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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 **PLAINTIFFS' TRIAL MEMORANDUM ON THE PARTICIPATION OF WEST PILOTS IN THE MCCASKILL-BOND PROCESS**

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

The McCaskill-Bond amendment to the Federal Aviation Act, 49 U.S.C. § 42112, note, § 117, (copy attached as Exhibit "A")[1] adopts certain seniority merger procedures that were used when the airline industry was regulated by the Civil Aviation Board (the "CAB"). Those procedures gave interested workers the right to participate in seniority merger arbitrations apart from their union representatives. That said, McCaskill-Bond

[1] If the Court believes that it needs more authority than just the current Complaint (Doc. 1) to decide the participation issues under McCaskill-Bond, then, with the Court's permission, the West Pilots will quickly file an amended complaint.

does not require the West Pilots to arbitrate enforcement of the Nicolau award. That is because McCaskill-Bond neither supersedes the Transition Agreement nor otherwise allows USAPA to disregard the Nicolau Award without "show[ing] some objective justification." *See Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976).

Regardless, if the West Pilots agree to arbitrate a resolution of the Nicolau Award dispute, the duty of fair representation ("DFR") requires that USAPA remain neutral. That requires a neutral process, akin to: (1) what the CAB required pursuant to the *Allegheny-Mohawk* Labor Protective Provisions ("LPPs"); (2) what McCaskill-Bond requires for current mergers; (3) what the Transition Agreement requires here; and (4) what occurred in the Nicolau arbitration. It also requires neutral definition of, and equal participation by, the parties in interest. Because USAPA must not take sides, those parties must be East Pilots and West Pilots, not USAPA.[2]

II. Legal Argument

A. McCaskill-Bond does not apply to the 2005 US Airways-America West merger.

As a preliminary matter, there are three reasons that McCaskill-Bond does not apply to the 2005 US Airways-America West merger and does not provide a process by which USAPA can legitimately disregard the Nicolau Award. First, McCaskill-Bond disclaims applying to airline mergers that occurred prior to December 26, 2007. 49 U.S.C. § 42112, note, § 117(c) ("This section shall not apply to any covered transaction involving a covered air carrier that took place before the date of enactment of this Act [Dec. 26, 2007]."). Not only did the US Airways-America West merger occur long before that date, but by that date Airways had already accepted the Nicolau Award seniority list. (Doc. 14-1 at App. 130, Doug Parker, Letter to US Airways Pilots (Dec. 20, 2007).)

[2] This is important because USAPA does not intend to be neutral. *See* Doc. 14-3 at App. 457, G. Hummel, *President's Message*, at 2 (Feb. 21, 2013) (stating that USAPA intends to "begin the seniority integration process with APA by pursuing date-of-hire integration of East and West Pilots).

Second, McCaskill-Bond expressly exempts seniority integration of employee groups that were represented by the same union at the time of the merger. 49 U.S.C. § 42112, note, § 117(a)(1) (providing that McCaskill-Bond does not apply where "the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers"). At the time of the 2005 US Airways-America West merger, ALPA represented both East and West Pilots. McCaskill-Bond, therefore, does not apply to East-West seniority integration.

Third, even if McCaskill-Bond did apply to East-West seniority integration (which it does not), it does not supersede provisions in a CBA (such as the Transition Agreement) that provide protections equivalent to the LPPs. 49 U.S.C. § 42112, note, § 117 (a)(2). ALPA Merger Policy, which was incorporated into the Transition Agreement, provided such protections. *Nat'l Airlines Acquisition, Arbitration Bd.*, 95 C.A.B. 584, 584, 1982 WL 35318, at *1 (C.A.B. Apr. 15, 1982). Consequently, McCaskill-Bond does not supersede the process, conducted pursuant to the Transition Agreement, that culminated in the Nicolau Award.

B. Precedent under the CAB.

1. Under the CAB, employees affected by an airline merge could demand that seniority lists be integrated by a neutral arbitrator.

McCaskill-Bond adopts LPP §§ 3 & 13, which controlled seniority integration in airline mergers when the industry was regulated by the Civil Aeronautics Board (the "CAB").[3] *See Allegheny-Mohawk*, 59 C.A.B. 19, 45 (1972). The purpose of the LPPs was to "ward off labor strife that could impede or delay a route transfer or merger, or detrimentally affect a carrier's stability or efficiency." *Braniff Master Exec. Council of the APA v. C.A.B.*, 693 F.2d 220, 223 (D.C. Cir. 1982). That same purpose underlies McCaskill-Bond.

[3] A copy of LPP §§ 3 & 13 is attached as Exhibit "B."

LPP § 3 required that "provisions shall be made for the integration of seniority lists in a fair and equitable manner." It also provided, if "employees affected" by a merger cannot agree on how to merge their seniority lists, that "the dispute may be submitted by either party for adjustment in accordance with section 13." And LPP § 13(a) provides that such adjustment shall be by neutral arbitration.

LPP §§ 3 & 13 also provided that the carrier was "responsible for integrating seniority lists." *Nat'l Airlines Acquisition*, 95 C.A.B. at 585, 1982 WL 35318, at *1 (emphasis added). As the CAB wrote, "Sections 3 and 13 impose upon the carrier a duty to integrate seniority listings fairly and equitably and a duty to submit certain disputes between it and its employees to arbitration." *Great No. Pilots Ass'n*, 91 C.A.B. 795, 799-800 (1981) (emphasis added). Consequently, to the extent that McCaskill-Bond applies to the East-West integration, it puts the onus on US Airways to ensure that the West Pilots are fairly integrated with the East Pilots.

Fair integration under the LPPs allowed all affected employees to participate in the neutral seniority integration process (either directly or through representatives). LPP § 13(a), for example, provided that "any party" involved in a merger related seniority dispute had a right to demand neutral arbitration. Consequently, under CAB regulation, sub-groups of affected employees had the right to participate in seniority integration arbitrations. That happened in *Pan Am. World Airways, Inc. v. CAB*, where the CAB ordered the carrier to arbitrate the seniority claim of a single employee. 683 F.2d 554 (D.C. Cir. 1982). It happened in other matters as well. *E.g.*, *So. Employees. v. Republic/ALEA*, 102 C.A.B. 616 (1983) (employee committee); *Pan Am-TWA Route Exchange, Arbitration Award*, 85 C.A.B. 2537 (1980) (three individual flight engineers). Indeed, the CAB read the LPPs as allowing it to order arbitration of any dispute that was "at least arguably" covered. *See Pan Am. World Airways*, 683 F.2d at 560 (approving this practice).

2. The general policy favoring arbitration supports this Court taking guidance from CAB-era decisions.

Unless Congress clearly states that "court-made law . . . is left undisturbed," the Supreme Court tells us that "Congress' silence is just that — silence." *Community for Creative Non-Violence v. Reid*, 490 US 730, 749 & n.15 (1989). Congress was silent as to whether to import wholesale the decisions reviewing the CAB's application of the LPPs. Consequently, the fact that McCaskill-Bond adopts LPP §§ 3 &13 does not mean that Congress intends federal courts to apply the LPPs now exactly as they were applied when the industry was regulated by the CAB. The Court, therefore, cannot use CAB-era decisions as the only basis to order arbitration of all disputes that are at "at least arguably" covered by the LPPs. *See Pan Am. World Airways*, 683 F.2d at 560.

But the Court has more than CAB-era decisions. It can rely on the generally strong presumption in favor of arbitration. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). That general policy bolsters CAB-era decisions that favor arbitration and provides the Court solid ground to apply LPP §§ 3 & 13 as they were applied by the CAB.

3. Until the East-West dispute is fully-settled, the West Pilots should participate in all seniority integration procedures.

The question of pilot seniority integration from the 2005 US Airways-America West merger was settled by the Nicolau arbitration in 2007. To the extent that USAPA claims it was not, the West Pilots are "employees affected" by the present US Airways-American Airlines merger. Consequently, if McCaskill-Bond applies, the West Pilots have a right to fully participate in each phase of MOU seniority integration beginning with creation of the Seniority Integration Protocol.

McCaskill-Bond, however, does not provide a basis to compel the West Pilots to arbitrate because it provides affected workers with a right, but not an obligation, to arbitrate. That said, if another arbitration is the only quick way to resolve the dispute over

whether the Nicolau Award should be the seniority order of the US Airways pilots, the West Pilots will arbitrate that point with the East Pilots under the terms set out in the concurrently filed *Plts.' Trial Memo. on Remedy*.

C. If USAPA rejects the Nicolau Award it must provide a neutral process for determining seniority integration and disclaim any right to ratify the result.

USAPA must remain neutral when resolving a dispute such as this because it has no legitimate reason to prefer the position of one pilot group over another. *Cf. Rakestraw*, 981 F.2d at 152 (recognizing as a legitimate reason the goal of discouraging pilots from crossing future picket lines). Neutrality precludes USAPA, its officers and its attorneys from playing any role in the substantive determination of pilot seniority integration. Neither USAPA, nor its officers, nor its attorneys can advocate for the position of one side or decide the merits of the dispute. USAPA, therefore, must do nothing more than: (1) defer resolution of the seniority dispute to pilot committees for the East and West Pilot groups; (2) require (and pay) for these committees to be represented by counsel who have not represented USAPA;[4] and (3) pay a neutral arbitrator to determine the seniority order to be used for the East and West pilots.

Seniority arbitration must be "final and binding." LPP § 13(a). That means it cannot be rejected by the USAPA Board of Pilot Representatives. It cannot be put to a member ratification vote. Rather, USAPA must commit to adopt the result of seniority arbitration without ratification, just as ALPA did in 2005.

III. Conclusion

Under all controlling authority—the LPPs, McCaskill-Bond, and general principles of fair representation—any determination of the seniority dispute here must be done in a fair, neutral process. USAPA cannot take sides in that process (as it has heretofore always

[4] USAPA's present counsel owes fiduciary duties to the entire craft, both East and West sides, and breaches that duty by advocating East interests over those of West. There is no justification for that to continue during arbitration between East and West Pilots.

done). Its officers and attorneys must be neutral. There must be full participation by West Pilot representatives. USAPA must fund the West Pilots' efforts the same as it does for the East Pilots.

Dated this 17th day of May, 2013.

POLSINELLI PC

/s/ Andrew S. Jacob

By _____

Marty Harper
Andrew S. Jacob
Jennifer Axel
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 17th 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 _____

Exhibit "A"

49 USC 42112

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 49 - TRANSPORTATION
SUBTITLE VII - AVIATION PROGRAMS
PART A - AIR COMMERCE AND SAFETY
subpart ii - economic regulation
CHAPTER 421 - LABOR-MANAGEMENT PROVISIONS
SUBCHAPTER II - MUTUAL AID AGREEMENTS AND LABOR REQUIREMENTS OF AIR CARRIERS

§ 42112. Labor requirements of air carriers

(a) Definitions.— In this section—

(1) "copilot" means an employee whose duties include assisting or relieving the pilot in manipulating an aircraft and who is qualified to serve as, and has in effect an airman certificate authorizing the employee to serve as, a copilot.

(2) "pilot" means an employee who is—

(A) responsible for manipulating or who manipulates the flight controls of an aircraft when under way, including the landing and takeoff of an aircraft; and

(B) qualified to serve as, and has in effect an airman certificate authorizing the employee to serve as, a pilot.

(b) Duties of Air Carriers.— An air carrier shall—

(1) maintain rates of compensation, maximum hours, and other working conditions and relations for its pilots and copilots who are providing interstate air transportation in the 48 contiguous States and the District of Columbia to conform with decision number 83, May 10, 1934, National Labor Board, notwithstanding any limitation in that decision on the period of its effectiveness;

(2) maintain rates of compensation for its pilots and copilots who are providing foreign air transportation or air transportation only in one territory or possession of the United States; and

(3) comply with title II of the Railway Labor Act (45 U.S.C. 181 et seq.) as long as it holds its certificate.

(c) Minimum Annual Rate of Compensation.— A minimum annual rate under subsection (b)(2) of this section may not be less than the annual rate required to be paid for comparable service to a pilot or copilot under subsection (b)(1) of this section.

(d) Collective Bargaining.— This section does not prevent pilots or copilots of an air carrier from obtaining by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 1160.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
42112(a)		
	49 App.:1371(k)(5).	
		Aug. 23, 1958, Pub. L. 85–726, § 401(k), 72 Stat. 756.
42112(b), (c)		
	49 App.:1371(k)(1), (2), (4).	
42112(d)		
	49 App.:1371(k)(3).	

In subsection (a), the words "properly" and "currently" are omitted as surplus.

In subsection (b), the word "providing" is substituted for "engaged in" for consistency in the revised title. In clause (1), the words "48 contiguous States and the District of Columbia" are substituted for "the continental United States (not including Alaska)" for clarity and consistency in the revised title. In clause (2), the words "overseas or" are omitted as obsolete. The word "only" is substituted for "wholly" for consistency. In clause (3), the words "as long as it holds" are substituted for "upon the holding" for clarity.

In subsection (c), the words "under subsection (b)(1) of this section" are substituted for "said decision 83 . . . engaged in interstate air transportation within the continental United States (not including Alaska)" to eliminate unnecessary words.

In subsection (d), the words "or other employees" are omitted as unnecessary because this section only applies to pilots and copilots.

References in Text

The Railway Labor Act, referred to in subsec. (b)(3), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended. Title II of the Act was added by act Apr. 10, 1936, ch. 166, 49 Stat. 1189, and is classified generally to subchapter II (§ 181 et seq.) of chapter 8 of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

Labor Integration

Pub. L. 110–161, div. K, title I, § 117, Dec. 26, 2007, 121 Stat. 2382, provided that:

"(a) Labor Integration.—With respect to any covered transaction involving two or more covered air carriers that results in the combination of crafts or classes that are subject to the Railway Labor Act (45 U.S.C. 151 et seq.), 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; except that—

"(1) if the same collective bargaining agent represents the combining crafts or classes at each of the covered air carriers, that collective bargaining agent's internal policies regarding integration, if any, will not be affected by and will supersede the requirements of this section; and

"(2) the requirements of any collective bargaining agreement that may be applicable to the terms of integration involving covered employees of a covered air carrier shall not be affected by the requirements of this section as to the employees covered by that agreement, so long as those provisions allow for the protections afforded by sections 3 and 13 of the Allegheny-Mohawk provisions.

"(b) Definitions.—In this section, the following definitions apply:

"(1) Air carrier.—The term 'air carrier' means an air carrier that holds a certificate issued under chapter 411 of title 49, United States Code.

"(2) Covered air carrier.—The term 'covered air carrier' means an air carrier that is involved in a covered transaction.

"(3) Covered employee.—The term 'covered employee' means an employee who—

"(A) is not a temporary employee; and

"(B) is a member of a craft or class that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.).

"(4) Covered transaction.—The term 'covered transaction' means—

"(A) a transaction for the combination of multiple air carriers into a single air carrier; and which

"(B) involves the transfer of ownership or control of—

"(i) 50 percent or more of the equity securities (as defined in section 101 of title 11, United States Code) of an air carrier; or

"(ii) 50 percent or more (by value) of the assets of the air carrier.

"(c) Application.—This section shall not apply to any covered transaction involving a covered air carrier that took place before the date of enactment of this Act [Dec. 26, 2007].

"(d) Effectiveness of Provision.—This section shall become effective on the date of enactment of this Act and shall continue in effect in fiscal years after fiscal year 2008."

Exhibit "B"

CIVIL AERONAUTICS BOARD

ALLEGHENY-MOHAWK LABOR PROTECTIVE PROVISIONS, MAY 1971

59 C.A.B.45
SECTIONS 3 AND 13

SECTION 3.
Insofar as the merger affects the seniority rights of the carriers employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

SECTION 13.
(a) In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein which cannot be settle by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time it is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b.) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure unless and until that alternative method or procedure shall have been agreed to by all parties.