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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

US Airline Pilots Association, *et. al.*,

Defendants.

Case No.: CV-13-00471-PHX-ROS

US Airline Pilots Association's Reply Memorandum in Support of its Motion to Dismiss

MEMORANDUM OF POINTS AND AUTHORITIES

Nothing in plaintiffs' Opposition changes the fact that their claims are without merit and should be dismissed in their entirety as a matter of law.

ARGUMENT

I. This Court's prior holding bars Plaintiffs' DFR Claim.

In all plaintiffs' characterizations and formulations, plaintiffs' claim remains essentially the same, namely that USAPA is bound to adhere to the Nicolau Award. But in the previous Declaratory Judgment Action, this Court granted USAPA's motion for summary judgment on Count II and held that USAPA "is free to pursue any seniority position it wishes" (2:10-cv-01570-ROS, Doc. 193, p. 1) and that a seniority proposal other than the Nicolau Award "does not automatically breach its duty of fair representation." *Id.* at p. 8. This holding applies with equal force not only to USAPA's role as exclusive bargaining representative in dealing with US Airways, but also to USAPA's authority as exclusive bargaining representative in dealing with the parties to the MOU (which includes US Airways) and in representing the US Airways pilots in the McCaskill-Bond proceeding. Accordingly, the judgment in the Declaratory Judgment Action is *res judicata* and bars plaintiffs from re-litigating their claim that USAPA is bound to negotiate for the Nicolau Award or that the failure to include it in the MOU violates its DFR.

Decided with equal clarity in the Declaratory Judgment Action is that the 2005 Transition Agreement may be modified by the mutual agreement of USAPA and US Airways. "It is undisputed that the Transition Agreement can be modified at any time 'by written agreement of [USAPA] and the [US Airways].'" 2:10-cv-01570-ROS, Doc. 193, p. 7. As shown in USAPA's Motion to Dismiss, the parties clearly did modify the 2005 Transition Agreement to provide that the MOU was neutral with respect to the

longstanding seniority dispute that underlies this series of cases. For these reasons alone, plaintiffs' DFR claim should be dismissed as a matter of law.

II. Plaintiffs' general DFR claim is not ripe.

The general DFR claim made in the Complaint is not ripe. The claim alleged in the Complaint is that "USAPA . . . breached the duty of fair representation by entering into the MOU with the firm *intention* of using a date-of-hire seniority list rather than the Nicolau Award." (Compl., ¶99, emphasis added.) This claim looks to the future and relies on what plaintiffs apprehend will be the final outcome of the seniority integration process. As such, this claim is no more ripe than that presented in *Addington I*, or in the cross-claim dismissed by this Court in the Declaratory Judgment Action, or in Count I of the Complaint in that action. The Ninth Circuit held this claim was not ripe not just because there was no ratified collective bargaining agreement, but because there was no such agreement that established an integrated seniority system different from the separate pre-merger America West and US Airways seniority systems. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1177 (9th Cir. 2010) (referring to a "list" that "becomes part of the single CBA"). As the Ninth Circuit explained, "the Supreme Court case that clarified that the DFR was applicable during contract negotiations articulated its holding in terms that imply a claim can be brought only after negotiations are complete and a 'final product' has been reached." *Id.* at 1182, citing *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78, 111 S.Ct. 1127 (1991).

The law is clear that a DFR does not become ripe until there is a final product. The MOU is not the final product. Indeed, the complete name of the MOU acknowledges its contingent nature – Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement. Moreover, under the terms of the MOU (which the majority of the putative class ratified), the process for seniority integration is separate from negotiations for the terms and conditions of employment. (MOU, ¶10.h.)

At the time the Ninth Circuit decided USAPA's appeal in *Addington I*, the final product would be achieved when a single CBA was negotiated and ratified by the union membership. In this case, any DFR claim that plaintiffs may have will not be ripe until completion of the McCaskill-Bond seniority integration process. It is irrelevant that the McCaskill-Bond Amendment did not exist at the time the Nicolau Award was rendered. It is the law now, and it governs the process for integrating seniority after a merger. As stated by US Airways, "[a]s plaintiffs well know, the MOU does not abandon or repudiate use of the Nicolau Award in the McCaskill-Bond seniority integration process." (US Airways, Inc.'s Reply in Support of Motion to Dismiss, Doc. 54, p. 4.)

Even assuming that the MOU is the "Single Agreement" envisioned in the 2005 Transition Agreement, it does not make plaintiffs' claim ripe. (Pl. Resp., p. 10.) As this Court noted in its decision granting summary judgment to USAPA on the Declaratory Judgment Action:

> But being "bound" by the Transition Agreement has very little meaning in the context of the present case. It is undisputed that the Transition Agreement can be modified at any time "by written agreement of [USAPA] and the [US Airways]." . . . Moreover, USAPA and US Airways are now engaged in negotiations for an entirely new collective bargaining agreement and there is no obvious impediment to USAPA and US Airways negotiating and agreeing upon any seniority regime they wish. As explained by the Ninth Circuit, "seniority rights are creations of the collective bargaining agreement, and so may be revised or abrogated by later negotiated changes in this agreement." *Hass v. Darigold Dairy Products Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985). And a union "may renegotiate seniority provisions of a collective bargaining agreement, even though the resulting changes are essentially retroactive or affect different employees equally." *Id.*

2:10-cv-01570-ROS, Doc. 193, p. 7. Thus to the extent USAPA is bound by the Transition Agreement, it is equally free to modify it, and the MOU, which even plaintiffs

admit confers substantial benefits upon all US Airways pilots, constitutes said permissible modification.

Plaintiffs' DFR claim is not ripe, and the complaint should be dismissed.

III. The complaint fails to allege facts supporting a DFR claim.

Plaintiffs have the burden of demonstrating a breach of the duty of fair representation by USAPA. Plaintiffs' attempt to put the onus on USAPA in defending the MOU flies in the face of established DFR precedents. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059 (1976) ("To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union."); *Truesdell v. S. California Permanente Med. Grp.*, 151 F.Supp.2d 1161, 1170 (C.D. Cal. 2001) (citing *Hines*) *aff'd*, 37 F.App'x 945 (9th Cir. 2002).

Despite plaintiffs' burden, the Complaint is totally bereft of facts alleging that USAPA's negotiation of the MOU was arbitrary, discriminatory or in bad faith. To the contrary, the Complaint acknowledges that the MOU was ratified by a significant majority of the Phoenix based pilots and that it provides for increased wages for all US Airways pilots immediately upon the effective date. (Compl., ¶¶79, 105.) As the MOU demonstrates, not only did it result in significant wage increases, it provides significant additional benefits including a guarantee that no current US Airways pilots, East or West, will be furloughed during the life of the agreement, and a fund to assist USAPA in their negotiations with the APA regarding seniority following the merger. (*See* MOU, ¶¶7, 11.)

Plaintiffs' DFR claim rests on the single -- and now thoroughly repudiated premise -- that USAPA was bound to incorporate the Nicolau Award into the "single agreement" despite the rulings by both the Ninth Circuit and this Court that, absent any arbitrary or discriminatory purpose or collusive conduct by the carrier, the parties are free

to negotiate for any seniority regime they wish.[1] The Complaint merely rehashes the historical background of the ALPA Merger Policy and the arbitration that resulted in the Nicolau Award. And in response to this motion to dismiss, plaintiffs cite no *legal* authority for their claim that notwithstanding these prior rulings, USAPA, an entirely independent labor organization, is somehow bound by an arbitration award obtained through procedures promulgated by a decertified predecessor union and which, if applied now, would be fundamentally unfair and inequitable. Even if, despite the voluminous contrary precedents, West Pilots could advance an argument that the Nicolau Award was binding on USAPA in the first instance, the Complaint makes no allegations that would enable the plaintiffs to completely ignore all of the substantial evidence presented on summary judgment in the Declaratory Judgment Action that the conditions evolving at US Airways since the time of the Nicolau Award, the substantial benefits of the MOU, and the impending merger with American Airlines, all fully support USAPA's right to agree to the MOU and to negotiate for different seniority provisions under the McCaskill-Bond procedures set forth in the MOU.

Plaintiffs misleadingly cite *Robesky v. Qantas Empire Airways Ltd*, 573 F.2d 1082 (9th Cir. 1978), as authority for their proposition that "USAPA's conduct is wrongful if it is 'unrelated to legitimate union interest.'" (Pl. Resp., p. 11.) In discussing the arbitrary prong of a DFR, the court in *Robesky* stated that "[a]cts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." 573 F.2d at 1090. Neither the Complaint nor plaintiffs' responsive papers explain *how* or *why* entering into the MOU that does not incorporate the Nicolau Award is "so egregious, so far short of minimum standards of fairness . . . and so unrelated to legitimate union

[1] *See Addington*, 606 F.3d at 1181 n.3 ("USAPA is at least as free to abandon the Nicolau Award as was its predecessor, ALPA.").

interests." Instead, they merely equate abandonment of the Nicolau Award as "unrelated to legitimate union interest". However, "legal conclusions . . . cast in the form of factual allegations" are insufficient to defeat a motion to dismiss. *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011), *cert. denied* 132 S.Ct. 850 (2011).

Plaintiffs assert that the DFR standard set forth by the Supreme Court in *Air Line Pilots Ass'n, Intern. v. O'Neill*, 499 U.S. 65, 111 S.Ct. 1127 (1991), "is not applicable in this case . . ." (Pl. Resp., p. 14.) They are wrong. "The duty of fair representation unquestionably attaches to contract negotiations by a union." *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 616 (9th Cir. 2003) (citing *O'Neill* for the proposition that "a union violates the DFR if it acts arbitrarily, discriminatorily, or in bad faith, in the bargaining process."); *see also Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992) ("A union's conduct during bargaining need only fall within '[a] wide range of reasonableness' to survive judicial review . . .", quoting *O'Neill*); *Addington*, 606 F3d at 1182.

Plaintiffs argue that the *O'Neill* standard does not apply because they "do not base their DFR claim on the substance of a term newly negotiated between Airways and USAPA." (Pl. Resp., p. 14.) Aside from the fact that this argument is barred by this Court's prior rulings that the parties were free to negotiate, it is wholly contradicted by the very first sentence in their response where they state "USAPA breached its duty of fair representation . . . because the Memorandum of Understanding . . . abandons the Nicolau Award. . ." (*Id.*, at p. 5.) They argue throughout their response that the MOU – containing (or omitting) terms newly negotiated -- is the "single agreement", and that by the very absence of the Nicolau Award from its terms, USAPA has breached its DFR and that US Airways has assisted USAPA in its breach. In this respect, plaintiffs have failed to factually distinguish *O'Neill*, and to escape the conclusion that the DFR standard set forth therein is applicable here and bars their claim as a matter of law.

Plaintiffs argue that "USAPA must 'show some objective justification'" for abandoning the Nicolau Award. (Pl. Resp., p. 11) It has long been held that utilizing date-of-hire "to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs." *Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 599 (9th Cir. 1974) (citing *Humphrey v. Moore*, 375 U.S. 335, 347, 84 S.Ct. 363 (1964)); *see also Ratkosky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988) (refusing to re-negotiate an agreement establishing seniority rights based on a two-tiered system that included dovetailing was not a breach of the union's duty of fair representation); *Hanley v. Continental Airlines, Inc.*, 1991 WL 94381, at *7 (D. Col. May 24, 1991) (The union favoring of seniority integration based on date-of-hire "is not so far outside a wide range of reasonableness that it is wholly irrational or arbitrary and a breach of the duty of fair representation. The fact that the integration favored the former Frontier group more than the Continental group does not in itself constitute a breach of the union's duty of fair representation."). Thus, to meet the DFR burden, plaintiffs must allege more than that USAPA "enter[ed] into the MOU with the firm intention of using a date-of-hire seniority list rather than the Nicolau Award list". (Compl., ¶99.) Plaintiffs fail to do so and the Complaint must be dismissed.

IV. The ratification of the MOU by a majority of the putative class is a defense to the DFR claim.

Plaintiffs' argument that the ratification defense is "antithetical to the doctrine of fair representation" (Pl. Resp., p. 16) is without merit, is without support, and is discredited by case law.

In DFR cases arising out of the negotiation of a seniority arrangement, ratification of that arrangement by plaintiffs is a valid defense to claims of union misconduct in reaching the seniority arrangement. *Gullickson v. Southwest Airlines Pilots' Ass'n*, 87 F.3d 1176, 1183-84 (10th Cir. 1996); *see also Papcin v. Dichello Distributors, Inc.*, 697

F.Supp. 73, 80 (D. Conn. 1988) (In dismissing plaintiffs' hybrid DFR claim, finding that the 1980 agreement modified seniority provisions, and "plaintiffs knew this to be the case when they voted to ratify the 1980 agreement.), *judgment aff'd*, __ Fed. Appx.__ (2d Cir. 1988). This defense is especially applicable in cases such as the instant case where the plaintiffs were "well-informed" as to the nature and effect of the collective bargaining agreement or other contract containing the seniority arrangement in question, and there are no allegations of irregularities during the ratification vote. *Gullickson*, 87 F.3d at 1186.

Plaintiffs' assertion that "[b]arely more than half of the West Pilots with positions on the Nicolau Award list participated in the MOU ratification vote" (Pl. Resp., p. 16) does not obviate the fact that the MOU's overwhelming approval by the West pilots constitutes a waiver of any claim for breach of duty of fair representation.[2] As plaintiffs are well aware, only members in good standing are eligible to vote. (*See* USAPA Constitution & Bylaws, Section 4, annexed in Doc. 14-2: Part 2 of the Appendix of Evidence in Support of Motion for Preliminary Injunction.) And, if, as plaintiffs assert, a significant number of West Pilots stood by the sidelines and refused to participate in the Union's democratic ratification procedures, they have only themselves to blame if they are unhappy with the outcome of the MOU ratification process. Union members cannot sleep on their rights or simply refuse to participate in a democratically conducted referendum and then claim their rights are violated by the contract ratified in that referendum. Contrary to plaintiffs' assertions, obstruction and failure to cooperate are equally fatal to any challenge to whether a union has complied with its duty to act reasonably and in good faith. *See, e.g.*, *Republic Steel Corp. v. Maddox*, 379 U.S. 650,

[2] In fact, West Pilots voted in favor of the MOU at much higher percentages (97.69%) than did the East pilots. (*See* Doc. 44-1, Ex. A to Szymanski Declaration showing percentages in favor of the MOU at the other pilot locations ranging from 55.84% at the Philadelphia based pilot group to 84.97% at the Washington D.C. based pilot group.)

653, (1965) (employee must afford the union the opportunity to act on his behalf); *Pegump v. Rockwell Int'l Cor*p. 109 F.3d 442, 444-45 (8th Cir. 1997) (dismissing claim for breach of duty of fair representation where, *inter alia*, plaintiff failed to cooperate); *Soto v. ECC Indus., Inc.*, 05 CIV. 4764 BMC MDG, 2007 WL 3232222 (E.D.N.Y. Oct. 31, 2007), *aff'd*, 358 Fed. App'x 220 (2d Cir. 2009) ("The facts are undisputed that plaintiff failed to cooperate in the union's attempt to consider whether to pursue his grievance, and there were ample additional grounds for the union to decide not to do so. Given the undisputed facts, no reasonable jury could find that the union acted outside of the broad discretion that the law allows . . . ."); *Mack v. Otis Elevator Co.*, No. 00 CIV 7778 LAP, 2001 WL 1636886, at *13 (S.D.N.Y. Dec. 18, 2001) (claim of breach of duty of fair representation undermined by refusal to cooperate with union); *Decrosta v. Nat. Post Office Mail Handler*s, Nos. 90-CV-1269, 90-CV-585, 1994 WL 173825 (N.D.N.Y. May 4, 1994) (granting summary judgment to union where conclusory allegations of union's bad faith were belied by "plaintiff's own failure to cooperate").

Accepting as true plaintiffs' allegation that USAPA entered "into the MOU with the firm intention of using a date-of-hire seniority list rather than the Nicolau Award list" (Compl., ¶99), the ratification of the MOU by the putative West Pilots Class is positive proof that they overwhelmingly agreed that the overall benefits provided for in the MOU outweighed insistence upon the Nicolau Award in the McCaskill-Bond process.

V. Plaintiffs raise no objection to USAPA's Motion to Dismiss on the ground that the DFR claim is a "minor dispute".

As explained in USAPA's Motion to Dismiss, the DFR claim alleged by plaintiffs in their Complaint rests on the premise that the MOU is the "single agreement" contemplated in the 2005 Transition Agreement. As shown in USAPA's Motion to Dismiss the MOU is clearly not the "single agreement" referred to in 2005 Transition Agreement and, in any event, resolution of this claim is a "minor dispute" within the

meaning of the Railway Labor Act, is within the exclusive jurisdiction of the System Board of Adjustment, and as such lies outside the jurisdiction of this Court. *See* 45 U.S.C. § 184. Plaintiffs' response makes no argument to the contrary and their claim should therefore be dismissed.

VI. Plaintiffs' attorneys' fee claim should be dismissed

There is no merit to plaintiffs' claim for attorneys' fees. Plaintiffs failed to prevail in either *Addington I* or in the Declaratory Judgment Action. They do not cite a single case in which fees were awarded to a losing party. The respondent in *Hall v. Cole*, 412 U.S. 1 (1973), won his suit against the union claiming that his expulsion violated his free speech rights under the LMRDA. The plaintiff in *Harrison v. United Transp. Union*, 530 F.2d 558 (4th Cir. 1975), was awarded consequential damages for lost wages and punitive damages. The plaintiffs in *Ramey v. District 141, Int'l Ass'n of Machinists & Aerospace Workers*, 362 F.App'x 212 (2d Cir. 2010), likewise prevailed in their DFR claim. The attorneys' fee claim should be dismissed as a matter of law.

CONCLUSON

For all the foregoing reasons, USAPA respectfully requests that the Complaint be dismissed in its entirety.

Respectfully submitted this 9th day of May 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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