45, § 13(a). The arbitration panel will have heard the evidence and will have decided on a "fair and equitable" basis for integration of the affected pilots' seniority lists. 59 C.A.B. 45, § 3. That award will render the duty of fair representation issues moot. Whatever the outcome of that award, the Addington Appellants will not be able to complain under the duty of fair representation because all of their arguments will have been heard and a final decision issued pursuant to the process provided by applicable

federal law. Their recourse at that point would be to challenge the award in court. *Air Wisconsin Pilots Protection Comm. v. Sanderson,* 909 F.2d 213, 216 (7th Cir. 1990).

Thus, although the duty of fair representation issues are not currently moot, they too will almost certainly become moot once the final McCaskill-Bond decision is issued. The duty of fair representation issues will thus become moot later this year. This event provides further reason why this Court should defer submission of this matter until December 2015, with a status report required of the parties at that time and the expectation that the appeal will be dismissed as moot at that point. *See, e.g.*, *Baca v. Adams*, No. 13-56132 (9th Cir. Jan. 16, 2015) (Docket Entry No. 32) (adopting similar approach).

Respectfully submitted this 3rd day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2015, I electronically filed Defendant-Appellee-Cross-Appellant US Airline Pilots Association's Supplemental Brief Pursuant to Court's Order Dated March 20, 2015 (Dkt #47) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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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Dated: April 3, 2015

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