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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 **REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (Doc. 13)** **Oral Argument Requested**

Plaintiffs Addington, *et al.*, (the "West Pilots") reply to US Airways ("Airways") and US Airline Pilots Association ("USAPA") in support of Plaintiffs' motion for preliminary injunction (Doc. 13).

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I. Overview

Plaintiffs' claims are that: (1) USAPA breached its duty of fair representation ("DFR") because the Memorandum of Understanding ("MOU") (Doc. 14-3 at App. 367) [1] abandons the Nicolau Award without a legitimate union purpose; and (2) US Airways ("Airways") shares such liability because it agreed to abandon the Nicolau Award, knowing this was a DFR breach for USAPA. In contrast, in 2008 and 2010, Plaintiffs' DFR claims were that USAPA intended to make a contract that breached its DFR. Their claim now is ripe because it alleges that USAPA made such a contract.

Neither Airways nor USAPA effectively challenge facts that are material to the West Pilots' claims. Neither has challenged the authenticity of any evidence submitted in support of the West Pilots' statement of facts. The lack of material factual disputes allows the Court to enter final judgment, obviating any question of a bond. If the Court were to provide only preliminary relief, there is no precedent to require more than a nominal security bond in this context.

II. This claim is ripe under the Ninth Circuit's standard.

The Ninth Circuit held that there would be "an unquestionably ripe DFR suit, once a contract is ratified." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1180 n.1 (9th Cir. 2010). In their Response to USAPA's Motion to Dismiss, the West Pilots demonstrate that their claims are ripe because they are predicated on a ratified contract. They incorporate that argument here by reference. The West Pilots also incorporate by reference the ripeness arguments made by Airways. (Doc. 49 at 8:23 to 10:15.)

III. The Court should make Airways a party to the injunctive relief.

A. Airways has not been neutral.

The MOU triggers the unqualified mandate in the Transition Agreement ("TA") (Doc. 14-1 at App. 094) to implement the Nicolau Award seniority order after negotiating

[1] Page references to ECF documents use the internal pagination of the document.

the Single Agreement. (Doc. 1 at ¶¶ 103-109.) Yet, the MOU leaves it to a later, uncertain process to determine whether this will occur. That is a breach of USAPA's DFR. By agreeing to the MOU, therefore, Airways has taken sides. Not only has its taken sides, but pursuant to the MOU, it has agreed to pay the expenses that USAPA incurs as it breaches its DFR in the process of integrating Airways pilots with American Airlines ("American") pilots. (Doc. 14 at ¶ 114; Doc. 5-2 at ¶ 7.)

It is too late, therefore, for Airways to claim neutrality. (Doc. 49 at 1:19 to 1:21& 3:5 to 3:7.) The fact that it 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" does not make it truly neutral. (*Id.* at 3:3 to 3:5.)

"Under certain circumstances, where a union has breached its duty of fair representation an employer may also be implicated in the union's breach." *Davenport v. Int'l Broth. of Teamsters, AFL-CIO*, 166 F.3d 356, 361-62 (D.C. Cir. 1999). A key element to such claims is "that the employer have [sic] actual notice of, or might reasonably be charged with notice of, the union's breach of duty to its members." *Am. Postal Workers Union, Loc. 6885 v. Am. Postal Workers Union*, 665 F.2d 1096, 1109 (D.C. Cir. 1981). Indeed, citing later to *Davenport*, this Court told Airways that it "must evaluate any proposal by USAPA with some care to ensure that it is reasonable and supported by a legitimate union purpose." (*Addington II*, Doc. 193 at 2:1 to 2:2.)

After more than five years of litigation, there is no question here that Airways had ample notice that USAPA's abandonment of the Nicolau Award as part of the MOU was not supported by a legitimate union purpose. This Court, therefore, should find that Airways shares liability for USAPA's DFR breach, that the West Pilots have a valid claim against Airways. [2]

[2] In opposition to Airways' motion to dismiss (Doc. 28), the West Pilots stated that "USAPA and US Airways have repudiated the Nicolau Award as part of the MOU." (Doc. 47 at 4:9 to 4:10.) More accurately, Airways shares liability with USAPA because Airways agreed to the MOU, knowing that it breached USAPA's DFR.

B. The Court has hybrid jurisdiction.

Ordinarily, a contract related claim by a worker against a carrier-employer must be remedied before the System Board. But, where a union's DFR breach is intertwined with such a claim (as is the case here), the United States District Court has hybrid claim jurisdiction. *Allen v. United Food & Commercial Workers Int'l,* 43 F.3d 424, 426 n.1 (9th Cir. 1994) (explaining that a hybrid claim "involves allegations both that the employer breached the collective bargaining agreement, and that the union breached its duty of fair representation"). Such claim need not allege a "conspiracy . . . between the union and the employer." *Peters v. Burlington Northern R.R.*, 914 F.2d 1294, 1302 (9th Cir. 1990). The West Pilots have a hybrid claim. This Court, therefore, has subject matter jurisdiction.

C. The Court should order Airways along with USAPA to use the Nicolau Award seniority order.

It is not enough for the Court to order only USAPA to use the Nicolau Award seniority order when integrating seniority with the American pilots. Where (as here) two parties are participating in illegal conduct, it is entirely proper for the Court to order both to act legally. It is particularly necessary to do so here where the East Pilots have a history of changing their identity to evade their legal obligations. The West Pilots, having struggled to defend the Nicolau Award for nearly six years, are entitled to effective relief. Effective relief requires an order that is directed at both USAPA and Airways (and their successors) because both will be involved in implementing integrated pilot operations.

Indeed, there is controlling precedent for this. *Bernard v. Air Line Pilots Ass'n, Int'l*, for example, upheld an injunction that "specified the basis by which pilots would be furloughed, promoted and given flying assignments [by Alaska Airlines] in the interim period until a new agreement could be reached." 873 F.2d 213, 215 (9th Cir. 1989). The West Pilots seek nothing more than that.

This Court, therefore, must issue an order that requires both Airways and USAPA (and their successors) to use the Nicolau Award seniority order to integrate pilot seniority in accordance with the MOU.

IV. The Court should order that Defendants must use the Nicolau Award.

The West Pilots recognize that the language they have proposed for the injunction could allow USAPA to believe that it has discretion to impede the MOU seniority integration process as long as it did not promote using something other than the Nicolau Award seniority order. That is unacceptable. The West Pilots, therefore, propose a mandatory injunction as follows:

> US Airline Pilots Association and US Airways, Inc., (and their successors) must participate in the pilot seniority integration process as specifically provided for in the Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement and, in so doing, must use an unmodified Nicolau Award to define the seniority order of the US Airways pilots.

The West Pilots agree that such relief must meet the standard for a mandatory injunction and demonstrate herein that they meet and exceed that standard.

A. The West Pilots should prevail on the merits of the DFR claim.

USAPA does not identify a genuine dispute as to any fact that is material to deciding the merits of the DFR claim. Because USAPA's arguments fail as a matter of law, the Court should find that the West Pilots are highly likely to succeed on the merits of their DFR claim. Indeed, because the merits can be decided as a matter of law, the Court can enter summary judgment (*i.e.*, final judgment) in favor of the West Pilots.

1. USAPA must not abandon the Nicolau Award unless it does so for a legitimate union purpose.

"Issue preclusion bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir. 2003). In prior litigation, USAPA argued (as it does now) that it is not bound by the TA. This Court properly rejected that argument, ruling that "decertification of ALPA and the certification of USAPA did not change the binding nature of the Transition Agreement." (Doc. 14 at ¶ 84(a); Doc. 14-3 at App. 355.)

USAPA also argued (as it does now) that pursuant to the inapplicable standard in *Airline Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991), it is free to abandon the Nicolau

Award. The Court rejected that argument as well, ruling that USAPA cannot abandon the Nicolau Award without "a legitimate union purpose." (Doc. 14 at ¶ 84(c); Doc. 14-3 at App. 357.) For the reasons set out by the West Pilots in support of their motion (Doc. 13) and in response to USAPA's motion to dismiss, for the reasoning of this Court in the prior litigation, and as a matter of issue preclusion, this Court should reject all such arguments by USAPA.

2. USAPA has no legitimate union purpose for abandoning the Nicolau Award.

USAPA does not address the explanation in the West Pilots' memorandum of what constitutes a legitimate union purpose. (Doc. 13 at 11:10 to 12:6.) Quite tellingly, it makes no effort to show that it has a legitimate union purpose to abandon the Nicolau Award. It merely argues that it had a legitimate reason to agree to other terms in the MOU. USAPA offers no basis for this Court to find that it has a legitimate basis to insist on terms that evade its duty to order seniority according to the Nicolau Award.

USAPA argues that the pending merger with American changes the circumstances that existed before. It fails to explain, however, how those changes justify making an agreement that abandons the TA requirement to order the seniority of Airways pilots according to the Nicolau Award. To justify abandoning the Nicolau Award, USAPA must identify a benefit that will accrue to the bargaining unit as a whole. It fails to do so. Without such a benefit, USAPA abandoned the Nicolau Award without a legitimate union purpose. USAPA's actions, therefore, violate the DFR.

3. The vote to ratify the MOU neither ratified USAPA's DFR breach nor waived the West Pilots' right to the Nicolau Award.

Equitable estoppel applies against a party who has engaged in conduct that causes justifiable reliance by the other party; it prevents the first party from taking the benefit of a contrary position. *See Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993).

Prior to the vote on ratifying the MOU, USAPA repeatedly told its members that they should not use their position on the Nicolau Award to decide whether to vote for

MOU ratification. For example, in a January 23, 2013, message to its members, USAPA stated that "no East pilot should vote against the MOU because they fear that ratifying the MOU will implement the Nicolau Award, and no West pilot should vote for the MOU because they believe the MOU will implement the Nicolau Award." (Doc. 14 at ¶ 88; Doc. 14-3 at App. 389-90.) For another example, on February 7, 2013, USAPA stated that "West pilots should not vote in favor of the MOU because they believe it will revive the Nicolau Award, and the East pilots should not vote against it because they are concerned it will cause the Nicolau Award to be implemented." (Doc. 14 at ¶ 90; Doc. 14-3 at App. 391.)

Now, USAPA argues that the vote ratifying the MOU in some way abrogates the West Pilots' right to enforce implementation of the Nicolau Award. Having repeatedly told its members that they should vote on MOU ratification without regard to their position on implementation of the Nicolau Award, it is incomprehensible how USAPA thinks it can now tell this Court that the West Pilots, by voting to ratify the MOU, intentionally and knowingly abandoned their right to such implementation. The Court must hold USAPA estopped from making such an argument.

The right to the benefits of the Nicolau Award is personal to each pilot. Every pilot with a position on the Nicolau Award seniority list, therefore, has the right to enforce implementation of the Award. That is true whether the pilot is a union member or not, whether the pilot is active or on furlough, whether the pilot voted on ratification or not.

It would be antithetical to the doctrine of fair representation if union members could vote to abrogate the rights of others who are represented by their union. That would negate the DFR "protection against the tyranny of the union majority," *Voccio v. Gen. Signal Corp.*, 732 F. Supp. 292, 295 (D.R.I. 1990), which limits the broad powers provided to labor unions. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975) ("In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests.").

Barely more than half of the West Pilots with positions on the Nicolau Award list voted to ratify the MOU. Even if the MOU were an overt vote on whether to abandon the Nicolau Award (which it was not), a bare majority of West Pilots cannot consent to abandonment of the Nicolau Award. The Court should find, therefore, that even if USAPA were not estopped from making such a defense, the MOU ratification vote could not, and did not, release USAPA from its duty to implement the Nicolau Award.

4. The RLA "status quo" is irrelevant to a DFR claim.

"Status quo" has no bearing on the DFR. Rather, "status quo" as used by USAPA refers to the default starting point for employer / union conduct "[p]ending the exhaustion of the RLA's mechanisms for resolving a major dispute [*i.e.*, contract negotiations]." *Bdh. of Locomotive Engineers v. Burlington No. R. Co.*, 838 F. 2d 1087, 1091 (9th Cir. 1988). It has nothing to do with a union's duty to fairly represent a worker. It does not limit DFR claims that a worker can bring against a union. USAPA fails to offer a logical explanation how status quo impacts the claims here. The Court should reject USAPA's argument that the notion of status quo frees USAPA to breach its DFR.

5. USAPA may not act without a legitimate union purpose.

That USAPA must have a legitimate union purpose to abandon the Nicolau award was fully briefed in the West Pilots' motion memorandum. (Doc. 13 at 10:13 to 11:9). In *Addington II*, this Court held that USAPA cannot abandon the Nicolau Award without "a legitimate union purpose." (Doc. 14 at ¶ 84(c); Doc. 14-3 at App. 357.) Nothing has changed to cause this Court to reach a different decision. As twice before, USAPA has not, and cannot, articulate a legitimate union purpose for abandoning the Nicolau Award.

6. That a minor dispute is intertwined with the DFR claim does not oust this Court's jurisdiction.

The district court is the proper forum to hear an intertwined contract related claim against a carrier and a DFR claim against a union. *Allen*, 43 F.3d at 426 n.1 (referring to this a hybrid jurisdiction). USAPA does not cite any authority that holds otherwise. For example, *Conrail v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989), was a dispute

between the union and the carrier—not a claim by workers against both the union and the carrier. *See id.* at 300 (union claims was that the contract did not allow the carrier to include "urinalysis drug screening . . . as part of all periodic and return-from-leave physical examinations"). USAPA makes an unsupported and untenable argument that the West Pilots' claim against Airways in some way defeats this Court's jurisdiction to hear the DFR claim against USAPA. The Court should reject this argument.

B. USAPA will cause irreparable harm if not enjoined.

"[P]ilots may suffer irreparable harm" when wrongfully denied seniority rights. *Bernard*, 873 F.2d at 217. That is particularly true in the context of multiple plaintiffs and complex airline operations, where the measure of harm is particularly uncertain. *See Local 553, Transport Workers Union of Am., AFL-CIO v. Eastern Air Lines, Inc.*, 695 F.2d 668, 677 (2d Cir. 1982) (holding that "it was within the District Court's discretion to find irreparable injury . . . because of the difficulty, as perceived at the time of the Court's ruling, of determining the identity of all the attendants who would suffer lost wages"); *IAM v. Trans World Airlines, Inc.*, 601 F. Supp. 1363, 1372 (W.D. Mo. 1985) ("[I]n a meritorious labor controversy the courts often grant preliminary injunctive relief in order to avoid the potential later problems of 'unscrambling eggs.'"). Given that this merger will form the world's largest airline and that the West Pilot class has more then 1,000 members, and considering the difficulty measuring seniority damages, the Court should regard the harm from the DFR breach here as irreparable.

USAPA asserts that it will suffer substantial harm if it is ordered to use the Nicolau Award seniority order. (Doc. 48 at 16:20 to 16:23 & 17:5 to 17:7.) Far more correctly, the East Pilot faction, not USAPA, will be affected by the injunction. By advocating for East Pilot interests, USAPA is taking a side in a dispute that was resolved with finality six years ago for no reason other than to favor a majority faction. USAPA's argument that East Pilots would suffer harm from an injunction clearly proves the other side to the coin — that real harm will befall West Pilots if they are denied the injunctive relief they request and USAPA is allowed to abandon the Nicolau Award. If that occurs, West Pilots

will lose seniority positions for years. There will be great harm to the pilot group that USAPA disfavors, the West Pilots, if there is no injunction. That the group favored by USAPA, the East Pilots, will not get tainted benefits if there is an injunction should be of no consequence to the Court.

There is no question that absent an injunction order USAPA will breach the DFR and West Pilots will lose years of rightful seniority benefits. Because the operation of an airline is far too complex to determine precisely which pilots will suffer such loss and the extent of the harm from such loss, this harm is properly deemed irreparable. The Court should reject USAPA's argument to the contrary.

C. USAPA fails to show any counter balancing cognizable detriment to providing injunctive relief.

In *Bernard*, the Ninth Circuit disregarded detriments that were "tainted by a duty of fair representation violation." 873 F.2d at 218. When balancing the detriment of providing injunctive relief against the detriment of withholding such relief, therefore, the Court should not recognize the deprivation of benefits that are tainted by the illegal conduct at issue. The Court, therefore, should not consider that some pilots (mostly East Pilots) would fare better under USAPA's date-of-hire seniority order than under the Nicolau Award seniority order. USAPA offers no credible explanation how any cognizable detriment could flow from an order directing it to adhere to its DFR and follow the Nicolau Award seniority order.

Instead, USAPA makes an *ipse dixit* argument that it must be free to revise the seniority order of the Airways pilots in the course of the integration with the American pilots. But it fails to explain why this would be a benefit. It fails to offer any evidence that supports its position.[3] It identifies no precedent for doing so. The Court should reject

[3] Jess Pauley's declaration does not establish that merger representatives can or would reorder the seniority of Airways pilots in the course of seniority integration with American pilots. It merely states that Airways pilots must "present a united position" in that process. (Doc. 48-3 at ¶¶ 16-17.) Mr. Pauley does not explain how an order mandating use of the Nicolau Award seniority order prevents that.

this argument and find that USAPA has no legitimate reason to be free to reorder Airways pilot seniority during the process of integrating Airways seniority with American seniority

D. The public interest in the orderly merger of airlines is best met by enforcing a seniority integration arbitration award (the Nicolau Award) that was intended to be final and binding.

The McCaskill-Bond Amendment, 49 U.S.C. § 42112, note, § 117(a), applies to airline mergers that occurred after 2007. It directs a seniority integration process analogous to ALPA Merger Policy. The public policies that underlie the McCaskill-Bond process, therefore, support enforcement of the Nicolau Award, which resulted from ALPA Merger Policy. The Nicolau arbitration occurred before McCaskill-Bond went into effect. It strains credulity to think that Congress intended that McCaskill-Bond would in some way negate the finality of voluntary seniority integration arbitration such as the Nicolau arbitration. Yet, that is what USAPA argues. The Court should reject this argument.

E. The Court should impose no more than a nominal security bond as a condition of ordering USAPA to adhere to its DFR.

1. The Court has discretion to impose only a nominal security bond as a condition of issuing the preliminary injunction here.

"Rule 65(c) invests the district court with discretion as to the amount of security required, if any." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (internal quotation omitted). In the context of public interest litigation, for example, "[t]he court has discretion to dispense with [a] security requirement [as a condition to ordering injunctive relief] or to request mere nominal security, where requiring security would effectively deny access to judicial review." *California ex rel Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985).

A DFR claim enforces a right established by federal labor law. Where such a claim is asserted for the benefit of a large class (such as the West Pilots), it is closely analogous

to public interest litigation. USAPA cites no example of a court imposing a substantial security requirement as a condition of a obtaining a preliminary injunction in such matters.[4] It surely would effectively deny access to judicial review to do so. That establishes a sound basis for this Court to impose nothing more than a nominal bond as a condition of issuing a preliminary order compelling USAPA's compliance with its DFR.

2. The Court would not impose any security bond if it issues an injunction after final judgment.

"[A]n injunction bond . . . is required only for a temporary restraining order or a preliminary injunction, Fed. R. Civ. P. 65(c), not for a permanent injunction." *Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002); *accord G.C. and K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1108, n.8 (9th Cir. 2003). The Court, therefore, will obviate the need to address a security bond if it enters final judgment on the merits, as the West Pilots intend to request next week.

The Court may "advance the trial on the merits and consolidate it with the hearing" on the preliminary injunction. Fed R. Civ. P. 65(a)(2). It can consolidate a hearing on an injunction with a determination of summary judgment. *E.g.*, *Teva Pharmaceuticals U.S.A, Inc. v. Sebelius*, 595 F. 3d 1303 (D.C. Cir. 2010). "[O]rdering consolidation during the course of a preliminary injunction hearing is reversible error when little or no notice is given of this change and the effect is to deprive a party of the right to present his case on the merits." Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2950 (2d ed. 1995).

USAPA will have an opportunity at the hearing on the preliminary injunction to demonstrate factual issues that are material to deciding the merits of the DFR claim. If it fails to offer any such evidence, the Court can enter summary judgment in plaintiffs' favor. Then, if it issues an injunction, Rule 65(c) would not apply.

[4] For example, there is no mention of a security bond in *Bernard*.

V. Conclusion

Neither Airways nor USAPA offers a valid reason for this Court to withhold injunctive relief. The West Pilots respectfully ask the Court to either grant their motion for a preliminary injunction with a nominal security bond or to enter final judgment and issue an injunction that does not require a bond. A proposed form of order for the injunction is separately filed.

Dated this 3rd day of May, 2013.

POLSINELLI PC

/s/ Andrew S. Jacob

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of May 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.

/s/ Andrew S. Jacob

By _____