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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 REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant US Airways, Inc. ("US Airways"), by and through its undersigned counsel, hereby submits its Reply in Support of Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' Complaint contains one cause of action against US Airways, Count Two, in which plaintiffs contend that US Airways breached an alleged implied covenant of good faith and fair dealing in the collectively-bargained Transition Agreement when it entered into a Memorandum of Understanding ("MOU") with defendant US Airline Pilots Association ("USAPA"), among others, that did not expressly require the use of the Nicolau Award seniority list in the integration of US Airways (East and West) pilots with American Airlines, Inc. ("American") pilots. Plaintiffs conceded in the Complaint that Count Two raises what amounts to a "minor dispute" under the Railway Labor Act, i.e., a dispute involving the interpretation or application of a collective bargaining agreement, and that such a dispute normally is subject to the exclusive arbitral jurisdiction of a Board of Adjustment. Plaintiffs alleged in their Complaint, however, that this case presents an exception to mandatory Board of Adjustment jurisdiction because "[d]espite vigorous protests by the West Pilots, USAPA refuses to assert breach of the Transition Agreement implied covenant" against US Airways. (*See* Compl. (Doc. No. 1), ¶ 110.) In its motion to dismiss, US Airways rebutted plaintiffs' allegation and established that the West Pilots themselves could pursue their grievance against US Airways for alleged breach of the Transition Agreement – a fact which plaintiffs inexplicably describe as "immaterial" in their opposition brief. (*See* Pltfs.' Opp. to US Airways' Mot. to Dismiss ("Opposition") (Doc. No. 47), at p. 7:27-8:3 (pp. 10-11 of ECF filing).)

In their opposition, plaintiffs additionally, and unconvincingly, argue that this Court has subject-matter jurisdiction because the breach of contract alleged in Count Two involves contract formation (i.e., entry into the MOU), whereas the breach-of-contract claims dismissed by Judge Wake in *Addington I* involved the interpretation of an already-existing collective bargaining agreement. (*See* Opposition, at p. 5:3-14 (p. 8 of the Doc. No. 47 ECF filing); *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1062-

1064 (D. Ariz. 2008).) In order to adjudicate the merits of Count Two, however, a decision-maker will have to determine whether the Transition Agreement contains an implied covenant of good faith and fair dealing and, if so, how that implied covenant interrelates with the Transition Agreement's express provision stating that the Transition Agreement can be modified, and whether US Airways' entry into the MOU breached that alleged implied covenant. Plaintiffs here face the same hurdle in establishing an exception to the Adjustment Board's exclusive jurisdiction as they did in *Addington I*. And, as in *Addington I*, plaintiffs must fail. Such contract-interpretation issues are within the exclusive jurisdiction of the Board of Adjustment.

Finally, plaintiffs assert that this Court has subject-matter jurisdiction over Count Two because a Board of Adjustment cannot enter the injunction against USAPA for breach of DFR that is also sought by plaintiffs in this lawsuit. Plaintiffs cite no authority for this proposition, and there is none. Moreover, if it were to conclude that US Airways had breached the Transition Agreement, the Board of Adjustment could enter an injunctive remedy against US Airways, if appropriate, and plaintiffs do not argue to the contrary. Under the present circumstances, plaintiffs can – indeed, they must – seek relief for an alleged breach of the Transition Agreement from the Board of Adjustment.

Perhaps in recognition of the inherent weakness of their breach-of-contract argument, plaintiffs appear to have abandoned Count Two. (*See* Pltfs.' Reply in Supp. of Mot. for Prelim. Inj. ("Plaintiffs' Injunction Reply") (Doc. No. 53), at p. 1:5-7 (p. 6 of ECF filing) (describing claim against US Airways as "US Airways ("Airways") shares such liability [i.e., USAPA's DFR liability] because it agreed to abandon the Nicolau Award, knowing this was a DFR breach for USAPA," and not mentioning any alleged breach of the Transition Agreement).) In any event, plaintiffs' opposition brief emphasizes new legal theories against US Airways that are both unsupported by the allegations in their Complaint and unrelated to whether this Court has subject-matter jurisdiction over Count Two. In particular, plaintiffs argue that, if the MOU modified the Transition Agreement (which, as discussed below, it plainly did but not in the way

plaintiffs say), then US Airways has "repudiated the Nicolau Award," and "acted in concert" or colluded with USAPA in USAPA's alleged breach of DFR. (*See* Opposition, at pp. 4:9-12, 4:17-19, 5:18-6:7, and 6:17-7:6 (pp. 7-10 of Doc. No. 47 ECF filing).)[1] Plaintiffs' argument should be rejected.

As plaintiffs well know, the MOU does not abandon or repudiate use of the Nicolau Award in the McCaskill-Bond seniority integration process. The MOU is silent on that subject, leaving the disputed issue to resolution through the legal and/or McCaskill-Bond processes. Thus, while the MOU does constitute an amendment to the Transition Agreement because the Transition Agreement would have required use of the Nicolau Award seniority list once there was a single collective bargaining agreement (such as the MOU) for the East and West pilots, it does not preclude use of the Nicolau Award. Against that backdrop, the MOU was ratified by the US Airways pilots, including the majority of West Pilots, and will provide significant pay increases to both East and West pilots upon the closing of the merger. In these circumstances, US Airways' entry into the MOU cannot possibly be regarded as demonstrating hostility towards the West Pilots and plaintiffs' Complaint makes no allegations to the contrary.

Because plaintiffs have not alleged any facts in their Complaint, or made any argument in their Opposition, to support this Court's exercise of jurisdiction over US Airways, the motion to dismiss should be granted.[2]

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[1] Plaintiffs have since clarified their reference to "repudiated the Nicolau Award." (*See* Preliminary Injunction Reply, at p. 2 n.2 (p. 7 of Doc. No. 53 ECF filing) ("More accurately, Airways shares liability with USAPA because Airways agreed to the MOU, knowing that it breached USAPA's DFR.").) Plaintiffs' newest legal theory for keeping US Airways in this case as a defendant is equally invalid as the theories advanced for the first time in their opposition.

[2] As discussed in its response to plaintiffs' motion for preliminary injunction (Doc. No. 49, at pp. 1:19-27 & 3:17-4:14 (pp. 2 & 4-5 of ECF filing)), US Airways has a significant interest in the prompt and final resolution of the merits of plaintiffs' DFR claim against USAPA. It 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.

ARGUMENT

I. Plaintiffs Have Established No Basis For An Exception To The Board Of Adjustment's Exclusive Jurisdiction Over Their Claim Against US Airways For Breach Of The Transition Agreement.

Plaintiffs' opposition brief focuses almost exclusively on new legal theories against US Airways that are unrelated to whether this Court has subject-matter jurisdiction over Count Two and, most recently, plaintiffs appear to have abandoned Count Two altogether. (*See* Plaintiffs' Injunction Reply, at p. 1:5-7 (p. 6 of Doc. No. 53 ECF filing) (describing claim against US Airways as "US Airways ("Airways") shares such liability [i.e., USAPA's DFR liability] because it agreed to abandon the Nicolau Award, knowing this was a DFR breach for USAPA," and not mentioning any alleged breach of the Transition Agreement).) Accordingly, US Airways will not repeat here the arguments for why plaintiffs have failed to establish a basis for this Court's exercise of subject-matter jurisdiction over their claim that US Airways violated the Transition Agreement. (*See* pp. 1:4-2:17, *supra*.)

II. Plaintiffs Have Not Established That US Airways "Acted In Concert" Or "Colluded" With USAPA In USAPA's Alleged Breach Of DFR.

Plaintiffs' reliance on *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 329 (1969), should be rejected because plaintiffs do not allege that in entering into the MOU, US Airways "acted in concert" with USAPA within the meaning of *Glover*. (*Cf.* Opposition (Doc No. 47), at pp. 5:17-6:7 & 6:17-7:6 (pp. 8-10 of ECF filing).) In *Glover*, the Court ruled that "a formal effort to pursue contractual or administrative remedies would be absolutely futile" because there were detailed factual allegations that "the bargaining representatives . . . ha[d] been acting in concert with the railroad employer to set up schemes and contrivances to bar Negroes from promotion wholly because of race." *Id.* at 331. Accordingly, in order for *Glover* to apply, plaintiffs must establish that US Airways and USAPA "acted in concert" with the same hostility towards the West Pilots. *See Croston v. Burlington N. R.R. Co.*, 999 F.2d 381, 387 (9th Cir. 1993), *abrogated on other grounds by Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

The *Glover* principle requires independent conduct by US Airways that evinces bad faith, discrimination, or hostility on the part of US Airways towards the West Pilots. *See Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474, 493 (N.D. Ill. 1991), *aff'd in relevant part, rev'd in part*, 981 F.2d 1524 (7th Cir. 1992). For example, in *Rakestraw*, the district court held that the union had breached its DFR towards a disfavored minority by advocating for a seniority proposal that abrogated the relative seniority rights of the minority – seniority rights which the union had promised never to change. The district court, however, ruled that plaintiffs had failed to establish collusion by the carrier in the union's breach of DFR because, even though the carrier was well aware of the animosity between the union and the minority group (regarded as strike-breakers by the union), there was no "evidence that [the carrier] acted in bad faith or discriminated against plaintiffs in accepting [the union's] proposal." *Id.*

Here, plaintiffs' Complaint does not even allege that US Airways and USAPA "acted in concert,"[3] let alone any independent conduct on the part of US Airways that demonstrates hostility towards the West Pilots. Rather, the only common allegation directed towards US Airways and USAPA is that they both entered into the MOU. (*See* Opposition (Doc. No. 47), at pp. 3:16-7:13 (pp. 6-10 of ECF filing).) But the mere fact that US Airways is a party to the MOU – without more – is insufficient to support an inference of collusion. *See United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1283 (7th Cir. 1985) (rejecting as "patently fallacious" the argument that negotiation between the carrier and union resulting in a new collective bargaining agreement "necessarily entails collusion"); *Croston*, 999 F.2d at 387 ("Conclusory allegations that do not demonstrate any act of collusion between the union and the

[3] Plaintiffs assert in a footnote that they "can amend their pleadings to state [an 'acting in concert'] cause of action directly" (Opposition (Doc. No. 47), at p. 4 n.3 (p. 7 of ECF filing)), but they have not done so. US Airways submits that plaintiffs cannot, consistent with Rule 11, allege that in entering into the MOU, US Airways acted with a motivation to abandon or repudiate the Nicolau Award, or benefit the East Pilots at the expense of the West Pilots, in the manner alleged by plaintiffs with respect to USAPA.

[carrier] will not establish jurisdiction"); *Addington*, 588 F. Supp. 2d at 1063 (D. Ariz. 2008) ("conclusory allegations . . . are insufficient to establish collusion").

Plaintiffs assert that US Airways and USAPA "acted in concert" because "*Glover* applies where a carrier-employer and union reach an agreement that is wrongful on its face" and "[a]n agreement that derogates existing seniority rights for no legitimate union purpose is wrongful on its face." (Opposition (Doc. No. 47), at p. 7:1-3 (p. 10 of ECF filing); *see also id*. at p. 6:3-5 (p. 9 of ECF filing).) But plaintiffs' characterization has no support in the plain language of the MOU and the relevant historical background. The MOU is silent as to whether the Nicolau Award seniority list will or will not be used in the McCaskill-Bond seniority integration process, and the MOU indisputably does ***not*** preclude use of the Nicolau Award. As plaintiffs themselves note, "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." (Preliminary Injunction Reply (Doc. No. 53), at pp. 5:27-6:1 (pp. 10-11 of ECF filing) (emphasis in original); *see also id*. at p. 6:1-4 (p. 11 of ECF filing) ("[I]n 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.").) Against this backdrop, the majority of West Pilots approved the MOU – a fact which destroys any notion that US Airways' entry into the MOU could be regarded as demonstrating hostility towards the West Pilots.

Finally, plaintiffs' reliance on *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th Cir. 1989), for the proposition that this Court has "jurisdiction to provide a remedy directed at both US Airways and USAPA" is misplaced. (*Cf*. Opposition (Doc. No. 47), at p. 6:8-16 (p. 9 of the ECF filing).) The court in *Bernard* did not "compel the parties [the union and the airline]" to reach a new collective bargaining agreement. (*Id*. (bracketed parenthetical added by plaintiffs).) Contrary to the parenthetical in plaintiffs' brief, "the parties" in the quoted passage from the Ninth Circuit's opinion is not a reference to "the

union and the airline," but rather refers to the groups of pilots from each of the two pre-merger carriers. *Id*. at 218.[4] *Bernard* thus lends no support to plaintiffs' argument that this Court has remedial jurisdiction in this action over US Airways.

III. Plaintiffs Fail To Demonstrate That Jurisdiction Over US Airways Is Necessary To Afford Plaintiffs Complete Relief On Their DFR Claim Against USAPA.

In the absence of the jurisdiction discussed in Section II *supra*, a carrier may only be joined in a DFR claim where "its presence may be necessary for complete relief in the claim against the union." *Addington*, 588 F. Supp. 2d at 1064 (D. Ariz. 2008). Plaintiffs assert that "jurisdiction over both US Airways and USAPA" is necessary because they seek an injunction compelling both "US Airways and USAPA to use the Nicolau Award for seniority integration in the course of the American Airlines merger" (Opposition (Doc. No. 47), at p. 7:20-23 (p. 10 of ECF filing) (emphasis in original)), but the simple expedient of asking for an injunction against a carrier – without more – is plainly insufficient to create jurisdiction that is otherwise lacking. Plaintiffs fail to provide any explanation in their opposition brief for why an injunction compelling US Airways to use the Nicolau award is necessary to afford complete relief on their DFR claim against USAPA. In their Preliminary Injunction Reply, however, plaintiffs assert that "it is particularly necessary to [enter an injunction against US Airways] here where the East Pilots have a history of changing their identity to evade their legal obligations," and "[e]ffective 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."

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[4] The full paraphrased sentence from the Ninth Circuit's opinion reads: "The district court acted within its discretion in issuing an order to set the tainted agreement aside, compel the parties to reach a new one according to ALPA's own internal procedures, and submit to a stipulated system for promotions and furloughs in the meantime." *Id*. The union's (i.e., ALPA's) "internal procedures" required negotiation, and, if necessary, mediation and arbitration, between ***pilot groups*** "before presenting [a] position to management. *Id*. at 216. The agreement "according to ALPA's own internal procedures" thus refers to an agreement between the pilot groups from the two pre-merger carriers – and not an agreement between ALPA and the surviving post-merger carrier.

(Doc. No. 53, at p. 3:16-20 (p. 8 of ECF filing).) Plaintiffs new arguments are without merit.

Even if it is true, as plaintiffs assert, that "the East Pilots have a history of changing their identity to evade their legal obligations," the solution lies in the careful drafting of an injunction against USAPA – and not in the entry of an injunction against a carrier which, throughout the entire McCaskill-Bond process, is contractually obligated to "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 Part 3 (Doc No. 14-3), at p. 373 (p. 62 of the ECF filing).) US Airways' role in "implementing integrated pilot operations" is likewise inapposite. The relevant question is whether US Airways will have a role in determining which seniority lists are used in the McCaskill-Bond seniority-integration process – it will not. If this Court were to enter a DFR-based injunction against USAPA requiring USAPA to use the Nicolau Award in the US Airways/American seniority integration, there is simply nothing more US Airways could provide to plaintiffs.[5]

Finally, plaintiffs' arguments about the inability of a Board of Adjustment to provide relief on their DFR claim against USAPA are irrelevant to this Court's jurisdiction over US Airways. (*Cf.* Opposition (Doc. No. 47), at p. 8:1-24 (p. 11 of the ECF filing).) Plaintiffs cite *Croston* and assert that they should be excused from pursuing grievance/arbitration procedures before the Board of Adjustment on their breach-of-contract claim against US Airways because the Board "cannot right the wrong" when "the wrong is at the level of contract formation." (*Id.*) However, the quoted language from *Croston* is inapplicable because the Ninth Circuit was addressing the circumstances under

[5] This is not a case, like plaintiffs' description of *Glover* and *Bernard*, where plaintiffs seek to change the terms of a contract and both parties to the contract must therefore be in front of the court. (*See* Opposition, at p. 7:3-6 (p. 10 of Doc. No. 47 ECF filing) ("To provide a meaningful remedy where a union and carrier-employer have made such an agreement [i.e., an agreement that is "wrongful on its face"], a court must have jurisdiction to order both parties (the employer and the union) to change the terms of the agreement.").) Plaintiffs here do not seek to change the terms of the MOU, they seek an order from the Court mandating how USAPA will exercise its authority pursuant to the MOU and the McCaskill-Bond statute.

which a district court would have jurisdiction over an employee's DFR claim against a union where the employee had not first pursued administrative remedies against the employer under the operative collective bargaining agreement and, in that context, said that an employee would be excused from first bringing a grievance "where the alleged breach of duty relates to the union's conduct in negotiating the collective bargaining agreement." *Croston*, 999 F.2d at 386. In the present case, US Airways does not dispute that the Court has jurisdiction over plaintiffs' DFR claim against USAPA. But the controlling inquiry here is whether US Airways must remain a defendant on the breach-of-contract claim in Count Two in order to allow this Court to provide plaintiffs with complete relief on their DFR claim against USAPA, and, because "complete relief may be granted against USAPA . . .[,] US Airways need not remain a party." *Addington*, 588 F. Supp. 2d at 1064.

CONCLUSION

For all the foregoing reasons, US Airways respectfully requests that Count Two of plaintiffs' Complaint be dismissed with prejudice for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Dated: May 3, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2013, I caused to be electronically transmitted the attached Defendant US Airways, Inc.'s Reply in Support of Motion to Dismiss, to the Clerk's office using the CM/ECF System for filing.

/s/ Robert A. Siegel

Robert A. Siegel

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