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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-ROS

US AIRWAYS, INC.'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendant US Airways, Inc. ("US Airways"), by and through its undersigned counsel, hereby submits its response to plaintiffs' motion for a preliminary injunction.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs seek 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" in connection with the pending merger and upcoming seniority integration between US Airways and American Airlines, Inc. ("American"). (Doc. No. 13, at p. i (p. 1 of the ECF filing).)

Insofar as plaintiffs' motion is directed at US Airways, the motion should be denied because the only claim in plaintiffs' Complaint asserted against US Airways, for breach of the collectively-bargained Transition Agreement, raises a "minor dispute" that is subject to the exclusive arbitral jurisdiction of a Board of Adjustment under the Railway Labor Act. (*See* US Airways' Motion to Dismiss (Doc. No. 28).) In any event, there is no basis for the Court to issue an injunction against US Airways because plaintiffs' motion does not assert that US Airways will oppose the use of the Nicolau Award seniority list and, in fact, US Airways will not be presenting or advocating for the use of the Nicolau Award or any other seniority list in the US Airways/American seniority-integration process.

With respect to plaintiffs' claim for breach of the duty of fair representation ("DFR") against defendant US Airline Pilots Association ("USAPA"), US Airways remains neutral on the merits of the claim. US Airways does, however, have a significant interest in the prompt and final resolution of the plaintiffs' DFR claim on the merits so that there is no interference with the seniority-integration process as between US Airways and American, and no delay – caused by Court order or otherwise – in the airlines' timely realization of the operational and financial benefits from a combined pilot workforce that is contemplated by their impending merger and by the Memorandum of Understanding ("MOU") that is referenced in plaintiffs' motion. In light of this interest, US Airways sets

forth its position that plaintiffs' DFR claim against USAPA is indisputably ripe for prompt and final adjudication by this Court.

ARGUMENT

I. There Is No Basis To Enter An Injunction Against US Airways.

Plaintiffs' Complaint contains only one cause of action against US Airways, for breach of the collectively-bargained Transition Agreement based on the allegations that an implied covenant of good faith and fair dealing embodied in the Transition Agreement requires the use of the Nicolau Award in the US Airways/American seniority-integration process and that US Airways breached that covenant when it entered into the MOU without expressly requiring the use of the Nicolau Award. (Compl. (Doc. No. 1) at ¶¶ 101-112.) This claim raises a "minor dispute" that is subject to the exclusive arbitral jurisdiction of a Board of Adjustment under the Railway Labor Act. (*See* US Airways' Motion to Dismiss (Doc. No. 28).) Accordingly, the Court does not have subject-matter jurisdiction over that claim and it cannot serve as the basis for injunctive relief against US Airways.[1]

Even if US Airways remains a defendant in this case, however, plaintiffs have established no likelihood of success on the merits of their "claim" against US Airways because their motion for preliminary injunction focuses exclusively on their DFR claim against USAPA, premised on plaintiffs' contention that USAPA will oppose the use of the Nicolau Award throughout the seniority-integration process with the American pilots. *See, generally, Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1433 (9th Cir. 1995) (affirming denial of preliminary injunction where "probability of success on the merits was low"). Plaintiffs' motion does not assert that US Airways will oppose

[1] Notwithstanding the fact that it has moved for dismissal of plaintiffs' breach-of-contract claim on jurisdictional grounds, US Airways has a significant interest in the prompt and final resolution of the merits of plaintiffs' DFR claim against USAPA and therefore intends to file a motion for limited intervention under Rule 24 of the Federal Rules of Civil Procedure if and when its motion to dismiss is granted.

the use of the Nicolau Award and, therefore, plaintiffs fail to provide a basis for issuing an injunction against US Airways.[2]

In any event, US Airways will not be presenting or advocating for the use of the Nicolau Award or any other seniority list in the US Airways/American seniority-integration process. The MOU expressly provides that "US Airways . . . ***shall remain neutral*** regarding the order in which pilots are placed on the integrated seniority list." (*See* MOU ¶ 10(d); Appendix Of Evidence In Support Of Motion For A Preliminary Injunction ("Plaintiffs' Evidentiary App.") Part 3 (Doc No. 14-3), at p. 373 (p. 62 of the ECF filing) (emphasis added).)[3] Accordingly, enjoining US Airways "from integrating pilot seniority without using the Nicolau Award list to define the relative seniority of US Airways pilots" would be an idle gesture and an unwarranted use of this Court's equity power. *See Shango v. Jurich*, 681 F.2d 1091, 1105 (7th Cir. 1982) ("Equity does not engage in idle gestures."); *Pinnacle Mining Co., LLC v. Bluestone Coal Corp.*, 624 F. Supp. 2d 530, 541 (S.D.W.Va. 2009) (same).

II. The Merits Of Plaintiffs' DFR Claim Against USAPA Are Ripe For Adjudication.

While US Airways should be dismissed from this lawsuit for lack of subject-matter jurisdiction, and while US Airways is neutral on the merits of plaintiffs' DFR claim against USAPA, it does have a strong interest in ensuring that the merits of the West Pilots' DFR claim against USAPA are finally resolved as quickly as possible. The MOU, to which US Airways is a party, requires that the US Airways/American seniority-integration process begin "as soon as possible" after the close of the merger transaction,

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[2] In a footnote in their motion, plaintiffs make a conclusory statement to the effect that they "believe US Airways has the right, under the Transition Agreement, to insist on using the Nicolau Award," but they do not argue that US Airways' non-exercise of this alleged right serves as the basis for their requested injunction against US Airways. (*See* Plaintiffs' Motion For A Preliminary Injunction (Doc. No. 13), at p. 14 n.2 (p. 18 n.2 of the ECF Filing).) Nor could they, given the exclusive jurisdiction of a Railway Labor Act Board of Adjustment to resolve such contractual disputes.

[3] The MOU, as included with plaintiffs' evidentiary appendix, is not signed by the parties thereto. It is, however, identical in all material respects to the signed version.

which is currently anticipated to occur in the third quarter of this year following satisfaction of closing conditions, and be completed no later than 24 months after the closing. (*See* MOU ¶ 10(a), Plaintiffs' Evidentiary App. Part 3, at p. 372 (p. 61 of the Doc No. 14-3 ECF filing); President's Message, Plaintiffs' Evidentiary App. Part 3, at p. 416 (p. 105 of the Doc. No. 14-3 ECF filing).) The timely completion of this seniority-integration process, including an arbitration if necessary, is a key component of the MOU which, in turn, is critical to American's restructuring plan and the successful consummation of a merger that will create the world's largest airline. Any delay in the seniority-integration process could compel the two airlines to continue with separate flight operations for an indefinite period of time past the merger date, and could cause significant adverse impact to the AMR Corporation Plan of Reorganization that will soon be approved by Judge Sean Lane of the U.S. Bankruptcy Court for the Southern District of New York.[4] *See, generally, In re AMR Corp.*, No. 11-15463, 2013 WL 1749923 (Bankr. S.D.N.Y. April 11, 2013) (approving merger).

USAPA has filed a motion to dismiss in which it argues, *inter alia*, that plaintiffs' DFR claim is still not ripe. (*See* USAPA's Motion to Dismiss (Doc. No. 44), at pp. 8-10 (pp. 13-15 of the ECF filing).) Presumably, USAPA will repeat those arguments in its opposition to plaintiffs' motion for preliminary injunction. In light of its strong interest in a prompt and final resolution of the merits of plaintiffs' DFR claim, US Airways will respond here to USAPA's ripeness arguments.

A. The Ninth Circuit's Decision In *Addington I* Does Not Preclude A Finding That Plaintiffs' DFR Claim In The Instant Lawsuit Is Ripe.

Contrary to USAPA's suggestion (*see* USAPA's Motion to Dismiss (Doc. No. 44) at p. 10 (p. 15 of the ECF filing)), the Ninth Circuit in *Addington I* did not rule that the West Pilots would never have a justiciable DFR claim prior to the finalization of an

[4] In order to ensure an expeditious final resolution of plaintiffs' DFR claim, US Airways submits that the May 14, 2013 preliminary injunction hearing should be consolidated with the trial on the merits pursuant to Rule 65 of the Federal Rules of Civil Procedure.

integrated US Airways/America West seniority list. Rather, the court reasoned that plaintiffs' DFR claim against USAPA in that lawsuit was not yet ripe because it remained uncertain "what seniority proposal ultimately will be acceptable to both USAPA and [US Airways] as part of a final CBA" and "whether that proposal will be ratified by the USAPA membership as part of a new, single CBA." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1179-1180 (9th Cir. 2010). But the court made clear that its conclusion did ***not*** mean "that a DFR claim based on a unions' promotion of a policy is never ripe until that policy is effectuated." *Id*. at 1181.

In light of the US Airways/American merger, the facts are entirely different and none of the contingencies at issue in *Addington I* are present here. To the extent a "final CBA," or a "new, single CBA," 606 F.3d at 1179-1180, is a prerequisite to ripeness of the DFR claim asserted by plaintiffs in this case, the requirement is satisfied. The MOU, which has already been approved by all parties and ratified by USAPA's membership, defines the terms and conditions of employment, including significant pay raises, that will become applicable to both the East and West pilots (and the American pilots as well) upon the effective date of AMR Corporation's Plan of Reorganization (i.e., the merger closing date) and those terms and conditions will remain in effect until at least January 1, 2019.[5] (*See, generally*, USAPA Negotiating Advisory Committee Update; Plaintiffs' Evidentiary App. Part 3 (Doc. No. 14-3), at pp. 392-394 (pp. 81-83 of the ECF filing).) The MOU thus represents the completion of the collective bargaining process for a combined East and West labor agreement – the very process that was still ongoing at the time of the Ninth Circuit's decision in *Addington I* and this Court's decision in *Addington II*.

While USAPA notes that a JCBA must still be negotiated following the merger, and asserts that the MOU is therefore not a "final product" and "does not affect [the

[5] The MOU creates a collective bargaining agreement, known as the Merger Transition Agreement ("MTA"), which "shall consist of the collective bargaining agreement between American and APA approved on December 19, 2012 by the Bankruptcy Court . . . (the "2012 CBA"), as amended pursuant to the provisions of [the MOU]." (MOU ¶¶ 1(a), 3, and 4; Plaintiffs' Evidentiary App. Part 3 (Doc. No. 14-3), at p. 367 (p. 56 of the ECF filing).)

ripeness] analysis at all" (USAPA's Motion to Dismiss (Doc. No. 44) at pp. 9-10 (pp. 14-15 of the ECF filing)), it fails to mention that the MOU itself has already determined and sharply circumscribed the parameters of the JCBA. If the parties cannot reach agreement on a JCBA, or the pilots do not ratify a negotiated JCBA, the MOU provides that the terms of the JCBA will be imposed through "final and binding" arbitration and that the arbitrator's award must be "consistent with the terms of the MTA" (*see* footnote 5) and "specifically shall adhere to the economic terms of the MTA and shall not change the MTA's Scope terms (Paragraph 25 of [the MOU]) or the modifications generated through the process set forth in Paragraph 24 of [the MOU]." (MOU ¶ 27; Plaintiffs' Evidentiary App. Part 3 (Doc. No. 14-3), at p. 378 (p. 67 of the ECF filing).) Contrary to USAPA's argument, the material terms and conditions of employment for both the East and West pilots following the merger are now known and fixed by the MOU.

What is not settled by the MOU, however, is the seniority list(s) for US Airways (East and West) pilots that will be used in the overall seniority integration with American's pilots. Any suggestion that the parties to the MOU (including US Airways) have agreed that the Nicolau Award seniority list will not be used is incorrect. (*Cf.* USAPA's Motion to Dismiss (Doc. No. 44) at p. 4 (p. 9 of the ECF filing) ("The MOU thus provides that the status quo regarding seniority is maintained . . . at US Airways").) In fact, the MOU does not specify which seniority list(s) will be used for US Airways' pilots because that issue was a subject of dispute between the West Pilots and USAPA and the dispute could not be resolved in the MOU negotiations.

What is also not settled is who will participate in the seniority-integration process. USAPA incorrectly characterizes the first stage of the McCaskill-Bond seniority-integration process as being limited to direct negotiations between "the unions representing the two groups of employees." (USAPA's Motion to Dismiss (Doc. No. 44), at p. 4 (p. 9 of the ECF filing).) Nothing in McCaskill-Bond, however, limits participation to the two unions at the pre-merger carriers. Rather, the statute provides for negotiations between "representatives of the employees affected." 49 U.S.C. § 42112 (adopting "the

labor protective provisions . . . as published in 59 C.A.B. 45"); *Allegheny-Mohawk*, 59 C.A.B. 19, 45 § 3 (1972) ("*Allegheny-Mohawk")* (specifying that "fair and equitable" seniority integration includes negotiations between "the carriers and the representatives of the employees affected"). Moreover, USAPA's statement that the MOU (as opposed to the statute) requires "***the parties*** to attempt to reach an agreement" is also misleading. (USAPA's Motion to Dismiss (Doc. No. 44), at p. 4 (p. 9 of the ECF filing) (emphasis added).) Nothing in the MOU purports to conclusively define who shall have the right to participate in the McCaskill-Bond process or to limit the participants to the signatories to the MOU. Indeed, US Airways understands that the West Pilot Class will claim a right to be represented separately in the McCaskill-Bond process by counsel of their choice – a position which US Airways believes to be supported by the relevant legal authority.

The fact that the MOU does not contain a finalized integrated seniority list also does not raise the same ripeness concerns as in *Addington I*. The Ninth Circuit's decision was premised on the assumptions that the final integrated seniority list would be the product of back-and-forth negotiations between US Airways and USAPA (and ultimately subject to ratification by USAPA's membership), and that a ratified non-Nicolau seniority list in conjunction with the improved terms and conditions of employment that might be contained in a single collective bargaining agreement – both of which were contingent future events at the time of the *Addington I* litigation – might be satisfactory to the West Pilots. *Addington*, 606 F.3d at 1180-1181. However, the factual and legal landscape of the US Airways/American seniority integration is totally different.

There will not be any negotiations between USAPA and US Airways regarding the relative placement of East and West pilots on the integrated seniority list. (*See* MOU ¶ 10(d) ("During the McCaskill-Bond process, including any arbitration proceeding, US Airways . . . shall remain neutral regarding the order in which pilots are placed on the integrated seniority list."); Plaintiffs' Evidentiary App. Part 3 (Doc. No. 14-3), at p. 373 (p. 62 of the ECF filing).) The final integrated seniority list will be determined in accordance with the federal McCaskill-Bond statute (enacted in 2007, after the

US Airways/America West merger), which makes provision for a "final and binding" arbitration to develop a "fair and equitable" integrated seniority list. (*Id*. at ¶ 10(c)); *see also* 49 U.S.C. § 42112 (stating that "sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger (as published at 59 C.A.B. 45) shall apply to the integration of covered employees of the covered air carriers"); *Allegheny-Mohawk* at 45 § 3 ("provisions shall be made for the integration of seniority lists in a fair and equitable manner"), and § 13 (providing for "final and binding" arbitration in the event of a dispute). There will be no additional approval or membership-ratification requirements with respect to the seniority-integration decision. And finally, as explained above, the terms and conditions of employment that will co-exist with the final integrated seniority list are known and fixed at this time.

USAPA has made it clear that, in the McCaskill-Bond process, it will not use the Nicolau Award seniority list to determine the relative seniority of the East and West pilots for purposes of integrating those pilots with American's pilots. The West Pilots, on the other hand, contend that the Nicolau Award must be used to determine the relative seniority of the US Airways pilots, and their legal theory is that USAPA will breach its DFR if it uses anything other than the Nicolau Award seniority list in the McCaskill-Bond process. Plaintiffs may be right or they may be wrong. But, unlike in *Addington I*, there are no future contingencies, and there are compelling reasons why the merits of plaintiffs' DFR claim should be resolved now.

B. Neither The Pendency Of The US Airways/American Merger Nor The Possible Future Outcomes Of The Post-Merger Seniority Integration Process Defeat The Ripeness Of Plaintiffs' DFR Claim In This Case.

In addition to relying on the Ninth Circuit's decision in *Addington I*, USAPA argues that plaintiffs' DFR claim is not ripe in light of the following two uncertainties: (1) whether the merger between US Airways and American will actually close; and (2) the final outcome of the post-merger seniority-integration process under the MOU and the McCaskill-Bond statute. (USAPA's Motion to Dismiss (Doc. No. 44), at pp. 8-10

(pp. 13-15 of the ECF filing).) Contrary to USAPA's assertions, neither of these "uncertainties" defeats the ripeness of plaintiffs' DFR claim.

First, the actual closing of the US Airways/American merger is not a fact that would affect this Court's analysis of the merits of plaintiffs' DFR claim or, stated differently, it is totally irrelevant to the question of whether USAPA has a legitimate union purpose for not using the Nicolau Award in the US Airways/American pilots seniority integration. As a result, the fact that the merger is still pending and has not yet closed does not defeat the ripeness of plaintiffs' claim. *See Educ. Credit Mgmt. Corp. v. Coleman*, 560 F.3d 1000, 1009 (9th Cir. 2009) (noting that adjudication of rights in the bankruptcy context always requires speculation, but nevertheless concluding that "fact-intensive inquiries that depend on further factual development may nevertheless be ripe if, as here, that development would do little to aid the court's decision"). This Court has before it all of the information necessary to decide the merits of plaintiffs' DFR claim. The closing of the merger will not change any of the material facts.

Moreover, if the Court were to conclude that the contingent nature of the merger is relevant, the fact that the merger is likely to occur strengthens a finding of ripeness. *Cf. Bazarian Int'l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 793 F. Supp. 2d 124, 129 (D.D.C. 2011) ("In evaluating whether a declaratory judgment claim that hinges on a contingency presents a justiciable controversy, courts look to the 'practical likelihood' that the contingency will occur."); *Browning-Ferris Industries of Alabama, Inc. v. Alabama Dep't of Environmental Mgmt.*, 799 F.2d 1473, 1478 (11th Cir. 1986) ("The practical likelihood that the contingencies will occur and that the controversy is a real one should be decisive in determining whether an actual controversy exists."). The merger has been approved by the Bankruptcy Court, *In re AMR Corp.*, No. 11-15463, 2013 WL 1749923 (Bankr. S.D.N.Y. April 11, 2013), it is anticipated to close, and USAPA has presented no evidence or argument to the contrary.

Second, adjudication of the merits of plaintiffs' DFR claim should not and need not await the completion of the post-merger seniority-integration process because plaintiffs'

claim seeks to define USAPA's position throughout that process. USAPA's position regarding the relative seniority of the East and West pilots will impact the West Pilots (one way or the other) in the overall US Airways/American seniority integration. That is true even if the West Pilots are allowed to advocate for the Nicolau Award seniority list, because the US Airways' pilots would still be asserting two conflicting positions. Resolution of plaintiffs' DFR claim is therefore "of critical importance to the negotiation process" itself. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 692-694 (1st Cir. 1994) (claim essential to the parties' negotiating positions was ripe where resolution was "of critical importance to the negotiation process in which the parties must engage," and "in fairness . . . must [therefore] be settled before they are ordered to commence negotiations"); *Eureka Federal Sav. & Loan Ass'n v. American Casualty Co.*, 873 F.2d 229, 231-232 (9th Cir. 1989) (question of insurer's liability limits was ripe for adjudication because the issue was a critical part of settlement negotiations and failure to adjudicate the question "would prevent the parties from settling . . . prior to a prolonged and costly trial").

CONCLUSION

For all the foregoing reasons, US Airways respectfully requests that the Court deny plaintiffs' motion for a preliminary injunction to the extent it seeks to enjoin US Airways, and that, in ruling on plaintiffs' motion vis-à-vis USAPA, the Court take no action that could delay the McCaskill-Bond seniority-integration process as prescribed in the MOU.

Dated: April 26, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2013, I caused to be electronically transmitted the attached Defendant US Airways, Inc.'s Response to Plaintiffs' Motion for a Preliminary Injunction, to the Clerk's office using the CM/ECF System for filing.

/s/Robert A. Siegel

Robert A. Siegel

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